CRIMINAL LAW—THE INSUFFICIENCY OF POSSESSION IN PROHIBITION OF CHILD PORNOGRAPHY STATUTES: WHY VIEWING A CRIME SCENE SHOULD BE CRIMINAL

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INTRODUCTION

To a child whose sexual exploitation is captured on film and uploaded to the Internet, the distinction between whether an online user possesses the photographs or is merely viewing them is immaterial. That child's victimization began with the sexual act, continued through the photography session, and continues on today as photographs of the molestation float through cyberspace, freely accessible to anyone who has the ability to surf the Web. Yet, the distinction between possessing and viewing is highly significant to police, prosecutors, defendants, and judges. Despite the Supreme Court's decision in Osborne v. Ohio, which held a prohibition against viewing child pornography to be constitutional, the federal statute and most state statutes criminalize only "knowing possession" or "knowing possession or con-

3. See Catharine A. MacKinnon, Women's Lives, Men's Laws 5-6 (2005) (“Anyone who has ever practiced law knows that the real issues of a case—its gut, how it plays on the street—are one thing; the legal issues, into which these real issues must somehow be shoehorned, are commonly another.”).
5. Id. at 111.
6. See, e.g., 18 U.S.C. §§ 2252A(a)(5)(B), (b)(2) (2000) (“Any person who . . . knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography . . . shall be fined under this title or imprisoned not more than 5 years, or both.”) (emphasis added)); Ala. Code § 13A-12-192(b) (LexisNexis 2007) (“Any person who knowingly possesses any obscene matter that contains a visual depiction of a person under the age of 17 years engaged in any act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, genital nudity, or other sexual conduct shall be guilty of a Class C felony.”) (emphasis added)).
trol." The knowledge requirement in these possession statutes requires that prosecutors either prove that a defendant did more than merely view child pornography—regardless of how often he viewed it or how grotesque the content—or suggests to judges that they perform questionable legal gymnastics in order to convict.

In Massachusetts, the child pornography statute only prohibits knowing purchase and possession. This Note explores how courts

7. See, e.g., Colo. Rev. Stat. Ann. § 18-6-403(3)(b.5) (West 2004) ("A person commits sexual exploitation of a child if, for any purpose, he or she knowingly . . . [p]ossesses or controls any sexually exploitative material." (emphasis added)).

8. All statutes that prohibit possession require “knowing possession.” See, e.g., statutes cited supra notes 5-6. This mens rea requirement means that the defendant must “knowingly cause[] a particular result or knowingly engage[] in specified conduct.” Joshua Dressler, Understanding Criminal Law 125 (3d ed. 2001). In terms of possession of child pornography, knowing possession requires that the defendant know that what he possesses is child pornography as opposed to, for example, adult pornography. The two terms—possession and knowing possession—are used interchangeably throughout this Note.

9. See, e.g., United States v. Stulock, 308 F.3d 922, 924-26 (8th Cir. 2002) (upholding the district court’s acquittal of the defendant despite the 1007 files found in his internet browser cache, which included photographs of girls in bondage from websites like www.lolitahardcore.com and www.hairless-lolita.com).

10. A common misconception about child pornography is that its victims are primarily older teenagers who appear younger than they actually are. Collins, supra note 1. In fact, one study found that the average age of victims is thirteen, with ages ranging from six to seventeen. Klain et al., supra note 1, at 8; see also Donna Andrea Rosenberg, Unusual Forms of Child Abuse, in The Battered Child 441, 431 (Mary Edna Helfer, Ruth S. Kempe & Richard D. Krugman eds., 5th ed. 1997). Another study found that of children who were identified, fifty-eight percent were prepubescent and six percent were infants. See Collins, supra note 1. What one author describes as the “starter kit” for newcomers to child pornography is a series of photographs of a boy and a girl, Gavin and Helena, who appear to be seven. In those photographs, they are having sex with each other and with Helena’s father. Jenkins, supra note 2, at 2. Jenkins cites an online viewer who exclaims that these photographs are “the greatest HC (hard-core) series ever made! [Helena has been] “acting” since she was a toddler until she was twelve years old, which means there are thousands of pics of her in action out there somewhere!” Id. Another popular series are the KX photographs, which depict kindergarten-age girls performing oral sex on men. These were taken in the 1990s and still circulate widely on the Internet. Id. at 2-3.

11. See, e.g., Commonwealth v. Diodoro, 932 A.2d 172, 174-75 (Pa. Super. Ct. 2007) (finding the defendant guilty of possession and control of child pornography because, while he was looking at images on websites, “he had the ability to download the images, print them, copy them, or email them to others,” even though he did not exercise his ability), appeal granted, 939 A.2d 290 (Pa. 2007).


Whoever knowingly purchases or possesses a negative, slide, book, magazine, film, videotape, photograph or other similar visual reproduction, or depiction by computer, of any child whom the person knows or reasonably should know to be under the age of 18 years of age and such child is:
are construing their state statutes and the federal statute to convict
defendants who viewed online visual depictions without downloading
them and whether those methods would be effective in Massa-
chusetts. This Note argues that Massachusetts's possession statute
is ineffective in satisfying the apparent intent of its drafters to ban
child pornography.\textsuperscript{13} To comply with the legislative intent, the
Massachusetts statute must expressly prohibit the viewing of child
pornography.

The background sections of this Note, Parts I-V, will begin
with an explanation of what constitutes child pornography, including
the effect it has on its victims and how the Internet has im-
pacted access to it. It will then discuss Supreme Court decisions
and federal laws that first criminalized the possession of child por-
ography. This Note will explore the federal statute that prohibits
possession and state statutes that prohibit possession, control, and

\textsuperscript{13} Act of Nov. 26, 1997, ch. 181, 1997 Mass. Acts 1034 (punishing the crime of
child pornography and stating, “to stop the sexual abuse and exploitation of children, it
is necessary to ban the possession of any sexually exploitative materials”); \textit{see also}
Commonwealth v. Hinds, 768 N.E.2d 1067, 1074 (Mass. 2002) (stating, in a case inter-
preting the phrase “visual depiction by computer,” that “[o]ur reading comports with
the Legislature’s expressed design to eliminate permanent records of sexually exploi-
tative material harmful to children”).
viewing of child pornography. It will then look at how courts in states other than Massachusetts have ruled in child pornography possession cases. It will conclude with a discussion of the Massachusetts statute and cases that have challenged it.

The Analysis portion of the Note, Part VI, will begin with an explanation of why viewing is a separate and distinct act from possession in Massachusetts. It will examine Massachusetts's definition of constructive possession and its statutory interpretation requirements. It will conclude that, under the current statute, people who view child pornography in Massachusetts are not violating the law as it is written. Further, it will suggest that technological advancements are outpacing the child pornography statute and are rendering its prohibitions incomplete. Finally, it will suggest how Massachusetts can bring the statute in line with the legislature's stated intent of ending child sexual exploitation by criminalizing viewing of child pornography.

I. CHILD PORNOGRAPHY

A. Defining Child Pornography

Generally, pornography is defined as "material (as books or a photograph) that depicts erotic behavior and is intended to cause sexual excitement." Child pornography consists of "images that sexually exploit children." Before photography was introduced in 1839, child pornography consisted of explicit drawings and paintings of minors. With the camera, and with each new form of technology, the media in which child pornography are available have increased. Today, child pornography may be depicted in photographs, videos, interactive CD-ROMs, and even live footage through videoconferencing.

18. Rosenberg, supra note 10, at 432 ("It is something of a universal phenomenon that technologies are employed in child abuse almost from the moment they become available.").
Under federal law, child pornography is broadly defined to include all visual depictions of minors engaged in "sexually explicit conduct."\(^{20}\) State statutory definitions vary,\(^ {21}\) but, generally, visual depictions of children performing sexual acts, naked in sexualized poses, or engaging in any "sexually suggestive" behavior meet the standard of child pornography.\(^ {22}\)

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\(^{20}\) 18 U.S.C.A. § 2256(8)(A)-(C) (West 2007). The statute states: "[C]hild pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

Id.

\(^{21}\) See, e.g., UTAH CODE ANN. § 76-5a-2(1) (2003). The statute states: "Child pornography" means any visual depiction, including any live performance, photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where:

(a) the production of the visual depiction involves the use of a minor engaging in sexually explicit conduct;

(b) the visual depiction is of a minor engaging in sexually explicit conduct; or

(c) the visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

Id.; MO. ANN. STAT. § 573.010(2) (West 2003) (defining child pornography as "[a]ny obscene material or performance depicting sexual conduct, sexual contact, or a sexual performance . . . and which has as one of its participants or portrays as an observer of such conduct, contact, or performance a child under the age of eighteen"); COLO. REV. STAT. ANN. § 18-6-403(2)(j) (West 2004) ("Sexually exploitative material" means any photograph, motion picture, videotape, print, negative, slide, or other mechanically, electronically, chemically, or digitally reproduced visual material that depicts a child engaged in, participating in, observing, or being used for explicit sexual conduct."). Explicit sexual conduct is further defined as "sexual intercourse, erotic fondling, erotic nudity, masturbation, sadomasochism, or sexual excitement." Id. § 18-6-403(2)(e).

\(^{22}\) JENKINS, supra note 2, at 37; see also ROGER J.R. LEVESQUE, SEXUAL ABUSE OF CHILDREN: A HUMAN RIGHTS PERSPECTIVE 62 (1999). Images produced with computer-imaging techniques are the exception. See Ashcroft v. Free Speech Coal., 535 U.S. 234, 256 (2002) (narrowing the Child Pornography Prevention Act's definition of prohibited images to exclude "virtual child pornography," in which photo-like images of children being sexually exploited are produced with computer-imaging techniques and no actual children are used in the creation of the images); see also David B. Johnson, Comment, Why the Possession of Computer-Generated Child Pornography Can Be Constitutionally Prohibited, 4 ALB. L.J. SCI. & TECH. 311, 314-16 (1994) (describing the technology used to create virtual child pornography); Sarah Sternberg, Note, The Child Pornography Prevention Act of 1996 and the First Amendment: Virtual Antitheses, 69
In *New York v. Ferber*, the Supreme Court distinguished child pornography from adult pornography by eliminating the need for a finding that the material is obscene. The 1982 ruling claimed that the relevant measure in determining whether an image constitutes child pornography is whether a child was "physically or psychologically" harmed in the creation of the work. The Supreme Court stated that "a sexually explicit depiction need not be 'patently offensive' in order to have required the sexual exploitation of a child for its production." Because the state's interest is in prosecuting the promoter of child-sexual exploitation, the threshold question is not what the final product looks like, but whether a child was sexually exploited in the creation of the material. Recognizing First Amendment principles, the Court imposed a limiting measure that required child pornography statutes to include a list of specifically proscribed activities within their definitions.

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**Fordham L. Rev.** 2783, 2788 (2001) (describing the morphing process in which a child's head and a pornographic photograph of an adult are morphed together to create an image of child pornography).


(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.


25. *Id.*

26. *Id.* at 764.

27. *Id.* at 764.


(i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;

(ii) graphic or lascivious simulated;

(II) bestiality;

(III) sadistic or masochistic abuse; or

(iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person.
B. Immortalizing a Crime Scene

Child pornography was not generally considered a form of child abuse until the mid-1970s. Today, a visual depiction of the sexual exploitation of a child is understood to be a photograph of a crime scene. Children who are the subjects of child pornography are impacted both by the criminal sexual abuse that occurs while the photographs are taken and by the additional impact of the existence of the pornography itself. Because the images exist online indefinitely, "[p]hysical, psychological, and emotional effects of child sexual abuse are coupled with the possibility of the pornography resurfacing." For her entire life, the victim lives with the

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Id.; Del. Code Ann. tit. 11, § 1103 (2007). Delaware's statute states that a "'Prohibited sexual act' includes:

1. Sexual intercourse;
2. Anal intercourse;
3. Masturbation;
4. Bestiality;
5. Sadism;
6. Masochism;
7. Fellatio;
8. Cunnilingus;
9. Nudity, if such nudity is to be depicted for the purpose of the sexual stimulation or the sexual gratification of any individual who may view such depiction;
10. Sexual contact;
11. Lascivious exhibition of the genitals or pubic area of any child;
12. Any other act which is intended to be a depiction or simulation of any act described in this subsection.

Id.

29. Jenkins, supra note 2, at 32-33.
31. Klain et al., supra note 1, at 10. One author notes: While little is known about the specific long-term effects of use in child pornography, the immediate trauma and effects of sexual abuse on children is well documented. Because child pornography is a clear record of child sex abuse, its victims would therefore experience the same emotional and physical consequences in addition to any harm resulting from the pornography.

Id. (citation omitted).

