

Florida Coastal School of Law

From the Selected Works of Julia Halloran McLaughlin

April 15, 2011

Exploring the First Amendment Rights of Teens in Relationship to Sexting and Censorship

Julia Halloran McLaughlin, *Florida Coastal School of Law*



Available at: https://works.bepress.com/julia_mclaughlin/2/

EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN
RELATIONSHIP TO SEXTING AND CENSORSHIP
[DRAFT]

Julia Halloran McLaughlin*

Table of Contents

INTRODUCTION

I. CHILD PORNOGRAPHY LAW AND TEEN SEXTING

- A. Summary of Federal Case Law and Federal and State Statutory Law
- B. Examples of State Criminal Prosecution of Teen Sexting

II. TEEN SEXTING IMAGES DO NOT CONSTITUTE CHILD PORNOGRAPHY

III. THE CONSTITUTION GUARANTEES TO TEENS A ZONE OF PROTECTED SEXUAL SPEECH

- A. Some Teen Sexting Constitutes Protected Speech
- B. Defining a Zone of Protected Teen Sexual Speech

IV. TEEN SEXTING IMAGES TRIGGER A VARIABLE STRICT SCRUTINY STANDARD.

V. TEEN SEXTING LEGISLATION MUST SATISFY A VARIABLE STRICT SCRUTINY STANDARD.

- A. Teen Sexting Model Statute
- B. Variable Strict Scrutiny Standard Applied to Teen Sexting Model Statute

CONCLUSION

2 EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN RELATIONSHIP TO SEXTING AND CENSORSHIP

INTRODUCTION

As teens mature sexually, emotionally and cognitively, they should enjoy expanded First Amendment rights and responsibilities commensurate with their age and experience. The prevalence of teen sexting¹ evidences the budding sexuality of teens as they explore ways to communicate and express their sexuality. In exploring the thorny issues raised by Teen Sexting Images (“TSIs”)², the First Amendment defines the zone of free speech. For the reasons explored in this article, it is arguable that pornography law, as applied to TSIs, must comply, at a minimum, with modified First Amendment freedom of speech protections. Under current law, the Supreme Court’s decision to afford First Amendment protection to pornography,³ but not to obscenity or to child pornography, creates the initial controlling legal framework within which to analyze TSIs. Additionally, the Supreme Court has recognized legislative authority to further restrict a minor’s access to pornography,⁴ further complicating the constitutional status of TSIs. Assuming that TSIs fall outside the definition of child pornography and obscenity, tension arises between the legislative authority to regulate access to indecent material and a minor’s constitutional right to create, possess and distribute TSIs.⁵

*I would like to thank Rebekah Gleason and Brian Foley for their thoughtful comments and excellent revision suggestions.

1. For the purposes of this paper, teen sexting is defined as the practice among teens of taking nude or partially nude digital images of themselves or others and texting them to other teens, emailing them to other teens or posting them on web sites such as Myspace.com or Facebook.com.

2. In this article a teen sexting images or “TSI” is defined as an image that is of one or more individuals between the ages of 13 and 18, including self-images (depicted person or persons); that is captured in a traditional or digital photographic or video format; that, if shared, is shared among teens between the ages of 13 and 18; and that is not obscene as defined under applicable state and federal law.

3. *See infra* notes xx to xx and accompanying text.

4. *Ginsberg v New York*, 390 U.S. 629, 636-37, 643 (1968).

5. In an earlier article entitled, *Crime and Punishment: Teen Sexting in Context*, 115 PENN ST. L. REV. 135 (2010), I reviewed state and federal law on the issue of teen sexting and proposed a model statute that recognized the right of minors to create and possess self-created TSIs and defined as delinquent conduct the distribution of TSIs with the intent to harm or embarrass those depicted in the images. This earlier article identified a

EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN RELATIONSHIP TO SEXTING AND CENSORSHIP

The first section of this article is divided into two parts. The first part frames the issues by first examining existing federal and state child pornography statutes and federal case law.⁶ The second part provides a brief summary of the state court precedent in which teens have been prosecuted as child pornographers as a result of creating, possessing or distributing TSIs. After providing this context, the second section demonstrates that TSIs do not constitute child pornography. The third section is subdivided into two parts. The first section argues that teens enjoy a constitutionally protected zone of sexual speech. This section is further subdivided. The second section of this paper focuses on defining this zone of First Amendment teen sexual speech. The third section identifies the appropriate constitutional standard of review to protect it. The fourth section applies the modified strict scrutiny standard to TSIs.