32. Id. at 11; see also Osborne v. Ohio, 495 U.S. 103, 111 (1990) ("[T]he materials produced by child pornographers permanently record the victim's abuse. The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come.").
33. Although child pornography features both girls and boys, about half of all pornography cases involve only girls. The other half involves boys and girls together or boys alone. Klain et al., supra note 1, at 8.
awareness that, at any given moment, a stranger may be deriving sexual pleasure from a photograph of her abuse.\textsuperscript{34}

The devastating impact of sexual abuse on children is widely documented.\textsuperscript{35} In addition to the immediate physical injuries that occur because of the abuse, long-term effects include physical manifestations such as headaches, pelvic pain, and back pain, as well as psychological manifestations including increased fearfulness, feelings of guilt and responsibility, a sense of powerlessness, and recurring flashbacks and nightmares.\textsuperscript{36} Adolescents are often depressed and suicidal, and many wind up in criminal trouble.\textsuperscript{37} Adult survivors have high rates of eating disorders, drug and alcohol addiction, sleep disturbances, and are more likely to engage in self-destructive behaviors like prostitution and self-mutilation.\textsuperscript{38} Males tend to repeat the abuse perpetrated on them with boys the same age as they were when they were abused.\textsuperscript{39} Females often become promiscuous, are more likely to be in violent relationships, and tend to isolate themselves socially.\textsuperscript{40}

\section*{C. Child Pornography Online}

Before the Internet, child pornographers relied on film developed from cameras to produce images and the postal system to trade those images.\textsuperscript{41} Both of these methods of acquiring and exchanging pictures were expensive as well as sufficiently public to create a risk of discovery.\textsuperscript{42} In fact, the U.S. Department of Justice

\begin{thebibliography}{9}
\bibitem{34} New York v. Ferber, 458 U.S. 747, 759 n.10 (1982); Kreston, supra note 30, at 26; \textit{see also} Perry v. Commonwealth, 780 N.E.2d 53, 56 (Mass. 2002) (writing that internet images are as permanent as conventional photographs).
\bibitem{35} \textit{See, e.g., Ferber, 458 U.S. at 758; Klain et al., supra note 1, at 10-11; Lefevre, supra note 22; William E. Prendergast, Sexual Abuse of Children and Adolescents: A Preventive Guide for Parents, Teachers, and Counselors (1996); Pamela D. Schultz, Not Monsters: Analyzing the Stories of Child Molesters 11-16 (2005).}
\bibitem{36} Klain et al., supra note 1, at 10.
\bibitem{38} Schultz, supra note 35, at 11-16.
\bibitem{39} Prendergast, supra note 35, at 71.
\bibitem{40} Id.
\bibitem{42} Id.
\end{thebibliography}
found that trafficking in child pornography in this country was almost nonexistent by the mid-1980s.\textsuperscript{43}

The Internet, on the other hand, has proven to be a child pornographer's ideal community.\textsuperscript{44} The Internet provides an inexpensive, anonymous arena for locating, disseminating, and reproducing photographs and videos.\textsuperscript{45} The Department of Justice states that the simplicity of using the Internet "has resulted in an explosion in the availability, accessibility, and volume of child pornography."\textsuperscript{46} Evidencing this sentiment are statistics such as those presented by Robert Mueller, former Director of the Federal Bureau of Investigation (FBI). Testifying before Congress in mid-2007, he said that in 1996, his agency investigated only 113 cases involving online child pornography.\textsuperscript{47} In contrast, in the first six months of 2007, the FBI had investigated more than five thousand such cases.\textsuperscript{48}

Not surprisingly, child pornographers go to great lengths to maintain secrecy.\textsuperscript{49} The bulk of online activity occurs on secret newsgroups and bulletin boards that require passwords for viewing

\begin{itemize}
\item \textsuperscript{43} Id.; see also JENKINS, supra note 2, at 40 (detailing how investigations by the Postal Inspection Service have led to the arrest and conviction of thousands of offenders).
\item \textsuperscript{44} In addition to enabling its users to maintain secrecy, the Internet has also proved to be a lucrative market for those who make a living off of creating child pornography. See Sternberg, supra note 22, at 2787 (relating the story of a child pornographer who claims, "[g]ive me a pretty, cooperative 14-, 15-year-old girl and I'll be sitting pretty with the money I make off her for a long time. Longer than you can imagine."); see also Henry F. Fradella, A Fourth Amendment Problem Combating Internet Child Pornography, CRIM. L. BULL., Mar.-Apr. 2007, at 284, 284; KLAIN ET AL., supra note 1, at 55.
\item \textsuperscript{45} U.S. Dep't of Justice, supra note 41; see also Eichenwald, supra note 19, at A1 ("Not long ago, adults sexually attracted to children were largely isolated from one another. But the Internet has created a virtual community where they can readily communicate and reinforce their feelings.").
\item \textsuperscript{46} U.S. Dep't of Justice, supra note 41.
\item \textsuperscript{47} FBI-Oversight: Testimony Before the H. Comm. on the Judiciary, 110th Cong. 7 (2007) (statement of Robert S. Mueller III, Director, Federal Bureau of Investigation, on July 26, 2007) [hereinafter FBI-Oversight], available at http://judiciary.house.gov/media/pdfs/Mueller070726.pdf; see also KLAIN ET AL., supra note 1, at 46.
\item \textsuperscript{48} FBI-Oversight, supra note 47, at 9; see also Collins, supra note 1.
\item \textsuperscript{49} Kreston, supra note 30, at 26 ("For the same reason that drug dealers do not stand on street corners shouting out their wares for the general public to hear, child pornographers do not make their sites readily available to the general public for fear of being detected by the police."); see also JENKINS, supra note 2, at 52 ("[N]o structure ... rivals the [online] child porn world for sheer complexity and creativity and for its global reach."); Lisa S. Smith, Private Possession of Child Pornography: Narrowing At-Home Privacy Rights, 1991 ANN. SURV. AM. L. 1011, 1011 (1991).
\end{itemize}
and trading photographs. To find the enormous cybercommunity, an individual must "consciously choos[e] a dozen times, or more, to click on icons and hyperlinks that assist and direct them in the active search for child pornography." Yet, despite the complexity involved in locating the cybercommunity, enthusiasts find it. Although the secrecy makes official statistics of the actual number of users unavailable, a member of a newsgroup, where much of the online activity occurs, estimated that approximately five to seven thousand new posts are added each week.

This quantity of users also increases the quantity of available images. One researcher stated that in a month of visiting active child pornography sites, a user "could easily accumulate a child porn library of several thousand images." Writing about the child pornography cases that come through his courtroom, one judge stated that "a typical case involves possession of thousands of images of children. But the court has also seen cases involving a handful of photographs as well as cases involving 10,000 photographs."

D. What Child Pornographers Do with the Pictures

An estimated forty to sixty percent of defendants arrested for possession of child pornography were also found to have sexually abused children. The link is not coincidental. Many child molest-

50. JENKINS, supra note 2, at 54, 56, 70. In fact, a search engine search for "child porn" will never bring up a site that features minors. Nor do any websites that include "child porn" or a similar phrase in their titles feature actual minors. These sites usually include photographs of adult men and women who look younger than they actually are. Id. at 53.

51. Kreston, supra note 30, at 26 ("There are no accidental tourists . . . Child pornography Web sites, though prolific, are not easily accessed by innocent individuals.").

52. JENKINS, supra note 2, at 13.

53. Id. at 55.

54. Id. at 3. "The material . . . is astonishingly diverse, from hard-core child porn through naked images to winsome pictures of fully clothed children." Id. at 55.


56. See Kreston, supra note 30, at 30 (citing a study by the Crimes Against Children Research Center at the University of New Hampshire, the U.S. Department of Justice, and the National Center for Missing and Exploited Children); see also Kim, supra note 16, at 18 (citing an internet crimes task force in Pennsylvania that found that over half of the defendants who were arrested for possession of child pornography were also sexually abusing children). Kim also cites a 2000 study by the Federal Bureau of Prisons that found that seventy-six percent of inmates who had been convicted of internet crimes against children also admitted that they had sexually molested children. The average number of victims per offender was 30.5. Id.
ers concede that child pornography “fuels their sexual fantasies and plays an important part in leading them to commit hands-on sexual offenses against children.”

Photographs of children engaged in sexual activity serve to legitimize the child pornographer’s “belief systems,” enabling him to convince himself that the smiling child is consenting to the molestation, or that the child is, in fact, the seducer. Photographs, particularly given the vast quantity available online, have the further impact of desensitizing the viewer. Initially, soft-core images of child pornography may be stimulating to a newcomer, but he will eventually move on to sites that feature material that is more lewd. As one bulletin-board poster wrote, “you want every day more and more and more.” The link between viewing child pornography and sexual molestation is easy to understand in this context. When viewing images is no longer stimulating, the viewer will seek out his own victim.

Those viewers who do seek out their own victims often use photographs to encourage children to participate. By showing children photographs of other children who look as if they are enjoying the abuse, the child pornographers normalize the sexual activity and create in the child a more willing participant. For example,

[First, the pedophile might allow the child to browse through a sexually-oriented magazine commonly found in the home. Once the child becomes comfortable with this material, the pedophile may expose the child to more explicit publications and films, which depict adults engaged in different sexual positions or homosexual activity. Finally, the pedophile will present the child

58. KLAIN ET AL., supra note 1, at 6; LEVESQUE, supra note 22, at 64-65.
59. KLAIN ET AL., supra note 1, at 6.
60. JENKINS, supra note 2, at 109.
61. Id.
62. Id.
63. See LEVESQUE, supra note 22, at 64-65.
64. Id. at 64.
65. Osborne v. Ohio, 495 U.S. 103, 111 n.7 (1990) (citing ATT‘Y GEN.’S COMM’N ON PORNOGRAPHY, FINAL REPORT (1986)); see also KLAIN ET AL., supra note 1, at 6; LEVESQUE, supra note 22, at 61; Kim, supra note 16, at 19 (“Grooming is a gradual process and a skilled child molester takes care in laying a foundation of trust, love and friendship before escalating the relationship to a sexual one.” The photographs of other children “smiling, laughing and seemingly having fun” “diminish the child’s inhibitions and give the impression that sex between adults and children is normal, acceptable and enjoyable.”).
with depictions of children and adults engaging in sexual conduct. The child, having become desensitized to the material, can then be convinced to participate in sexual conduct and to be photographed or filmed.

Possession of child pornography is therefore important to the perpetuation of child pornography.\textsuperscript{66}

One researcher explains that "pornography provides a powerful tool to help convince children that what they are being asked to do is 'all right.'"\textsuperscript{67}

\section*{II. Legislating Against Child Pornography}

\subsection*{A. Setting the Stage to Criminalize Possession of Child Pornography}

In 1982, the Supreme Court decided its first child pornography case, \textit{New York v. Ferber}.\textsuperscript{68} In that case, the Court upheld a New York law that criminalized the promotion of child pornography, finding that “[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.”\textsuperscript{69}

This ruling opened the door for federal legislative action against child pornography, beginning with the Child Protection Act of 1984,\textsuperscript{70} which followed the Supreme Court’s \textit{Ferber} decision by criminalizing the production, dissemination, and receipt of any sexually exploitative depictions of children, regardless of whether they were obscene.\textsuperscript{71} Today, Congress’s prohibitions of child pornogra-

\textsuperscript{66} Smith, \textit{supra} note 49, at 1042 (citations omitted).

\textsuperscript{67} Levesque, \textit{supra} note 22, at 64; see also Mass. Gen. Laws Ann. ch. 272, § 29C (West 2000) (including in the findings of the child pornography possession statute “that such material is used to break the will and resistance of other children so as to encourage them to participate in similar acts”).


\textsuperscript{69} Ferber, 458 U.S. at 757; see also Levesque, \textit{supra} note 22, at 68 (“[T]he case reflects an important move to allow intrusion into any individual’s private life in order to restrict immoral behavior.”). See generally Susan G. Caughlan, Note, \textit{Private Possession of Child Pornography: The Tensions Between Stanley v. Georgia and New York v. Ferber}, 29 WM. & MARY L. REV. 187 (1987) (providing a detailed analysis of the \textit{Ferber} decision as it relates to obscenity).


\textsuperscript{71} See \textit{supra} notes 23-28 and accompanying text; see also Leary, \textit{supra} note 68; Smith, \textit{supra} note 49, at 1020-21. For a discussion of past laws proscribing the produc-
phy are codified in the Child Pornography Prevention Act of 1996, which broadens the definition of criminal behavior beyond production and dissemination.\textsuperscript{72} For the purposes of this Note, the most important change to the Act since 1984 is its prohibition of the possession of child pornography,\textsuperscript{73} which was added in 1990\textsuperscript{74} after the Supreme Court decided Osborne v. Ohio.\textsuperscript{75}

B. Osborne v. Ohio

The Supreme Court's decision in Osborne v. Ohio dictates the parameters within which a state can prohibit behavior connected to child pornography.\textsuperscript{76} In Osborne, the police found four photographs of a naked fourteen-year-old boy in a variety of sexual positions in Clyde Osborne's home.\textsuperscript{77} Osborne was convicted under an Ohio statute that criminalized the "possess[ion] or view[ing] of any material or performance that shows a minor who is not the person's child or ward in a state of nudity."\textsuperscript{78} Osborne challenged the statute, sale, and distribution of child pornography, see Klain et al., supra note 1, at 12-25.


\textsuperscript{73} 18 U.S.C. § 2256A(a) ("Any person who . . . knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography . . . shall be punished as provided in subsection (b).")

\textsuperscript{74} Klain et al., supra note 1, at 14.

\textsuperscript{75} Osborne v. Ohio, 495 U.S. 103 (1990).

\textsuperscript{76} Id.

\textsuperscript{77} Id. at 107.

\textsuperscript{78} Ohio Rev. Code Ann. § 2907.323(A)(3) (West 2006). The statute states:

(A) No person shall do any of the following:

... 

(3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.

Id.
ute on constitutional grounds, claiming that he had a First Amendment right to private possession of pornography. 79

The Court stated, “Given the gravity of the State’s interests in this context, we find that Ohio may constitutionally proscribe the possession and viewing of child pornography.” 80 Prior to Osborne, possession of child pornography statutes reached only production, sale, or distribution of images. 81 Although Osborne cleared the way to convict private viewers, the majority made no distinction between possession and viewing in its discussion of the constitutionality of the Ohio statute. 82 Only in the dissent is there even a casual mention of the act of viewing as separate from the act of possessing. 83

C. Possession, Control, and Viewing

Although states reacted to Osborne by amending their statutes, many only added “knowing possession” to the list of criminal behaviors. 84 Now, nearly twenty years after Osborne, every state has a criminal statute that prohibits behaviors involved with child

79. Osborne, 495 U.S. at 107. See generally Stanley v. Georgia, 394 U.S. 557, 566 (1969) (overruling a Georgia statute that banned the possession of obscene matter as perhaps “a noble purpose, but . . . wholly inconsistent with the philosophy of the First Amendment”).

80. Osborne, 495 U.S. at 111. For a First Amendment analysis of the Court’s holding, see Smith, supra note 49, at 1028, and Sternberg, supra note 22, at 2793-94.

81. Fradella, supra note 44, at 6; see also Levesque, supra note 22, at 69 (explaining that, in most countries, the regulation of child pornography only prohibits behaviors specifically associated with distribution and production). Because the Internet is borderless, photographs from foreign countries easily make their way into the United States. Id. at 66.

82. Smith, supra note 49, at 1028-29 (“Justice White’s opinion found that Ohio could reasonably conclude that proscribing the possession and viewing of child pornography would decrease the demand for and production of these materials.” (citing Osborne, 495 U.S. at 109-10)).

83. Osborne, 495 U.S. at 138 n.13 (Brennan, J., dissenting) (“Since [the statute] makes it a crime to ‘view’ as well as to possess depictions of nudity, visitors to an art gallery might find themselves in violation of the law.”).

84. See Commonwealth v. Simone, No. 03-0986, 2003 WL 22994238, at *11 n.7 (Va. Cir. Ct. Nov. 12, 2003) (opining that after Osborne, “[t]he Virginia General Assembly, perhaps not coincidentally, first criminalized the ‘possession’ of child pornography in 1992 with the enactment of Va. Code § 18.2-374.1:1, though production and distribution were already prohibited”); see also Thomas F. Liotti, Penal Law, 48 SYRACUSE L. REV. 781, 786 (1998) (“In the area of child pornography, the Legislature continued to expand the punishment of child pornographers by creating the crimes of ‘Possessing an Obscene Sexual Performance by a Child’ and ‘Possessing a Sexual Performance by a Child.’ This is in response to Osborne v. Ohio.”) (citations omitted)); Fradella, supra note 44, at 6 (“In the wake of Osborne, both the federal government and those of the states criminalized possession of child pornography.”).
pornography. Yet, only three states—Ohio, New Jersey, and Arkansas—criminalize the viewing of child pornography.

Comprehension of the definitions of viewing, possession, and control is necessary to understand how prosecutors and courts are interpreting the statutes of their jurisdictions in relation to images a defendant accesses online. First, to *view* is "to look at attentively: scrutinize, observe." In general, neither control nor possession is required for the act of viewing to occur.

Second, a common articulation of what constitutes *criminal possession* can be found in the Model Penal Code, which requires that "the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession." Knowing possession requires a further showing that the defendant was aware that the images he possessed were, in fact, child pornography. Courts have found that a defendant who has downloaded, printed, emailed, or saved an online image of child pornography has demonstrated his knowing possession of the image.

A further articulation of criminal possession from the Model Jury Instructions for the Massachusetts Superior Court makes clear that a defendant need not exercise control over an object to have possessed it. He need only have the ability to do so: "The word possession means that a person has knowledge of the location of the object, and the ability and the intention to exercise control and power over it."

Finally, a handful of states criminalize the knowing possession and control of child pornography. Courts in these jurisdictions

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85. Klain et al., supra note 1, at 26.
87. Merriam-Webster's, supra note 15, at 1394.
88. Model Penal Code § 2.01(4) (Official Draft 1962). The dictionary definition of possession is "the act of having or taking into control." Merriam-Webster's, supra note 15, at 968. The legal definition is "to have in one's actual control." Black's Law Dictionary 546 (8th ed. 2004) [hereinafter Black's].
89. The Model Penal Code states that a defendant has knowledge when "he is aware that his conduct is of that nature or that such circumstances exist." Model Penal Code, supra note 88, § 2.02(2)(b)(1).
92. See, e.g., Colo. Rev. Stat. Ann. § 18-6-403(3)(b.5) (West 2004); supra note 7 (pertinent provision of Colorado Revised Statutes Annotated section 18-6-403(3)(b.5)).
look to whether the defendant "exercise[d] power or influence over" the images.93 When a prosecutor charges a defendant who looked at child pornography online with controlling the images, the court does not need to address whether the defendant actually possessed the images.94 If the evidence demonstrates that the defendant took the steps to seek out the images, the court can convict him of controlling those images.95 Consequently, in jurisdictions where prosecutors can charge defendants with control rather than with possession, the issue of whether viewing is equivalent to possession does not arise. Prosecutors need only prove that the defendant controlled the images—proof of possession of them is unnecessary.

D. The Browser Cache and the Relationship Between Possession and Viewing

The need to distinguish between viewing and possession has arisen in cases in which a defendant admits to viewing images online but argues that his conduct did not rise to the level of possession because the images exist only in cyberspace and not in a tangible form in his control.96 In these cases, the prosecution uses the existence of images in the defendant's computer's browser cache to demonstrate that by viewing the images, he came into possession of them.97

93. BLACK'S, supra note 88, at 146.
94. See Commonwealth v. Diodoro, 932 A.2d 172, 175 n.5 (Pa. Super. Ct. 2007) (clarifying that because the court had found the appellant guilty of control of pornographic images, "we need not reach the issue of whether his actions of accessing and viewing the images constituted possession thereof"), appeal granted, 939 A.2d 290 (Pa. 2007); see also Barton v. State, 648 S.E.2d 660 (Ga. Ct. App. 2007), cert. denied, No. S07C1655, 2007 Ga. LEXIS 622 (Ga. Sept. 10, 2007). In Barton, the court noted that, although Georgia prohibits both possession and control of child pornography, the prosecution failed to include "control" in its indictment. Id. at 661 n.2. The court "[r]eluctantly" agreed with Barton that the prosecution had not provided sufficient evidence to convict him of possession of the 106 images found in his computer cache, and the court did not have the option to convict him of control of the images. Id. at 662.
95. See Diodoro, 932 A.2d 172. In Diodoro, the Pennsylvania court found that the defendant's use of the computer mouse, his search for websites, and his closing of those websites were indicative of his intent and his ability to control the 300 images found in his computer cache. Id. at 174. Moreover, the court reasoned, "while Appellant was viewing the pornography, he had the ability to download the images, print them, copy them, or email them to others, which we find is further evidence of control." Id. at 174-75.
96. See, e.g., United States v. Romm, 455 F.3d 990, 993-96 (9th Cir. 2006); United States v. Bass, 411 F.3d 1198, 1200 (10th Cir. 2005); United States v. Tucker, 305 F.3d 1193, 1204 (10th Cir. 2002).
97. Romm, 455 F.3d at 993-96; Bass, 411 F.3d at 1200; Tucker, 305 F.3d at 1204.
A browser cache is a folder located on the hard drive of every computer into which the web browser automatically saves a copy of every viewed web page.98 The process speeds up the loading of internet pages because, when a user returns to a website, the web browser retrieves the page from the cache rather than the Internet.99 The storage process is a default function on the computer.100 Even files that are manually deleted or put into the recycle bin remain saved in the cache.101 Although when the cache fills up, the oldest files in it are replaced by the newest ones viewed by the user,102 one court referred to the everlasting effect of looking at an image online as a "digital footprint."103

Users who are aware of the existence of the cache can delete it manually or with commercial software.104 However, without forensic software—and, of course, without knowledge of the cache's existence—a user cannot access the images stored in the cache.105 In possession cases that rely on the existence of images in the defendant's cache, the dispositive issue is the defendant's awareness of how his computer works and whether he understood that the images he viewed saved to his computer.106

99. Id. at 1230.
100. Bass, 411 F.3d at 1207 (Kelly, J., dissenting).
101. United States v. Gourde, 440 F.3d 1065, 1068 (9th Cir. 2006) (en banc); see also Beryl A. Howell, Real World Problems of Virtual Crime, 7 YALE J.L. & TECH. 103, 116 (2004) (“Images searched out, found and viewed on web pages are automatically saved by the computer’s web browser in a browser cache file and stored on the hard drive, until the contents of that file are deleted by the user.”).
103. Gourde, 440 F.3d at 1071.
104. Jenkins, supra note 2, at 110-11 (explaining that experienced child pornographers will often “instruct novices in the essential importance of cleaning the computer’s cache regularly to erase images, which might otherwise constitute legal evidence of possession of child pornography”); see also Kent, supra note 102, at 286 (instructing, in a section entitled “I was 'Researching' at Hustler Online, and now I'm unemployed,” that “[t]o cover your tracks, clear the cache to remove the offending pages”); Howard, supra note 98, at 1231.
105. United States v. Kuchinski, 469 F.3d 853, 862 (9th Cir. 2006) (“When the Active Temporary Internet Files get too full, they spill excess saved information into the Deleted Temporary Internet Files. All of this goes on without any action (or even knowledge) of the computer user.”); see also Barton v. State, 648 S.E.2d 660, 661 (Ga. Ct. App. 2007), cert. denied, No. S07C1655, 2007 Ga. LEXIS 622 (Ga. Sept. 10, 2007).
106. See, e.g., United States v. Stulock, 308 F.3d 922, 925 (8th Cir. 2002).
III. Prosecuting the Viewing Defendant Under the Federal Statute

A. The Federal Statute

Federal statute 18 U.S.C. § 2252A criminalizes the knowing possession of child pornography. All federal courts have agreed that a defendant who admitted to viewing child pornography online cannot be guilty of possession if he was unaware that the images he was viewing were saved to the cache on his hard drive. The courts' legal wrangling occurs primarily around the difficulty of applying the legal definition of possession to intangible images that exist only in cyberspace.

B. The Necessity of Knowledge

In United States v. Stulock, the Court of Appeals for the Eighth Circuit clarified that knowledge of the existence of the cache is critical to a finding of guilt under knowing possession. The court stated, "[o]ne cannot be guilty of possession for simply having viewed an image on a Web site, thereby causing the image to be automatically stored in the browser's cache, without having purposely saved or downloaded the image."

In United States v. Kuchinski, the Court of Appeals for the Ninth Circuit drew a bright line between knowing possession and possession. Kuchinski had downloaded 110 images, but his cache contained nearly 18,000 additional images. In deciding what quantity of images should be used in determining his sentence, the court stated:

There is no question that the child pornography images were found on the computer's hard drive and that Kuchinski possessed the computer itself. Also, there is no doubt that he had accessed the web page that had those images somewhere upon it, whether he actually saw the images or not. What is in question is whether it makes a difference that, as far as this record shows, Kuchinski had no knowledge of the images that were simply in the cache files. It does.

108. See, e.g., Kuchinski, 469 F.3d at 862; Stulock, 308 F.3d at 925.
110. Stulock, 308 F.3d 922.
111. Id. at 925.
112. Kuchinski, 469 F.3d at 861.
113. Id. at 862.
Kuchinski's inability to control the images in his cache was the dispositive point. Unable to exercise "dominion and control" over the images, he could not have knowingly possessed them.\textsuperscript{114}

C. Using Control to Demonstrate Possession

All federal courts have found the defendant's knowledge of the cache necessary for a conviction of knowing possession.\textsuperscript{115} The majority of courts have found that his ability to control the images while he was looking at them to be sufficient to meet the definition of possession.\textsuperscript{116}

In \textit{United States v. Tucker},\textsuperscript{117} the defendant argued that he had not possessed child pornography but had only viewed it on his web browser.\textsuperscript{118} He claimed that, although he understood that his computer saved images to the cache file on his hard drive, he deleted them after each viewing because he did not want the images saved.\textsuperscript{119} The court looked to the "ordinary, everyday meaning" of possession and found Tucker guilty because, regardless of his attempt to delete the images, he understood that his computer was saving them.\textsuperscript{120} That understanding enabled him to control the images, which the court found sufficient to establish that he possessed them.\textsuperscript{121} The court's conviction rested on Tucker's express awareness of the computer cache.\textsuperscript{122}

Three years later, in \textit{United States v. Bass}, the same court found Bass guilty based on his inferred awareness that images were

\textsuperscript{114} \textit{Id.} at 863.
Where a defendant lacks knowledge about the cache files, and concomitantly lacks access to and control over those files, it is not proper to charge him with possession and control of the child pornography images located in those files, without some other indication of dominion and control over the images. To do so turns abysmal ignorance into knowledge and a less than valetudinarian grasp into dominion and control.