I. CHILD PORNOGRAPHY LAW AND TEEN SEXTING

A. Summary of Federal Law

While the First Amendment guarantees freedom of speech, not all

zone of teen privacy, but did not fully develop the First Amendment justifications for the creation, possession and limited distribution of TSIs. In my first article, I examined the current case law, legislation and pending legislation dealing with TSIs and proposed model legislation based upon my research. In this article I delve into the First Amendment constitutional justifications for the private creation, possession and limited distribution of TSIs. This paper explores the First Amendment free speech justifications for the creation, possession and limited distribution of TSIs. This article furthers teen sexting scholarship by reasoning that TSI should typically be deemed a status offense, handled through juvenile justice diversion programs, without detention or sex offender registration requirements. This is in stark contrast to the application of mandatory minimum terms of incarceration and sexual predator registration requirements applicable to minor teens charged with child pornography crimes when they are tried as adults under applicable waiver rules.

7. Those familiar with the federal law relating to child pornography and the state precedent prosecuting teens who engaged in teen sexting conduct as child pornographers may wish to proceed directly to Section II of this paper.

4 EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN RELATIONSHIP TO SEXTING AND CENSORSHIP

speech is of equal societal value. In *Roth v. United States*,⁷ the Court recognized the adult's right to possess pornography so long as it was not obscene. In *Miller v. California*,⁸ the Supreme Court identified the controlling definition of obscenity, recognizing that not all pornography constitutes obscenity.⁹ Nine years later, the Court recognized in *New York v. Ferber*,¹⁰ the ability of the states to enact legislation to protect the welfare of minors and, in furtherance of this interest, to outlaw depictions of minors which portray sexual acts, even if the images did not satisfy the definition of obscenity.¹¹ In reaching its decision, the *Ferber* Court relied heavily upon the legislative judgment that using children in pornography harms them in a number of ways: it interferes with a child's ability to form healthy attachments later in life;¹² it is an intrinsic form of child abuse;¹³ it is a permanent record of the abuse and continues the harm to the child through distribution.¹⁴ Given this evidence of immediate and ongoing harm to children used in the production of child pornography, the *Ferber* Court recognized a state's right to reject the *Miller* obscenity test as too narrow¹⁵

7. *Roth v. United States*, 354 U.S. 476, 484-85 (1957).

8. *Miller v. California (Miller)*, 413 U.S. 15, 24 (1973). In *Miller*, the Supreme Court introduced the following definition of obscenity:

- (a) The average person, applying contemporary community standards, finds that the work, taken as a whole, appeals to 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.

9. *Id.* at 26.

10. *New York v. Ferber*, 458 U.S. 747, 764-65 (1982).

11. *Id.* The court adjusted the *Miller* formulation in the following manner, "[a] trier of fact need not find that the material appeals to the prurient interest of the average person, it is not required that sexual conduct portrayed be done so in a patently offensive manner and the material at issue need not be considered as a whole." *Id.* at 764.

12. *Id.* at 758.

13. *Id.* at 759.

14. *Id.*

15. *Id.*

EXPLORING THE FIRST AMENDMENT RIGHTS OF
TEENS IN RELATIONSHIP TO SEXTING AND
CENSORSHIP

and set out to craft a specific standard under which to analyze the constitutionality of state child pornography laws. The *Ferber* court noted, “[a]s with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or as authoritatively construed.”¹⁶

Thus, the *Ferber* Court created, in addition to the *Miller* obscenity exception, the child pornography exception, another category of speech falling outside of the protections afforded by the First Amendment.¹⁷ Nevertheless, legislation prohibiting child pornography must satisfy some constitutional standards. “Here the nature of the harm to be redressed requires that the state offense be limited to works that visually depict sexual conduct by children below a specified age. The category of ‘sexual conduct’ proscribed must also be suitably limited and described.”¹⁸

The court continued to clarify its holding in relationship to the *Miller* obscenity standard,

The *Miller* formula is adjusted in the following respects: [a] trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that the sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole. . . . As with obscenity laws, criminal responsibility may not be imposed without the element of scienter¹⁹ on the part of the defendant.²⁰

The court noted that “the distribution of descriptions or other depictions of

16. *Id.* at 764.

17. *Id.*

18. *Id.*

19. The element of mens rea in child pornography cases requires intentional conduct with respect to each element of the crime. *See Note, Child Pornography, the Internet and the Challenge of Updating Statutory Terms*, 122 HARV. L. REV. 2206, 2209-10 (2009). It seems far from clear that teens engaging in sexting satisfy the requisite mens rea element to qualify as child pornographers.

20. *Ferber*, 458 U.S. at 764-65.