\textit{Id.}

\textsuperscript{115} \textit{See, e.g., id.} at 861; \textit{United States v. Romm}, 455 F.3d 990, 993 (9th Cir. 2006); \textit{United States v. Bass}, 411 F.3d 1198, 1201 (10th Cir. 2005); \textit{Stulock}, 308 F.3d at 925.

\textsuperscript{116} \textit{See supra} notes 88-91 and accompanying text.

\textsuperscript{117} \textit{United States v. Tucker}, 305 F.3d 1193 (10th Cir. 2002).

\textsuperscript{118} \textit{Id.} at 1204.

\textsuperscript{119} \textit{Id.}

\textsuperscript{120} \textit{Id.}

\textsuperscript{121} \textit{Id.} ("We agree with the district court . . . that Tucker had control over the files present in his Web browser cache files."); \textit{see also} Kreston, \textit{supra} note 30, at 27.

\textsuperscript{122} \textit{Tucker}, 305 F.3d at 1204 ("Tucker maintains that he did not possess child pornography but merely viewed it on his Web browser. He concedes, however, that he knew that when he visited a Web page, the images . . . would be sent to his browser cache file and thus saved on his hard drive.").
saved onto his hard drive. In Bass, the defendant admitted that he had viewed child pornography but claimed that he was unaware that the images automatically saved to his cache. In fact, he had run a program to delete any images from his computer specifically because he did not want to possess them (and did not want his mother to see them). Relying on its decision in Tucker, the court held that Bass’s attempt to delete the images was evidence of his awareness that the computer had automatically saved them. Because “a jury . . . reasonably could have inferred” that he knew the images were saved, the court found that the case was similar to Tucker.

Dissenting, Judge Kelly charged the majority with rewriting the statute to criminalize viewing. “Although reprehensible,” he wrote, “viewing child pornography is not a crime.” He found that the real issue of proving knowing possession beyond a reasonable doubt rested on the distinction between Bass’s suspicion that the images he viewed were saved onto his hard drive and his lack of affirmative knowledge that they had been saved. He argued that “[k]nowing possession of pornography cannot be established merely by demonstrating that Mr. Bass was ignorant, negligent, careless, or foolish not to have known that downloading files is easy, and material is saved in temporary internet files.”

The Court of Appeals for the Ninth Circuit looked to the Tenth Circuit for guidance in deciding United States v. Romm. Stuart Romm looked at child pornography websites while in a hotel room in Las Vegas. More than forty images had saved to his computer cache. The court found that Romm’s act of enlarging several of the photographs from their original thumbnail size demonstrated his ability to control the images, which was sufficient to establish knowing possession at the time at which he was viewing the images. The court went on to differentiate the act of viewing from the act of possession as manifested by the ability, whether acted on or not, to control the images on the screen. Writing about a

124. Id. at 1202.
125. Id.
126. Id.
127. Id. at 1206 (Kelly, J., dissenting).
128. Id. at 1207.
129. Id.
130. United States v. Romm, 455 F.3d 990, 999 (9th Cir. 2006).
131. Id. at 995.
132. Id. at 1001.
dissenting opinion in United States v. Gourde, the Romm court stated:

Assuming a lack of control over the images saved to the cache, our colleague has opined that a person who looks at child pornography over the internet no more 'receives' it, than a visitor to the Louvre 'receives' a visualization of the Mona Lisa. However, as the record here indicates, Romm had access to, and control over, the images that were displayed on his screen and saved to his cache. He could copy the images, print them or email them to others, and did, in fact, enlarge several of the images. This control clearly differentiates Romm's conduct from that of a visitor to the Louvre who gazes on the Mona Lisa, even if we put aside the stringent museum rules against photographing or copying without museum permission.

Again, the dispositive issue in Romm was the defendant's ability to control the images as he viewed them. He could have printed, emailed, or copied them. The common thread in the federal courts' decisions is that a defendant's awareness of the browser cache is sufficient to find that he had the ability to control the images he viewed and, consequently, to convict him of possession.

IV. PROSECUTING IN STATE COURTS

State courts with possession-only statutes often convict child pornography viewers under the doctrine of constructive possession.

133. United States v. Gourde, 440 F.3d 1065, 1082 (9th Cir. 2006) (en banc). Gourde contested whether the investigators had probable cause to search his computer for images of child pornography. The majority found that "[i]t neither strains logic nor defies common sense to conclude, based on the totality of these circumstances, that someone who paid for access for two months to a website that actually purveyed child pornography probably had viewed or downloaded such images onto his computer." Id. at 1071. However, in his dissent, Judge Kleinfeld argued that the federal statute does not prohibit viewing child pornography.

About the closest the statutes get to mere looking is the phrase "knowingly receives." Though precedent does not settle the question, it does not square with common sense to treat looking as knowingly receiving. One would not say that a person who had looked at the Mona Lisa at the Louvre had "received" it. The government tries to make something of the computer browser's cache, but that cannot be the same thing as "receiving" because the cache is an area of memory and disk space available to the browser software, not to the computer user. The concept of "receiving" implies possession. Possession requires dominion and control, a concept well understood from drug and firearms cases.

134. Romm, 455 F.3d at 1001 (citations omitted).

135. Id.
Constructive possession is "control or dominion over a property without actual possession or custody of it." Although each state has its own definition of what constitutes constructive possession, the commonality among these cases is the courts' focus on the ability of the defendant to control the images.

A. Application of the Doctrine of Constructive Possession

In *Kromer v. Commonwealth*, the Virginia Appeals Court defined possession in the context of the Internet for the first time. Looking to the precedent of *Tucker*, the court concluded that whoever had used the computer in question had knowingly possessed child pornography. Having established that child pornography existed on the computer and that the defendant was aware of the existence of the pornography, the court then looked to link the defendant to the computer to establish his constructive possession of the pornography. The defendant did not raise the issue of his ignorance of the computer cache until his appeal, so the court did not consider whether he could be found to have constructively possessed the images in his cache of which he was unaware. Rather, this case suggests that, once downloaded from the Internet, images...

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137. BLACK'S, supra note 88, at 547. Acclaimed property law scholar, Jesse Dukeminier, described the use of the term "constructive" as "a way of pretending that whatever word it modifies depicts a state of affairs that actually exists when actually it does not." He continued: "The pretense is made whenever judges wish, usually for good but often undisclosed reasons, a slightly different reality than the one confronting them." JESSE DUKEMINIER ET AL., PROPERTY 29 n.14 (6th ed. 2006).

138. See MASS. JURY INSTRUCTIONS, supra note 91 (explaining that constructive possession exists when a "person who, although not in actual possession, knowingly has both the power and the intention at any given time to exercise dominion, power or control over an object either directly or through another person").

139. *Kromer*, 613 S.E.2d at 871.

140. United States v. Tucker, 305 F.3d 1193 (10th Cir. 2002); see supra notes 117-122 and accompanying text.

141. *Kromer*, 613 S.E.2d at 874. In *Kromer*, the defendant was charged with violating section 18.2-374.1:1(A) of the Code of Virginia which states, "Any person who knowingly possesses child pornography is guilty of a Class 6 felony." *Id.* at 872.

142. *Id.* at 874. The court stated that, "[w]hile this appears to be a case consigned to the new and evolving area of computer technology, we examine this case under familiar principles of constructive possession of contraband." *Id.* The constructive possession standard, taken from a drug case, required, "circumstances which tend to show that the defendant was aware of both the presence and character of the substance and that it was subject to his dominion and control." *Id.*

143. *Id.* at 875.
on a computer can be found to be constructively possessed by the owner of the computer.

Similarly, the Alabama Criminal Court of Appeals looked to a drug possession case for a definition of constructive possession in *Ward v. State*, holding that "[c]onstructive possession exists when the defendant exercises, or has the power to exercise, dominion and control over the item." The court found that Ward had the power to control the images of child pornography when he was viewing the web pages. Although the evidence was insufficient to show whether Ward had actually exercised that power, the fact that he could have done so was sufficient to show that he had knowing possession of the images.

Whereas the courts in *Kuchinski* and *Stulock* found the defendants incapable of knowing possession when they were unaware of the existence of the images in their caches, the Washington Court of Appeals found the defendant guilty of constructive possession, despite his ignorance of the cache. In *State v. Mobley*, the defendant was convicted of possession of child pornography for three images found in his cache. Here, the court focused on the issues of dominion and control rather than on the technological savvy of the defendant. Mobley claimed that, although he had dominion and control over the hard drives on which the images were found, he had no more than "passing control" over the images.

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145. *Ward*, 2007 WL 1228169, at *7 (quoting United States v. Laughman, 618 F.2d 1067, 1077 (4th Cir. 1980) in which nine passengers on a boat were found guilty of constructive possession of two tons of marijuana).

146. *Id.* at *8.

147. *Id.*

148. United States v. Kuchinski, 469 F.3d 853 (9th Cir. 2006).

149. United States v. Stulock, 308 F.3d 922 (8th Cir. 2002).


151. *Id.* at 414.

152. *Id.* at 416 (surmising "that the core question seems to be whether the totality of the circumstances establishes that a defendant reached out for and exercised dominion and control over the images at issue"). Although the court does not expressly include the other crime from which the defendant was convicted within its discussion of the totality of the circumstances, it seems possible that it included in its deliberations the charge that he had raped his ten-year-old daughter, which she testified he did every week for two years. *Id.* at 414.
while he was viewing them.\textsuperscript{153} The court, however, examined the legislative intent behind the statute and determined that it was best met by considering the relationship between the defendant and the images.\textsuperscript{154}

The court looked to a drug-possession case for the jurisdiction’s standard for constructive possession and found that it required that the defendant have dominion and control over the contraband or the premises where the contraband is found.\textsuperscript{155} The court then concluded that the evidence that Mobley had sought out child pornography sites and had viewed images of child pornography was sufficient for a finding that he had controlled those images.\textsuperscript{156} Accordingly, he was held to be guilty of constructive possession.\textsuperscript{157}

B. A Dissenting Judge on Viewing

Pennsylvania prohibits possession or control of child pornography.\textsuperscript{158} In \textit{Commonwealth v. Diodoro}, Anthony Diodoro admitted that he had sought out child pornography websites and had viewed images online.\textsuperscript{159} Using a familiar argument,\textsuperscript{160} he claimed that because he had neither saved nor downloaded the images, he had not possessed them.\textsuperscript{161} The Pennsylvania court focused its discussion on whether Diodoro had controlled the thirty images found in his computer cache.\textsuperscript{162} Because the court found the evidence to be suf-

\textsuperscript{153} Id. at 416.
\textsuperscript{154} \textit{Id.} ("This approach recognizes and promotes the purposes behind Washington’s child pornography statute, to protect children by discouraging their sexual exploitation for commercial gain and personal satisfaction.").
\textsuperscript{155} Id. (citing State v. Morgan, 896 P.2d 731, 733 (Wash. Ct. App. 1995), which found a defendant who was near the hood of a car that had cocaine on it guilty of possession).
\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} 18 PA. CONS. STAT. ANN. § 6312(d) (West 2007) ("Any person who knowingly possesses or controls any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.").
\textsuperscript{160} \textit{See United States v. Bass}, 411 F.3d 1198, 1202 (10th Cir. 2005); United States v. Tucker, 305 F.3d 1193 (10th Cir. 2002).
\textsuperscript{161} \textit{Diodoro}, 932 A.2d at 174.
\textsuperscript{162} Id.
ficient to support the charge of control, it did not extend its discussion into whether Diodoro had possessed the images. 163

Like dissenting Judge Kelly in United States v. Bass, 164 dissenting Judge Klein charged the Diodoro majority with rewriting the statute. 165 Further, he took issue with how the majority interpreted the statute, which, like similar statutes around the country, he found ambiguous. He asked, "[i]f appellate courts from other jurisdictions struggle with the issue, how can this Court reasonably say that the language in our statute is clear enough to provide a layperson with fair warning that the mere viewing of child pornography on a computer screen is a crime?" 166

Judge Klein noted that the majority's holding was in line with the legislative intent behind the statute to "cut off the market for child pornographers by criminalizing the purchasers." 167 And while he never made a specific plea to the legislature to rewrite the statute to include viewing, he did suggest—three times—that if viewing were prohibited, there would be no question as to Diodoro's guilt. 168

A 2007 New Jersey case supports Judge Klein's claim that a prohibition on viewing could have resulted in the just conviction of Diodoro. 169 In State v. Tanner, the defendant appealed his conviction of possession of child pornography, claiming that the evidence was insufficient to establish that he possessed the images on his hard drive. 170 The court pointed out that even without sufficient

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163. Id. at 175 n.5 (clarifying that because the court had found the appellant guilty of control of pornographic images, "we need not reach the issue of whether his actions of accessing and viewing the images constituted possession thereof"). Given the strong dissent over the majority's holding, it seems likely that the majority would have raised the issue of possession if it believed it was a viable claim.