6 EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN RELATIONSHIP TO SEXTING AND CENSORSHIP

sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retain First Amendment protection.”²¹ This exception seems to accord First Amendment protection to written works. Additionally, the Supreme Court has noted that obscenity must do more than inspire mere lust defined as a “healthy, wholesome, human reaction common to millions of well-adjusted persons in our society,” rather than to any shameful or morbid desire.”²²

Thus, following *Ferber*, state and federal lawmakers passed legislation prohibiting the creation, possession and distribution of child pornography. In 1996, Congress passed The Child Pornography Protection Act.²³ This statute banned not only the use of live children in pornography, but also computer generated images.²⁴ This portion of the law was struck down by the US Supreme Court in 2002 in the case of *Ashcroft v. Free Speech Coalition*.²⁵ The reasoning in this case links child pornography convictions to harm to the child or children used to create the images. Absent the use of and harm to a real child or children, virtual child pornography with digitized pixel images does not fall within the definition

21. *Id.*

22. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498 (1985).

23. The Child Pornography Protection Act, Pub. L. 104-208, *partially invalidated* by *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

24. 18 U.S.C. § 2256 (1978) prohibited “any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture,” that “is, or appears to be, of a minor engaging in sexually explicit conduct,” and any sexually explicit image that is “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression” it depicts “a minor engaging in sexually explicit conduct” *Id.*

25. *Free Speech Coalition*, 535 U.S. 234. The *Free Speech Coalition* court held:

Thus, the CPPA does more than prohibit pandering. It bans possession of material pandered as child pornography by someone earlier in the distribution chain, as well as a sexually explicit film that contains no youthful actors but has been packaged to suggest a prohibited movie. Possession is a crime even when the possessor knows the movie was mislabeled. The First Amendment requires a more precise restriction. *Id.* at 234.

EXPLORING THE FIRST AMENDMENT RIGHTS OF
TEENS IN RELATIONSHIP TO SEXTING AND
CENSORSHIP

of child pornography. Thus, the Court ruled unconstitutional the portion of the statute encompassing virtual, digitized child pornography. In support of its decision, the court reasoned:

The argument that virtual child pornography whets pedophiles' appetites and encourages them to engage in illegal conduct is unavailing because the mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it, absent some showing of a direct connection between the speech and imminent illegal conduct. The argument that eliminating the market for pornography produced using real children necessitates a prohibition on virtual images as well is somewhat implausible because few pornographers would risk prosecution for abusing real children if fictional, computerized images would suffice. **Moreover, even if the market deterrence theory were persuasive, the argument cannot justify the CPPA because, here, there is no underlying crime at all.** (Emphasis added).²⁶

Thus, the absence of harm to a child involved in the production of the virtual image rendered the criminal prohibition unconstitutional.

In addition to the federal statutes described above, Congress also passed the Adam Walsh Act (AWA).²⁷ The first title of this act is referred to as SORNA.²⁸ It creates a national sex offender registry and seeks to eliminate differences in state sexual offender registration laws, in order to implement a uniform national standard.²⁹ The statute requires mandatory

26. Id. at 237.

27. 42 U.S.C. § 16911 (2009) (“Adam Walsh Act”).

28. The first subchapter of the AWA is entitled the Sex Offender Registration and Notification Act (“SORNA”). 42 U.S.C. § 16913 (2009). Some commentators have questioned the constitutionality and wisdom of AWA. See, e.g., Anne Marie Atkinson, *The Sex Offender Registration Act (SORNA): An Unconstitutional Infringement of States’ Rights Under the Commerce Clause*, 3 CHARLESTON L. REV. 573 (2009); Steven J. Costigliacci, *Protecting our Children From Sex Offenders: Have We Gone Too Far?*, 46 FAM. CT. REV. 180 (2008).

29. See, e.g., Jacob Frumkin, *Perennial Punishment? Why the Sex Offender Registration and Notification Act Needs Reconsideration*, 17 J. L. & POL’Y 313 (2008). Frumkin states:

8 EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN RELATIONSHIP TO SEXTING AND CENSORSHIP

sex offender registration if the convicted defendant is over the age of 14.³⁰ Today, every state has a statute criminalizing the creation, possession and distribution of child pornography³¹ and federal law mandates state enforced sexual offender registration.³² Thus, teens engaged in sexting may be charged under child pornography laws and become subject to federally mandated sex offender registration rules.

Given the broad directive of *Ferber*, requiring that the prohibited conduct be adequately defined, the specific definition of child pornography

AWA sets forth harsh penalties for a sex offender who simply fails to register as required by SORNA. First, a conviction for failing to register can result in a statutory maximum of ten years in prison. Theoretically, a judge can now sentence an offender to a longer term for failure to register than the term a sex offender served for the sex crime itself. Second, for every "change of name, residence, employment, or student status," a sex offender has only three business days to update his or her registration. The pre-existing federal misdemeanor penalty for failure to register as a sex offender allowed for a markedly longer duration: ten business days. Third, a sex offender must continue to register for at least fifteen years, even for low-level (Tier I) sex offenses requiring less than a year in jail. Depending on a sex offender's classification as set forth in SORNA, he or she must verify the registration and provide, among other things, a current photograph, DNA sample, and fingerprints at least once a year (and as much as three times a year for Tier III offenders). Fourth, AWA significantly broadens the quantity of required registration information beyond preexisting statutes. Finally, the scheme allows for optional exemptions that each state may choose to adopt. The difficulty of knowing how to address these additional requirements all but ensures registration violations for offenders unfamiliar with the framework of a state where he or she moves, works, or attends school. *Id.* at 318-20.

30. *Id.* at 345.

31. *See 50 State Statutory Surveys, supra* note 13.

32. *See 42 U.S.C. §§ 14071-14072 (2009)*. States are required to adopt minimum sex offender registry standards in order to receive federal law enforcement funding. *Id.*

EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN RELATIONSHIP TO SEXTING AND CENSORSHIP

differs from state to state. Many states include in the definition of child pornography “the exhibition of breasts, as well as genitals.”³³ Some states prohibit the creation, possession and distribution of “sexually suggestive images of minors,” thus eliminating the nude or partially nude requirement.³⁴ Clearly, images depicting sexual conduct by a child may fall far short of the local definition of obscenity.

State courts across the country have faced the dilemma of whether the broad language of child pornography laws encompasses teen sexting conduct. Teens and their parents have been shocked to discover that the child pornography laws are broad enough to encompass this conduct.³⁵ For example, In 2006, an Iowa jury convicted an eighteen-year-old high school senior under the state child pornography statute prohibiting “knowingly disseminating obscene material to a minor,”³⁶ sentenced the teen to one-year

33. For example many states have adopted a legal standard which affords to courts and prosecutors broad discretion in categorizing an image of a minor as pornographic. *See, e.g.*, 720 ILL. COMP. STAT. 5/11-20.1(a)(1)(vii) (Supp. 2009) (“depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed or transparently clothed genitals, pubic area, buttocks, or, if such person is female, a fully or partially developed breast of the child or other person”); OKLA. ST. ANN. TIT. 21, § 1024.1 (West 2002) (visual depictions “where the lewd exhibition of the uncovered genitals has the purpose of sexual stimulation of the viewer, and defining forbidden sexual conduct to include acts of exhibiting human genitals or pubic areas”).

34. WIS. STAT. ANN. § 948.01(7)(e) (West 2008) (“visual depictions of sexually explicit conduct including the lewd exhibition of intimate parts”).

35. *Canal*, 773 N.W.2d at 529-30 (2009 Iowa) ; *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010) (Even assuming the photo constituted a ‘prohibited sexual act,’ there was no evidence that Nancy Doe possessed or distributed the photo.); *A.H. v. State*, 949 So.2d 234 (Fl. Dist. Ct. App. 2007) (upholding the adjudication of a teen-age woman as delinquent for “producing, directing or promoting a photograph or representation of sexual conduct of a child.”); *State v. Vezzoni*, No. 22361-2-III, 2005 WL 980588 (Wash. App. Div. Apr. 28, 2005).

36. Under Iowa law:

[a]ny person, other than the parent or guardian of the minor, who knowingly disseminates or exhibits obscene material to a minor, including the exhibition of obscene

10 EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN RELATIONSHIP TO SEXTING AND CENSORSHIP

probation, a \$250 fine and required him to register as a sex offender.³⁷

In *Canal*, upon the request of his 14-year-old high school friend, the senior sent an electronic photo of his nude erect penis to her, along with a picture of his face and the words, “I love you.”³⁸ The jury conviction was recently affirmed on appeal.³⁹ The Iowa Supreme Court upheld the jury determination that the photo of defendant’s nude penis was obscene.⁴⁰ The jury instructions adopted the *Miller* contemporary community standard language modified to reflect the community’s view as to “what is suitable to minors.”⁴¹ The jury instructions defined obscene material as:

any material depicting or describing the genitals, sex acts, masturbation, excretory functions or sadomasochistic abuse which the average person, taking the material as a whole *and applying contemporary community standards with respect to what is suitable material for minors*,⁴² would find appeals to the prurient interest and is patently offensive; and the material, taken as a whole, lacks serious literary, scientific,

material so that it can be observed by a minor on or off the premises where it is displayed, is guilty of a public offense and shall upon conviction be guilty of a serious misdemeanor.