164. Bass, 411 F.3d at 1206 (Kelly, J., dissenting).

165. Diodoro, 932 A.2d at 176 (Klein, J., dissenting).

166. Id. at 179.

167. Id. at 176.

168. Id. ("Were the legislature to amend the statute to prohibit individuals from 'knowingly possessing, controlling, or viewing' child pornography, there would be no issue. But that is not what the legislature has done, at least not yet."); id. at 179 ("Again, the legislature could have drafted [the statute] to criminalize the mere viewing of child pornography. In our sister state of New Jersey, for example, the statute does not merely prohibit the possession of child pornography."); id. ("While it well may be desirable for the Pennsylvania legislature to amend the statute to specifically proscribe the 'viewing' of child pornography, as the New Jersey legislature did, it has not done so.").


170. Id. at *3.
evidence to convict him of possession, "the statute proscribes either the viewing of that pornography, or the possession, and the jury did not necessarily need to find both to sustain a conviction." The appeals court affirmed the trial court's conviction based on the defendant's viewing of child pornography.172

V. The Massachusetts Statute

A. The Origin of the Massachusetts Prohibition Against Possession of Child Pornography

1. The Social Context

On October 1, 1997, Jeffrey Curley, a ten-year-old boy from Cambridge, Massachusetts, was kidnapped, raped, suffocated to death with a gasoline-soaked cloth, and thrown into a river in Maine.173 Child pornography was found in the apartment of one of the two men charged with his murder, and materials from the North American Man/Boy Love Association were in his car.174 Two months later, the acting Governor of Massachusetts, Paul Cellucci, signed into law section 29C of chapter 272 of the Massachusetts General Laws, outlawing the knowing purchase and possession of child pornography in the Commonwealth of Massachusetts.175

Although none of the legislative history of section 29C mentions Curley's death, the Massachusetts legislature could not have been unaware of the petition that was delivered to the State House by the Curley family at a rally on October 19, 1997.177 Signed by 6800 voters, the petition demanded harsher penalties for crimes in-

171. Id.
172. Id. at *4.
174. Id. The reporter describes the North American Man/Boy Love Association (NAMBLA) as "a group that advocates consensual sex between men and boys." Id. In 2000, in a case that is still pending, the Curley family sued NAMBLA for wrongful death, claiming that the information provided on its website incited their son's murderers to commit the killing and rape. Judy Rakowsky, Curley Parents Sue Man-Boy 'Love' Group, Web Site Say [sic] Killer Was Spurred by Joining NAMBLA, BOSTON GLOBE, May 17, 2000, at B1.
175. MASS. GEN. LAWS ch. 272, § 29C (2006). For the full text of the statute, see supra note 12.
volving child pornography. At the time the petition was signed, only the production and dissemination of child pornography were prohibited in Massachusetts. However, it is unlikely that voters knew at that time that Representative Nancy Flavin had already introduced a bill outlawing possession of child pornography in January of 1997 in response to what was widely viewed as an outrageous outcome of a correct interpretation of the law. A Hampshire County trial court judge had found a defendant guilty of child molestation and then found no law upon which she could refuse his request for the return of the child pornography that the police had confiscated from his home.

2. The Bill and Its Passage

Thus, when Jeffrey Curley was murdered, the bill prohibiting the purchase and possession of child pornography was already making its way through the House and the Senate. However, Curley’s death and the resulting petition seemed to speed up the process of the bill’s passage. Less than two weeks after the petition arrived at the State House, having sat with the Senate since mid-July, the bill was read a third time on the Senate floor. At that time, a new section that declared the statute an “emergency law” and included legislative findings was added.

178. Id. This petition was accompanied by another, signed by 8600 voters, demanding a reinstatement of the death penalty. Id. See generally Doris Sue Wong & Adrian Walker, House Says ‘Yes’ to Death Penalty, Vote is 81-79; Bill Differs from Senate’s, BOSTON GLOBE, Oct. 29, 1997, Metro Section, at A1. Massachusetts had not executed a criminal since 1947 and had no statute permitting capital punishment at the time of Jeffrey Curley’s death. Id. Although the Senate had voted three times in the years since 1982 to reinstate the death penalty, the House rejected each bill. Id. Twenty-seven days after Curley’s death, the House voted to reinstate the death penalty. Id. In the final vote of the entire legislature, the measure lost by one vote. Matt Murphy, House Lawmakers Again Soundly Reject Mass. Death-Penalty Bill, LOWELL SUN (Mass.), Nov. 8, 2007, available at 2007 WLNR 22053860 (Westlaw).

179. MASS. GEN. LAWS ch. 272, § 29A (2006) (statute entitled “Child Pornography or the Enticement, Solicitation, Employment, etc. of Children”).

180. Id. at § 29B (statute entitled “Dissemination of, and Possession with Intent to Disseminate, Obscene Matter”).


183. Id.


186. MASS. CONST. amend. art. 48, referendum, pt. 2 requires that any law declared to be an emergency law must include a preamble “setting forth the facts consti-
Whereas, The deferred operation of this act would tend to defeat its purpose, which is to punish the possession of child pornography, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

SECTION 1. The General Court hereby finds: (1) that the sexual exploitation of children constitutes a wrongful invasion of a child's right to privacy and results in social, developmental and emotional injury to such child and that to protect children from sexual exploitation it is necessary to prohibit the production of material which involves or is derived from such exploitation and to exclude all such material from the channels of trade and commerce; (2) that the mere possession or control of any sexually exploitative material results in continuing victimization of children as such material is a permanent record of an act or acts of sexual abuse or exploitation of a child and that each time such material is viewed the child is harmed; (3) that such material is used to break the will and resistance of other children so as to encourage them to participate in similar acts; (4) that laws banning the production and distribution of such material are insufficient to halt this abuse and exploitation; (5) that to stop the sexual abuse and exploitation of children, it is necessary to ban the possession of any sexually exploitative materials; and (6) that the commonwealth has a compelling interest in outlawing the possession of any materials which sexually exploit children in order to protect the privacy, health and emotional welfare of children and society as a whole.187

On November 17, 1997, the House unanimously adopted the bill, including the new preamble and the emergency measure.188 Two weeks later, the bill became law.189 As he presented the new law to the public, acting Governor Cellucci stated: "'It is now illegal to purchase or have in your home or in your possession magazines, books, videos, Polaroid shots, or to download from the Internet material that contain[s] sexually exploitative images of..."
children. . . . There will be zero tolerance of those who dare dabble in this filth."

At the time the Massachusetts legislature created section 29C, the three other states that currently prohibited viewing of child pornography—Arkansas, Ohio, and New Jersey—had already enacted their statutes. The Massachusetts legislative history does not include any of the debates or discussions regarding the selection of behaviors to be prohibited by the statute. Although the preamble refers specifically to possession, control, and viewing as those activities that victimize children, the law only prohibits knowing purchase and possession.

B. Statutory Interpretation in Massachusetts

1. Statutory Interpretation Generally

Just as judges nationwide have applied the federal and state statutes prohibiting possession of child pornography to viewers of

190. Wong, supra note 182.
It is the express intent of this act to eradicate the use of children as subjects of pornographic materials. This act seeks to protect victims of child pornography and to destroy a market for the exploitative use of children. The use of children as subjects of pornographic material is harmful to the physical and psychological health of children. Thus, this state has a compelling interest in penalizing those who solicit, receive, purchase, exchange, possess, view, distribute or control such material.

Id.
194. Colorado's child pornography statute also includes an express finding that "each time such material is shown or viewed, the child is harmed." Colo. Rev. Stat. Ann. § 18-6-403(1.5) (West 2004). In People v. Renander, the court agreed with the prosecution that this finding authorized a charge per image rather than the total number of children viewed. People v. Renander, 151 P.3d 657, 660 (Colo. Ct. App. 2006). The court further found that the statute was "designed to stop the sexual victimization of children," and that "each sexually exploitative image is a permanent record and, therefore, constitutes a discrete act of victimization of the child." Id. at 662.
197. Id.
online pornography, inevitably Massachusetts judges will soon have to do the same. To apply statutory law to cases before them, judges must interpret the statute under which a defendant has been charged. Interpretation includes a determination of the plain meaning of the words and the intent of the legislative body in writing those words. Usually, such interpretation is simple. If the statute’s words are unambiguous, then the intent of the legislature in writing those words is clear, and the application of the words should achieve their intended effect. In such situations, the desired result of clear law—that “[c]itizens ought to be able to open up the statute books and have a good idea of their rights and obligations”—is fulfilled.

However, when a statute’s words do not give rise to the apparent intent of the legislative body, or when the words are ambiguous and the meaning not easily decipherable, courts must engage in

198. See, e.g., United States v. Kuchinski, 469 F.3d 853, 861 (9th Cir. 2006); United States v. Romm, 455 F.3d 990, 993 (9th Cir. 2006); United States v. Bass, 411 F.3d 1198, 1201 (10th Cir. 2005); United States v. Stulock, 308 F.3d 922, 924 (8th Cir. 2002).

199. Gurley v. Commonwealth, 296 N.E.2d 477, 479-80 (Mass. 1973) (“Where the language of a statute is plain, it must be interpreted in accordance with the usual and natural meaning of the words.”); see also Kobrin v. Gastfriend, 821 N.E.2d 60, 72 (Mass. 2005) (“There are . . . occasions when we depart from the literal wording of a statute, despite the unambiguous nature of that literal wording. However, such departures from the Legislature’s straightforward wording are rare, reserved for those instances where application of the literal meaning would result in ‘absurd or unreasonable’ consequences . . . .”); Duracraft Corp. v. Holmes Products Corp., 678 N.E.2d 1196, 1198 (Mass. App. Ct. 1997) (“We look first to the words of the statute . . . .”); 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:01, at 113-29 (6th ed. 2000) (explaining the plain meaning rule); JAMES WILLARD HURST, DEALING WITH STATUTES 51-52 (1982).

200. See HURST, supra note 199, at 32 (“The standard criterion for proper interpretation of a statute is to find ‘the intention of the legislature.’”).

201. In most statutes, the words achieve the intent without any need for interpretation. Noted legal scholar William Eskridge writes:

At the time of its enactment, a statute usually resolves the most pressing legal questions that gave rise to it, and resolves them in ways that are just as clear to the addressees as to the authors of the statute. For such issues there is no need for “interpretation”; the statute is clear. Interpretation is required for those issues that were . . . unanticipated . . . .

WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 9 (1994); see also STEVEN VAGO, LAW AND SOCIETY 184 (6th ed. 2000) (writing that courts generally are easily able to apply statutes to the cases before them).

202. ESKRIDGE, supra note 201, at 33.

203. Ambiguity exists in statutes for a variety of reasons, including, for example, sloppy drafting, the legislature’s failure to predict possible future scenarios, and the necessity of a bill’s proponents to make adjustments in order to get the statute passed.

VAGO, supra note 201, at 184; see also GUIDO CALABRESI, A COMMON LAW FOR THE
The primary debate within the field of statutory interpretation concerns what sources may be considered in identifying the intent of the legislature that passed the statute. Some legal scholars, notably originalists and textualists, argue that statutes should be interpreted as a reasonable person would construe their meaning, using only the words on the page. Other scholars believe that multiple sources, particularly legislative history, can assist an interpreter in discerning the intent of the legislature. While scholars debate textualism, intentionalism, and the other "isms" that govern statutory interpretation, courts generally "qualify the deference they pay to the statutory text by their willingness to use some evidence outside the text to establish legislative intent."
Although courts will examine external sources in construing the meaning of an ambiguous criminal statute, the rule of lenity requires that the statute be interpreted in favor of the defendant.208 This canon of construction is intended to “guarantee that courts will go no further than the legislature intended in interpreting criminal prohibitions.”209 Because the rule of lenity exists to prevent a defendant from being convicted of a crime he might not have known he was committing, it only applies when a statute is ambiguous on its face.210 Thus, the Massachusetts Supreme Judicial Court stated that the rule of lenity applies when “an ordinary person reading the statute” would “be surprised to learn” that a specific act he had committed is criminal under that statute.211

2. The Massachusetts Statute that Governs Statutory Interpretation

In Massachusetts, statutory interpretation is governed by both statute and case law. The statute governing statutory construction lists eleven rules, prefaced by the instruction that the “rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the law-making body.”212 The only section applicable to the interpretation of the Massachusetts child pornography possession statute is the fair import provision213 that specifies that “[w]ords and phrases shall be construed accord-

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209. Price, supra note 208, at 886; see also Dressler, supra note 8, at 48-49.

210. See Commonwealth v. Ruiz, 688 N.E.2d 963, 966 (Mass. 1998) (“As is well established, however, criminal statutes must be construed strictly against the Commonwealth. This does not mean that we read unambiguous statutory language to favor defendants; it means simply that . . . ambiguity must be resolved in favor of a defendant.” (citations omitted)); see also Dressler, supra note 8, at 49; 3 Singer, supra note 199, § 59.3, at 142 (6th ed. 2001) (“Strict construction is a means of assuring fairness to persons subject to the law by requiring penal statutes to give clear and unequivocal warning in language that people generally would understand, concerning actions that would expose them to liability for penalties and what the penalties would be.” (citations omitted)).

211. See Perry v. Commonwealth, 780 N.E.2d 53, 58 (Mass. 2002) (holding that a defendant convicted of dissemination of child pornography should have known that computer-stored images should be included within the legislature’s definition of visual materials).

212. MASS. GEN. LAWS ch. 4, § 6 (2006).

213. Id. One author argues that this fair import provision specifically encourages courts to interpret statutes broadly. Price, supra note 208, at 886.
ing to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning."214 The statute thus requires that the plain meaning of the statute prevail unless the legislature may have intended a specific legal definition of a particular word.

3. Massachusetts Case Law on Statutory Interpretation

Massachusetts case law highlights the importance of construing the words within the statute by their plain meaning. Again and again, however, the cases declare that an interpreter cannot truly understand the plain meaning without identifying the legislature's intent in passing the law. For example, in the 1931 criminal case of Commonwealth v. Welosky,215 the Massachusetts Supreme Judicial Court stated:

The words of a statute are the main source for the ascertainment of a legislative purpose. . . . Statutes are to be interpreted, not alone according to their simple, literal or strict verbal meaning, but in connection with their development, their progression through the legislative body, the history of the times, prior legislation . . . and, on the other hand, be not stretched by enlargement of signification to comprehend matters not within the principle and purview on which they were founded when originally framed and their words chosen.216

In 1946, the court declared, "[t]he legislative intent in enacting a statute is to be gathered from a consideration of the words in which it is couched, giving to them their ordinary meaning unless there is something in the statute indicating that they should have a different significance."217 These cases suggest that the words have no plain meaning until the legislative intent has been determined.

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214. Mass. Gen. Laws ch. 4, § 6. The remaining rules govern, for example, how to interpret repealed statutes, standards for newspaper publication when required by statute, and how plurals, singulars, and gender-specific pronouns should be interpreted. Id.


216. Id. at 658-59 (emphasis added); see also Hanlon v. Rollins, 190 N.E. 606, 608 (Mass. 1934) ("The general and familiar rule is that a statute must be interpreted according to the intent of the Legislature ascertained from all the words construed by the ordinary and approved usage of the language . . . to the end that the purpose of its framers may be effectuated." (emphasis added)).

217. Meunier's Case, 66 N.E.2d 198, 200 (Mass. 1946) (emphasis added); see also Sullivan v. Town of Brookline, 758 N.E.2d 110, 115 (Mass. 2001) ("A fundamental tenet of statutory interpretation is that statutory language should be given effect consistent
Massachusetts case law recognizes the essential principle of statutory construction that determining the plain meaning of the words is the first, and often the only, step. However, the determination of what the words mean must be done through the lens of the intent of the legislature. The case law establishes that "something in the statute" can render ambiguous words that would otherwise appear clear. The limiting factor in interpretation is that the matters covered by the statute must be "within their principle and purview." When viewed alongside the statutory cannon of construction requiring that words must be construed by their plain meaning unless the result contradicts the intent of the legislature, it is clear that a statute can only be fairly applied once the purpose of the legislature is identified and the words are interpreted to achieve that purpose. Consequently, the plain meaning of the statute is unascertainable without an understanding of the purpose for which the statute was enacted.

VI. Analysis: Interpretation and Application of Section 29C

In Massachusetts, section 29C of chapter 272 prohibits the knowing purchase and possession of child pornography. The following analysis concludes that the Massachusetts legislature intended to punish those who view child pornography. Yet, as the statute currently reads, those who merely view online pornography in Massachusetts are not violating the law and, consequently, cannot be convicted.

with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result." (emphasis added)).

218. See Pyle v. Sch. Comm. of S. Hadley, 667 N.E.2d 869, 871-72 (Mass. 1996). The court explained how Massachusetts has interpreted the plain-meaning rule:

Our primary duty is to interpret a statute in accordance with the intent of the Legislature. Where the language of a statute is clear and unambiguous, it is conclusive as to legislative intent. Where the ordinary meaning of the statutory terms yields a workable result, we need not resort to extrinsic aids of interpretation such as legislative history. We accord the words of the statute their ordinary meanings, however, with due regard to the statute's purposes.

Id. (citations omitted).


A. Interpreting Section 29C

Although the legislative history of section 29C does not specify why the legislature added section 1,223 the Massachusetts Supreme Judicial Court has referred to the section as "legislative ‘findings’."224 The legislature may have added the section so that its intent could not be contested.225 Likewise, it may have included it in reaction to the public outcry at that time over the violent death of Jeffrey Curley at the hands of a man who possessed child pornography.226 Regardless of the reason for its inclusion, the findings provide insight into the intent of the legislature in passing the bill and, thus, are indispensable in the interpretation of the statute.227

The inclusion of the findings has a two-fold impact on the interpretation of the statute. First, it eliminates the need to look at extrinsic materials to determine the intent of the legislature because the findings specify the intent. Ironically, however, the second impact is that the findings render the statute ambiguous. Had the legislature not included its findings, it would be difficult to make an argument that the legislative history—or any other sources available228—should be examined because the plain meaning of the

223. MASS. GEN. LAWS ANN. ch. 272, § 29C (West 2000); see supra note 187 and accompanying text.
224. Perry v. Commonwealth, 780 N.E.2d 53, 56 (Mass. 2002) (holding that the legislative findings of section 29C do not apply to section 31). Legislative findings are not commonly included in Massachusetts statutes. Fewer than ten Massachusetts statutes explicitly include findings. See, e.g., MASS. GEN. LAWS ANN. ch. 231, § 85S (West 2000) (governing the protection of works of fine art); MASS. GEN. LAWS ANN. ch. 151A, § 14F (governing contributions to the Unemployment Trust Fund).
225. Evidence of how the court has perceived the legislature’s intent when it has included such statements in other statutes is found in Moakley v. Eastwick, in which the Massachusetts Supreme Judicial Court looked to a similar inclusion to determine the “primary goal of the Act.” Moakley v. Eastwick, 666 N.E.2d 505, 508 (Mass. 1996). Again, in Doe v. Sex Offender Registry Board, the court found that “[t]he purpose is affirmatively supported by expressed legislative findings,” followed by a footnote that reprinted those findings verbatim. Doe v. Sex Offender Registry Bd., 857 N.E.2d 473, 480 (Mass. 2006).
226. See supra notes 173-177 and accompanying text.
227. See 2A SINGER, supra note 199, § 46:5 (“A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section to produce a harmonious whole.”).
228. See Spencer A. Stone, Note, What Was Congress Smoking? The Uncertain Distinction Between “Cocaine” and “Cocaine Base” in the Anti-Drug Abuse Act of 1986, 30 W. NEW ENG. L. REV. 297, 336 (2007) (suggesting that “to determine the intent of Congress in passing a statute, it is proper to consider almost any source that can provide guidance on the subject”). But cf. VERMEULE, supra note 204, at 35 (arguing that even those who believe that the intent of the legislature ought to be determined by looking at
words is clear.229 A legislature that criminalizes the possession of child pornography could intend to do only that. What creates ambiguity in section 29C is that the conduct that the legislature prohibits does not eliminate the harms that the legislature has identified.

According to the second finding, “the mere possession or control of any sexually exploitative material results in continuing victimization of children.”230 Further, “each time such material is viewed the child is harmed.”231 Regarding possession specifically, the legislature provided “that to stop the sexual abuse and exploitation of children, it is necessary to ban the possession of any sexually exploitative materials.”232 Finally, the legislature claimed that “the Commonwealth has a compelling interest in outlawing the possession of any materials which sexually exploit children in order to protect the privacy, health and emotional welfare of children and society as a whole.”233 The prohibitions that derive naturally from these findings are those that are expressly stated as behaviors that harm children—possession, control, and viewing. Yet, of these three, the legislature only prohibited possession.234

The legislative history of section 29C includes no discussion about the inclusion of the findings within the statute235 or why certain behaviors were criminalized and others not. The legislature

sources extrinsic to the statute itself would argue against “collecting and reviewing all possible evidence of original understandings or intentions”).

229. HURST, supra note 199, at 55 (explaining that an argument could never be made that a statute is unclear because its legislative history conflicts with its plain meaning, and stating that “the rule makes a showing of uncertainty on the face of the statute an absolute prerequisite to looking beyond the face”); see also Rubin v. United States, 449 U.S. 424, 430 (1981) (“When we find the terms of a statute unambiguous, judicial inquiry is complete.”); MARMOR, supra note 204, at 55 (noting that judges will not turn to extrinsic evidence to discern legislative intent unless the statutory text is ambiguous); VERMEULE, supra note 204, at 30 (“Few if any people think that the legislative history is ‘authoritative’ in the sense that it is itself a source of law that is hierarchically superior even to unambiguous text.”).

230. MASS. GEN. LAWS ANN. ch. 272, § 29C (West 2000). The section reads: “that the mere possession or control of any sexually exploitative material results in continuing victimization of children as such material is a permanent record of an act or acts of sexual abuse or exploitation of a child and that each time such material is viewed the child is harmed.” Id.

231. Id. (emphasis added).

232. Id. § 1(5).

233. Id. § 1(6).

234. MASS. GEN. LAWS ch. 272, § 29C (2006) (“Whoever knowingly purchases or possesses a negative, slide, book, magazine, film, videotape, photograph or other similar visual reproduction, or depiction by computer, of any child whom the person knows or reasonably should know to be under the age of 18 years of age.”).

235. In fact, the first time the findings appear in the legislative history is in the session in which they were accepted. JOURNAL OF THE SENATE, supra note 185.
may have had a variety of reasons for electing to criminalize only possession and not control or viewing. For example, despite the Supreme Court's ruling in *Osborne* that a prohibition on possession and viewing is not unconstitutional, the legislature may have been unsettled by the prohibition's intrusion into the privacy of personal possession. The legislature also may have had reservations about how a prohibition on viewing could be enforced since it is highly unlikely that the police would actually observe the viewer during the commission of the crime.

It is also plausible that the legislature understood the act of viewing as harmful conduct included within the purview of possession and, accordingly, as conduct that could not occur without the viewer being in possession of the material he was viewing. It is likely that the legislature was responding to the videotapes that the judge returned to the convicted child pornographer and the materials that were found in the apartment of Jeffrey Curley's murderer. Viewing these tangible materials assumes possession of them because they are actual objects. Of course, as Justice Brennan noted in *Osborne*, a person can view images in an art gallery without possessing them. Likewise, a person could view a videotape of child pornography that he does not possess. However, the distinction between a videotape and an online image is that *someone* possesses the videotape. *Someone* can be convicted of possession, and the videotape can be seized, never to be viewed again. The Massachusetts Supreme Judicial Court construed the legislature's "expressed design" to be "to eliminate permanent records of sexually exploitative material harmful to children." Because an online image exists only when a person is looking at it on a screen, to cause harm to the child depicted in it, it must be viewed. The elimination of the record of online child pornography, then, requires that it never be viewed.

236. *Osborne v. Ohio*, 495 U.S. 103, 148 (1990). "Mr. Osborne's pictures may be distasteful, but the Constitution guarantees both his right to possess them privately and his right to avoid punishment under an overbroad law." *Id.* at 148 (Brennan, J., dissenting).


240. *See supra* text accompanying notes 29-34.
Moreover, because the legislature identified each act as a separate behavior within its findings, an argument that possession naturally encompasses control and viewing fails. First, the findings refer to "mere possession," meaning "nothing more than" possession. Second, if possession subsumed control and viewing, the legislature would not have stated "possession or control." It would have separated the words with "and" to signify that each requires the other to create the harmful behavior. The "or" demonstrates the legislature's recognition that each is a distinctly harmful behavior.

Despite the incongruity that leads to textual ambiguity between the findings and the prohibited acts, the intent of the legislature is clear. By outlawing the possession of child pornography, it sought "to protect children from sexual exploitation" and "to protect the privacy, health and emotional welfare of children and society as a whole." If, at the time the bill was passed, the legislature primarily understood viewing only to occur in conjunction with possession—possession of a photograph or a videotape, for example—the fact that it did not include viewing as a criminal act is understandable. Now, however, viewing can and does occur independently of possession. In fact, materials can exist solely as objects to be viewed and not possessed. For example, "the exploitative uses for interactive CD-ROM and videoconferencing technology are obvious." Under the current statute, the viewing of such a "videoconference" is unquestionably legal. Yet, surely the Massachusetts legislature would find that the viewing of a real-time videoconference of the sexual exploitation of a child is harmful and violates "the privacy, health and emotional welfare" of the child.

243. But see Price, supra note 208, at 931. Regarding the application of the statute to new technologies, one author commented that "[i]t is indeed remarkable that Massachusetts did not specifically criminalize computerized child pornography as late as 1998" in reference to the types of "visual material" that are specifically prohibited in Massachusetts. Id. It is also useful to note here that in 2006, 73% of Americans, or 147 million adults, reported using the Internet. In 1998, however, one year after the passage of section 29C, just over 35% of Americans reported using the Internet. Mary Madden, Internet Penetration and Impact 2006, Pew Internet & Am. Life Project, Apr. 2006, at 3, available at http://www.pewinternet.org/pdfs/PIP_Internet_Impact.pdf.
245. Rosenberg, supra note 10, at 432.
An added risk of a possession-only prohibition is that the list of what may not be possessed will require amending each time a new technology is developed. The Massachusetts Superior Court addressed a similar issue in Commonwealth v. Gousie, when it suggested that if the court gave in to the defendant's insistence that each unique form of visual material be specified within the statute, "the result would be that every technological advance could not be recognized by a court without benefit of a legislative response in the nature of a special statutory amendment." The court's holding presumes that all forms of child pornography can somehow be possessed. Yet, it is not difficult to imagine a defendant claiming rightfully that he did not possess an online videoconference live feed of a child in the act of being sexually exploited. What all forms of child pornography do have in common, however, is that a defendant can view them.


Changes are already developing in P2P networks to get around the liability risks of possessing and distributing illegal material. One such system involves encrypting the files that a user wants to share, pushing the encrypted files onto another client machine, and then making the decryption key available at web sites only accessible to Freenet users, along with pointers to where the material may be found. The keys are distributed, not the material, and the person in possession of the encrypted material has deniability about what the subject matter of the encrypted file is. Some in law enforcement are already anticipating a need for new laws to make it illegal to possess a deliberately stored decryption key that the user knows relates to an illegal file.

Id. (emphasis added); cf. Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 671 (2004) (noting that the five-year-old factual record of the case no longer "reflect[ed] current technological reality. . . . The technology of the Internet evolves at a rapid pace").


249. Commonwealth v. Diodoro, 932 A.2d 172, 176 (Pa. Super. Ct. 2007) (Klein, J., dissenting) (writing that "[i]f the legislature fails to keep up with modern technology, it is not our responsibility to correct its oversight"), appeal granted, 939 A.2d 290 (Pa. 2007); see also Howell, supra note 101, at 15.

250. See Eichenwald, supra note 19.

The [child pornography] business has created youthful Internet pornography stars—with nicknames like Riotboy, Miss Honey and Gigglez—whose images are traded online long after their sites have vanished. In this world, adolescents announce schedules of their next masturbation for customers who pay fees for the performance or monthly subscription charges. Eager customers can even buy "private shows," in which teenagers sexually perform while following real-time instructions.

Id.
Thus, while there may be valid reasons why the legislature de­
cided to criminalize only purchase and possession, and not control
or viewing, the result is that it created a statute that does not pro­
hibit all of the conduct that the statute specifically claims harms
children. The stated legislative intent of “protect[ing] the privacy,
health and emotional welfare of children and society as a whole”
cannot be achieved under the statute as it currently reads. Given
the findings that the legislature has presented—that a child is
harmed each time material is viewed—the emotional welfare of the
child victim is not protected by prohibiting only possession of the
material. The harm continues, according to the legislature, with
each viewing.

B. Challenging the Massachusetts Statute

Since the enactment of section 29C in 1997, three cases have
challenged its validity.251 Although all three defendants were ulti­
mately convicted, the cases demonstrate the manipulability of a
possession-only statute. Both Hinds and Kenney were ultimately
decided in the highest court of Massachusetts. If section 29C pro­
hibited viewing child pornography, the issues raised by those de­
fendants would have been moot, and the cases would likely have
terminated in the courts in which they originated.

In Commonwealth v. Gousie, the defendant emailed several
images of child pornography from his own computer.252 He was
charged with violating section 29C.253 Gousie claimed that his con­
duct was insufficient to show that he ever possessed the images be­
cause, he argued, “computer transmitted images are not ‘visual
material’ under the statute” and thus cannot be possessed.254 The
trial court disagreed, stating that the legislature’s inclusion of “de­
piction by computer” within the statute proves that it intended that
computer images be capable of possession.255 The court further
found that the legislature’s preamble “is evocative that the Legisla­
ture intended that computer images depicting sexual exploitation of
children should be excluded from the Commonwealth in all

Hinds, 768 N.E.2d 1067, 1073 (Mass. 2002); Gousie, 2001 WL 1153462.
253. Id.
254. Id.
255. Id. (discussing MASS. GEN. LAWS ch. 272, § 29C (2000)). Because Gousie
had e-mailed an image, there was no issue of whether he had the required mens rea of
knowing possession. Id.
forms."\textsuperscript{256} \emph{Gousie} was the first articulation from a Massachusetts court that computer images are capable of being possessed.

One year later, in \emph{Commonwealth v. Hinds}, the defendant claimed that the possession statute referred only to tangible items.\textsuperscript{257} Again, the court disagreed, stating, "the Legislature's creation of a separate and distinct category for 'depiction by computer' manifests an intent to give special treatment to the unique issues presented by computers, including the fact that stored data, although intangible in their unprocessed form, are readily transferrable to a graphic image."\textsuperscript{258} Here, although the court found that the statute includes images that a defendant has saved onto his hard drive, the court did not address images that are saved automatically to the cache. Thus, although the court had again concluded that computer images can be knowingly possessed, it did not address the issue of whether such materials can be knowingly possessed if the defendant is unaware that his computer automatically saved them while he was viewing them.\textsuperscript{259}

Most recently, in \emph{Commonwealth v. Kenney}, the defendant challenged the constitutionality of section 29C.\textsuperscript{260} Arguing that the statute was overbroad and vague, the defendant claimed that his First Amendment rights had been violated when he was charged with possession of child pornography.\textsuperscript{261} Relying on \emph{New York v. Ferber}\textsuperscript{262} and \emph{Ashcroft v. Free Speech Coalition},\textsuperscript{263} the court found his claims to be without merit.\textsuperscript{264} The court also specified that the defendant—like Gousie and Hinds before him—was challenging only "the scope of the proscribed material" and not the prohibited acts of purchase or possession.\textsuperscript{265}

None of these cases raised the issues presented in other jurisdictions regarding whether a defendant can be convicted of knowing possession of images in a computer cache if he was unaware of

\textsuperscript{256} \emph{Id.} at *4.
\textsuperscript{257} \emph{Commonwealth v. Hinds}, 768 N.E.2d 1067, 1074 (Mass. 2002).
\textsuperscript{258} \emph{Id.}
\textsuperscript{259} \emph{Cf.} United States v. Stulock, 308 F.3d 922, 925 (8th Cir. 2002) (finding that although defendant did not purposely save or download images, his computer automatically saved previously viewed images without his knowledge).
\textsuperscript{260} \emph{Commonwealth v. Kenney}, 874 N.E.2d 1089, 1093 (Mass. 2007).
\textsuperscript{261} \emph{Id.} at 1096.
\textsuperscript{262} \emph{New York v. Ferber}, 458 U.S. 747 (1982); see also \emph{supra} notes 23-28 and accompanying text.
\textsuperscript{263} \emph{Ashcroft v. Free Speech Coal.}, 535 U.S. 234 (2002); see also \emph{supra} note 22.
\textsuperscript{264} \emph{Kenney}, 874 N.E.2d at 1097-102 (discussing \emph{Ferber} and \emph{Ashcroft}).
\textsuperscript{265} \emph{Id.} at 1104.
their existence. Nor did the cases address whether the prosecution had proved constructive possession. Thus, the Massachusetts courts have yet to rule on whether a defendant in Massachusetts can knowingly possess images on his hard drive that he did not actively save.

C. Applying the Massachusetts Standard for Constructive Possession to Online Child Pornography Images

Because the child pornography statute in Massachusetts prohibits only knowing purchase and possession, and not control or viewing, a prosecutor would likely claim that a viewing defendant, who was unaware of the saved images in his cache, had constructive possession of the images.

1. The Constructive Possession Standard

Unlike the constructive possession standards in Virginia, Alabama, and Washington, the Massachusetts constructive possession standard includes a requirement of intent. As described in an illegal possession of adult pornography case, “[c]onstructive possession exists when a person has no present personal dominion over an item but has the intent and capability to maintain such dominion.” The definition thus requires that a person have the ability and the intent to control the item. This additional element of

266. See, e.g., United States v. Kuchinski, 469 F.3d 853, 861 (9th Cir. 2006); United States v. Romm, 455 F.3d 990, 993 (9th Cir. 2006); United States v. Bass, 411 F.3d 1198, 1201 (10th Cir. 2005); United States v. Stulock, 308 F.3d 922, 924 (8th Cir. 2002). Although Stuart Romm was a Massachusetts resident and practicing attorney, he was tried by the federal court in Las Vegas for violating the federal child pornography statute. He was ultimately disbarred by the Massachusetts Board of Bar Overseers. See In re Romm, No. BD-1998-027, 1999 WL 33721622 (Mass. State Bar Dispute Bd. Nov. 3, 1999).


268. See supra notes 136-156.


270. Capability is “ability.” Merriam-Webster’s, supra note 15, at 182. The general definition of “ability” is “the quality or state of being able.” Id. at 3. Its legal definition is “[t]he capacity to perform an act or service.” Black’s, supra note 88, at 4. Dominion is “control, possession.” Id. at 525. Intent is “[t]he state of mind accompanying an act, esp. a forbidden act.” Id. at 825. The definition goes on to specify that “[w]hile motive is the inducement to do some act, intent is the mental resolution or determination to do it.” Id.
intent creates an obstacle for a prosecutor, who must attempt to prove that the defendant, while viewing the images, intended to control them. Given that many defendants argue that they specifically did not save, download, e-mail, or otherwise possess the images precisely because they did not intend to control them, the prosecution will have to convince the court to find intent in the defendant’s ability to control.

2. Constructive Possession Precedent in Massachusetts

The Massachusetts Supreme Judicial Court explored the constructive possession standard in the context of illegal possession of adult pornography in Commonwealth v. Lotten Books, Inc., a 1981 case in which a bookstore cashier and the bookstore as a corporate defendant were found guilty of possession with intent to disseminate obscene films. Lotten Books, Inc. had private booths in which customers could view pornographic films by inserting coins into a projector. The bookstore cashier, Albert Pulli, who was in charge at the time the police came into the store, did not have keys to the cabinets that held the projectors. However, he knew how to contact the store owner who had the keys, and he was staffing the store so that customers could come in to view the films.

The court recognized that it could not find Pulli guilty of possession because, with no key, he did not have access to the films. However, it stated that the proper definition of possession that controlled in this case should be “a definition which will best reflect the intent of the Legislature.” The legislature’s intent, it held, was not to permit a defendant to evade a charge of possession by keeping keys to the locked illegal matter off the premises. Rather, the

271. See, e.g., United States v. Bass, 411 F.3d 1198, 1202 (10th Cir. 2005); United States v. Tucker, 305 F.3d 1193, 1204 (10th Cir. 2002).
272. See supra note 150 and accompanying text (discussing State v. Mobley and the totality of the circumstances test); see also State v. Mobley, 118 P.3d 413 (Wash. Ct. App. 2005).
274. Id.
275. Id.
276. Id. at 149.
277. Id. at 148-49 (“The fact that Pulli could gain access to the compartments by the mere expedient of a phone call to someone who produced the keys supports a finding of at least constructive possession.”).
278. Id. at 149.
279. Id. (“A person cannot thwart the intent of the statute by placing the contraband in a locked compartment and then entrusting the keys to another party.”).
intent was to reach a defendant who had the intent and the ability to exercise dominion and control over the illegal matter. Pulli’s intent was apparent because he worked in a bookstore that sold obscene literature and showed adult pornographic movies. His ability was demonstrated by his knowledge of whom to call to get the keys. Consequently, the court convicted him of constructive possession.

D. A Defendant Who Is Unaware of the Cache Would Not Be Convicted of Possession of Child Pornography Under the Massachusetts Statute

1. Possession

If a defendant appeared before a Massachusetts court charged with possession of child pornography, the prosecution would have to prove both that he possessed it and that he knew that he possessed it. For a defendant who was unaware of the existence of the cache and merely viewed the images online, the court should find that ignorance of the cache precludes a finding of knowing possession. The mens rea of “knowing” requires that the defendant be “conscious and aware of [his act]” and “realize[ ] what [he is] doing.” He must be “aware that his conduct is of that nature or that such circumstances exist.” If the defendant is unaware that the images remained on his computer after he viewed them, the prosecution cannot prove that he intended to save and consequently possess them there. The court should find that he does not possess them.

A prosecutor could attempt to prove that the defendant knew of the cache under the doctrine of willful blindness. Although

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280. Id.
281. The court distinguished its holding in *Lotten Books, Inc.* from the Supreme Court’s holding in 1914 that “possession of a locked trunk does not give rise to possession of its contents.” *Id.* at 149 n.9 (claiming that in *National Safe Deposit Co. v. Stead*, the Supreme Court overstated the proposition that the possession of a locked trunk does not automatically infer possession of what is inside the trunk (citing *National Safe Deposit Co. v. Stead*, 232 U.S. 58, 68 (1914), which construed Bottom v. Clarke, 61 Mass. (7 Cush.) 487 (1851))). It claimed that the Supreme Court’s holding was only relevant for a situation in which the alleged possessor could not “lawfully” open a locked compartment holding the illegal matter. *Id.* (emphasis added). Here, because Pulli as the bookstore manager could lawfully open the cabinets with a key, the Massachusetts court found that the Supreme Court’s holding did not apply. See *id.*
282. See, e.g., United States v. Stulock, 308 F.3d 922, 925 (8th Cir. 2002).
283. 2 MASS. JURY INSTRUCTIONS, supra note 91, § 4.12.
284. MODEL PENAL CODE, supra note 88, § 2.02(b)(i); see also DRESSLER, supra note 8, at 126.
knowledge is a requirement both in section 29C and in the definition of constructive possession, Massachusetts includes the doctrine of "willful blindness" within its definition of "knowingly." Willful blindness "generally exists if the actor is aware of a high probability of the existence of the fact in question, and he deliberately fails to investigate in order to avoid confirmation of the fact."285 In Massachusetts, a fact finder may determine that a defendant who claims that he had no knowledge did in fact have knowledge if "the facts suggest a conscious course of deliberate ignorance."286 Thus, the prosecution would have to prove that the defendant suspected that his computer was saving the images and purposely did not attempt to learn how his computer works. Complete ignorance, however, is not willful blindness.

2. Constructive Possession

The prosecution would then turn to constructive possession, which requires proof that, although the defendant did not actually possess the images, he had the ability and intent to control them. Regarding the ability to control, the court would likely find that the defendant was unaware of the cache, and thus had no ability to access it. This would distinguish him from Pulli, who was aware of the obscene movies in the cabinet and knew how to access them.287 However, the court may consider the defendant’s ability to control the images while he was viewing them, notwithstanding his inability to control images saved in his cache. This interpretation would mirror that of the majority in Commonwealth v. Diodoro,288 which held that a defendant's unexercised ability to control the images

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286. Commonwealth v. Mimless, 760 N.E.2d 762, 772 (Mass. App. Ct. 2002) (quoting United States v. Hogan, 861 F.2d 312, 316 (1st Cir. 1988)). The Mimless court approved of a trial judge's instruction to the jury that it could find the defendant guilty if it found that he "deliberately closed his eyes as to what would have been obvious to him." Id. at 772 n.9 (internal quotation marks omitted). In Massachusetts's most notable willful blindness case, prison guards knew that a chemical used to clean the toilets inside the cells was poisonous. They also knew that prisoners, in emptying their own portable toilets into clogged sinks, were in daily contact with the chemical and the waste from their own and other inmates' toilets. Ahearn v. Vose, 833 N.E.2d 659, 662-63 (Mass. App. Ct. 2005). However, the guards were found not to have actual knowledge or willful blindness of inhumane prison conditions. Id. at 669. Despite the guards' knowledge of the danger of the chemical and the fact of its proximity to the prisoners, the court found that they were unaware, at least legally, that the prisoners were in harm's way. Id.
288. See supra notes 157-166 and accompanying text.
while he was viewing them was sufficient to find actual control of them.\textsuperscript{289} Of course, under the Massachusetts standard, the prosecution would additionally have to prove that he had \textit{intended} to control the images while he was viewing them.

Regarding the defendant’s intent\textsuperscript{290} to control the images, his decision \textit{not} to print, download, e-mail, or save them\textsuperscript{291} demonstrates a lack of intent to control.\textsuperscript{292} Again, this distinguishes the defendant from Pulli\textsuperscript{293} (and from Diodoro),\textsuperscript{294} where intent to control the contraband was demonstrated by the fact that the defendant worked in the store that had private booths for viewing pornographic movies.\textsuperscript{295} Accordingly, the court should determine that the defendant had no constructive possession of the images in the cache. Based on the plain meaning of the statute, the court

\textsuperscript{289} Although the Pennsylvania statute considered by the \textit{Diodoro} court prohibits control of child pornography, the dissenting judge accused the majority of convicting the defendant of viewing because he had never actually controlled the images. Commonwealth v. Diodoro, 932 A.2d 172, 176 (Pa. Super. Ct. 2007) (Klein, J., dissenting), appeal granted, 939 A.2d 290 (Pa. 2007).

\textsuperscript{290} In describing the inferences that a jury must draw to convict a defendant based on his intent, attorney and legal scholar James Marshall opined:

\textit{If we know what a person wishes to happen, to occur (his motive), and that he has the capacity (the skill, strength, means) to accomplish it, and if he has the opportunity, we infer that he will \textit{try}. Therefore we say he intends to act to bring about the happening, the occurrence, and therefore that he is responsible if it occurs.}\textsuperscript{\textit{James Marshall, Intention—In Law and Society} 137 (1968). This description of intent assumes within it motive and ability. The \textit{Diodoro} majority, on the other hand, seemed to define intent to control as solely a desire on the part of the defendant to see the photographs. The court stated parenthetically, \textquote{[a] showing that a defendant was aware of the presence of the article that constitutes contraband established an intent to exercise control over such contraband."} \textit{Diodoro}, 932 A.2d at 174 (citing Commonwealth v. Armstead, 305 A.2d 1, 2 (1973)).

\textsuperscript{291} \textit{See United States v. Bass,} 411 F.3d 1198, 1206-07 (10th Cir. 2005) (Kelly, J., dissenting) (describing the ways in which a defendant can indicate knowing possession).

\textsuperscript{292} Another factor, raised by the dissent in \textit{United States v. Gourde}, is the basic tenet that \textquote{[c]ommon sense suggests that everyone, pervert or not, has the desire to stay out of jail. . . . It would be irrational to assume that an individual is indifferent between subjecting himself to criminal sanctions and avoiding them, when he can attain his object while avoiding them."} \textit{United States v. Gourde,} 440 F.3d 1065, 1080 (9th Cir. 2006) (en banc) (Kleinfeld, J., dissenting). Applied here, the defendant specifically did not take affirmative action to place the images in his possession because he knew that, although viewing was legal, possession was not.

\textsuperscript{293} Commonwealth v. Lotten Books, Inc., 428 N.E.2d 145 (Mass. 1981); \textit{see supra} notes 269-278 and accompanying text.

\textsuperscript{294} \textit{Diodoro,} 932 A.2d 172; \textit{see supra} notes 157-166 and accompanying text.

\textsuperscript{295} \textit{Lotten Books, Inc.,} 428 N.E.2d at 147; \textit{see supra} notes 269-278 and accompanying text.
should end its deliberations at this point and find the defendant not guilty of knowing possession of child pornography.

E. If the Legislature Intended It, Can't the Court Just Do It?

On its face, section 29C does not punish viewing. In Commonwealth v. Kenney, the Massachusetts Supreme Judicial Court stated of section 29C, "[w]e presume that the Legislature, at the time of the statute's enactment in 1997, knew of preexisting law and of the decisions of our court and the United States Supreme Court, and intended the statutory language to be interpreted consistent with those statutes and decisions." This presumption, as well as the plain-meaning rule of statutory interpretation, forbids a court from inferring meaning into the unambiguous words of a statute. Although viewing child pornography is undoubtedly within the findings as a harmful act, the only expressly prohibited act is possession.

Accordingly, in situations where a defendant has only viewed the material, courts will be forced either to follow the plain language of the statute and acquit or to stretch the definition of possession to encompass an act that the statute clearly does not reach. Although some courts have manipulated possession statutes "beyond their reasonable import to accomplish a result not ex-

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296. The Due Process Clause of the Fourteenth Amendment of the Constitution states that no state shall "deprive any person of life, liberty, or property, without due process of the law." U.S. Const. amend. XIV, § 1. Due process includes the right of every defendant to have each element of a crime proved beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970). Accordingly, for a court to convict a defendant under a statute that requires knowing possession, it must find beyond a reasonable doubt that the defendant possessed the contraband and knew that he possessed it. To convict a defendant of possessing child pornography that he was looking at online, the court must "conclude beyond a reasonable doubt that [the defendant] knowingly possessed the pornographic images which were found on the computer hard drive." Bass, 411 F.3d at 1201. Given that the defendants in these cases were unaware of the cache and how to access it, the court cannot find the element of knowing possession beyond a reasonable doubt.


298. For a discussion of the plain-meaning rule, see supra notes 199-202 and accompanying text.

299. Some scholars argue that by literally interpreting a statute, notwithstanding an absurd or clearly wrongful result, a court "force[s] the legislative hand." Calabresi, supra note 203, at 34; see also Price, supra note 208, at 931 ("Ruling the other way in [the] case . . . might have served to discipline legislators for failure to anticipate new criminal developments.").
pressed,” Massachusetts courts should heed the words of Judge Kleinfeld in United States v. Gourde, who wrote in his dissent:

Though the spirit and purpose of the law is doubtless to stamp out the child pornography industry, criminal laws have no penumbras or emanations. There is no principle more essential to liberty, or more deeply imbued in our law, than that what is not prohibited, is permitted. That principle, and due process concerns, are why criminal statutes are strictly construed; that is, ‘[a] criminal law is not to be read expansively to include what is not plainly embraced within the language of the statute.’

The conduct of defendants who view child pornography online may be reprehensible, immoral, and repulsive, but in Massachusetts, it is currently not illegal.

**Conclusion**

The Massachusetts legislature passed section 29C of chapter 272 of the Massachusetts General Laws, claiming “that laws banning the production and distribution of [sexually exploitative] material are insufficient to halt this abuse and exploitation” and that banning possession was necessary “to stop the sexual abuse and exploitation of children.” Banning possession, however, is only sufficient when the defendant clearly possesses the images.

In cases where possession is unclear, only an explicit prohibition against viewing will allow for a conviction. Although an internet user looking at a web page may lack the requisite awareness

300. In re Bergeron, 107 N.E. 1007, 1008 (Mass. 1915); see, e.g., Bass, 411 F.3d 1198; Commonwealth v. Diodoro, 932 A.2d 172 (Pa. Super. Ct. 2007), appeal granted, 932 A.2d 172 (Pa. 2007). *But cf.* Moore v. State, 879 A.2d 1111 (Md. 2005). Moore held that “the plain language of the statutory terms 'to depict or describe' is unambiguous. The plain meaning of 'use a computer to depict or describe' is to use a computer to create, not to use a computer to download.” *Id.* at 1118. Under this holding, the defendant, whose child pornography included horrific images of preschool girls, was nonetheless correctly convicted of the misdemeanor of possession rather than the felony of production of child pornography. *Id.* at 1119.

301. United States v. Gourde, 440 F.3d 1065, 1081 (9th Cir. 2006) (en banc) (Kleinfeld, J., dissenting) (citations omitted); see also Commonwealth v. DeBella, 816 N.E.2d 102, 106 (Mass. 2004) (“Close adherence to the language of a statute and its express exclusions is even more important where a defendant's freedom is involved and there are due process considerations.”); Michael S. Moore, *Four Reflections on Law and Morality*, 48 WM. & MARY L. REV. 1523, 1532 (2006) (noting that judges sometimes make decisions based on morality when “the obvious application of the obvious law will be obviously wrong—unjust, otherwise immoral, contrary to what any law maker could have wanted, contrary to a rule's purpose, or just plain stupid or absurd”).

302. MASS. GEN. LAWS ANN. ch. 272, § 29C (West 2000).
that the page is saving to the computer’s cache;\(^{303}\) there is no doubt that he is viewing that page. For viewing to occur, an image must exist. For an image to exist, a photograph must be taken of a child who is being sexually exploited. If a child is being sexually exploited in order for an image to exist for a person to view online, it is clear that the law banning only possession is insufficient to halt abuse and exploitation. If, as the Massachusetts legislature states, the act of viewing the image of a child in the moment of exploitation harms that child, the legislature must expressly prohibit such viewing. It is the legislature’s responsibility to amend section 29C to include viewing child pornography as a criminal act.\(^{304}\)

As possession statutes are currently interpreted, the conviction of the defendant rests on his technological savvy. The defendant’s actions are the same in all of the cases—he has viewed child pornography online that has saved to his computer cache. In none of the cases has the defendant accessed the images on his cache. The defendants who are aware that these images are automatically saved are convicted. The defendants who are not aware are not. However, the defendant’s knowledge of his cache is irrelevant to the child who is harmed by the viewing. Such harm includes not only a victim’s knowledge of the photograph’s existence and the crime that led to its creation, but also the fact that the image has become a cog in the child pornography machine that results in further victimization of other children.\(^{305}\) Given the legislature’s findings, which include strong statements about the Commonwealth’s compelling interest in ending the exploitation of children,\(^{306}\) it seems unlikely that the Massachusetts legislature truly intended that a child pornographer’s conviction or acquittal should rest on his familiarity with how his computer works.


\(^{304}\) See Ted Sampsell-Jones, Reviving Saucier: Prospective Interpretations of Criminal Laws, 14 GEO. MASON L. REV. 725, 725 (2007) (“The ideal of fair warning demands that the line between criminal and non-criminal conduct be clearly defined in advance. When legislatures fail to speak clearly, courts are left to clean up the mess.”); see also Kreston, supra note 30, at 27 (suggesting that the federal statute either should be amended to prohibit viewing or that viewing “should be recognized as a necessary and sufficient condition of possession”).

\(^{305}\) See supra notes 56-67 and accompanying text.

\(^{306}\) MASS. GEN. LAWS ANN. ch. 272, § 29C (West 2000).
The U.S. Supreme Court has already upheld the constitutionality of the prohibition against viewing child pornography. The Massachusetts legislature now has an obligation to the children who are harmed each time their images are viewed to amend section 29C to expressly prohibit the viewing of child pornography.

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