IOWA CODE ANN. § 728.2 (West 2006).

Obscene material in relationship to the dissemination to minors law is defined as: “Obscene material” is any material depicting or describing the genitals, sex acts, masturbation, excretory functions or sadomasochistic abuse which the average person, taking the material as a whole and applying contemporary community standards with respect to what is suitable material for minors, would find appeals to the prurient interest and is patently offensive; and the material, taken as a whole, lacks serious literary, scientific, political or artistic value. IOWA CODE ANN. § 728.1 (West 2006).

37. *Canal*, 773 N.W.2d at 529-30.

38. *Id.*

39. *Id.* at 532.

40. *Id.*

41. *Id.* at 530-31.

42. *See infra* notes xx-xx and accompanying text. The use of an obscenity standard geared for minors in accordance with the *Ginsberg* standard further complicates the constitutional questions associated with teen sexting laws.

EXPLORING THE FIRST AMENDMENT RIGHTS OF
TEENS IN RELATIONSHIP TO SEXTING AND
CENSORSHIP

political, or artistic value.⁴³

Thus, while perhaps constituting “mere nudity”⁴⁴ under the adult standard, given the “suitable material for minors”⁴⁵ standard, the e-mailed photo was deemed obscene. By adhering to the statute designed to encompass and punish adult pedophilia, the court ignored many important facts. The image was self-created by a male minor, at the request of a female minor, three years his junior, was not further published, and was not sent with any desire to harm or embarrass the recipient. Thus, tried as an adult, Jorge Canal, a high school senior, paid a heavy price for what some might describe as a youthful indiscretion.⁴⁶ The Iowa court failed to apply the *Bellotti II* factors to the variable obscenity standard.⁴⁷

Washington courts also faced the issue of teen sexting. In 2005, the Washington court of appeals upheld the trial court’s conviction of Anthony Vezzoni.⁴⁸ Following a bench trial, Anthony was convicted of possession of and dealing in the depictions of a minor engaged in sexually explicit conduct under RCW9.68A.070.⁴⁹ He appealed his conviction, arguing that the statute was unconstitutional because the category of banned speech in the statute was not sufficiently narrow because it lacked the word lewd and, further, it lacked a scienter element.⁵⁰ The court ruled that the pictures of minors need not be lewd, but merely sexually stimulating, a fair inference from the photos in question.⁵¹ The court summarily rejected the defendant’s

43. *Id.*

44. *Id.* at 533.

45.

Id. at xx. See *infra* xx-xx discussing the creation and implementation of the variable obscenity standard under Ginsberg.

46. A similar price was paid by Phillip Alpert, *see infra*, notes 234-235 and accompanying text.

47. See *infra* notes x-x and accompanying text.

48. *State v. Vezzoni*, No. 22361-2-III, 2005 WL 980588 (Wash. App. Div. Apr. 28, 2005).

49. Prior to amendment, the Washington statute provided: “A person who knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct is guilty of a class B felony.” WASH. REV. CODE. § 9.68A.070 (2010).

50. *Id.* at *3.

51. *Id.*

12 EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN RELATIONSHIP TO SEXTING AND CENSORSHIP

scienter arguments.⁵² Likewise, in finding the images merely sexually stimulating, rather than obscene, the court raises but does not address the question of whether teens have a First Amendment right to create and possess indecent images.

II. TEEN SEXTING DOES NOT CONSTITUTE CHILD PORNOGRAPHY.

A. *No Harm*

In each of the forgoing cases discussed above,⁵³ the prosecutors and the courts failed to consider whether the policy underlying the child pornography law would be furthered by prosecuting the teens. The *Ferber* court, as previously noted, identified the following three public policy interests in support of modifying the *Miller* formula to include child pornography: 1) It interferes with a child's ability to form healthy attachments later in life;⁵⁴ 2) It is an intrinsic form of child abuse;⁵⁵ and 3) It is a permanent record of the abuse and continues the harm to the child through distribution.⁵⁶

A review of the foregoing cases tried in Iowa and Washington demonstrates that the policy goals underlying the child pornography laws are not even implicated, much less advanced, by charging teens as child pornographers in these cases. With respect to the first element, absent evidence of psychological trauma associated with the depictions or publications at issue, there is no reason to conclude that sexting interferes with a teen's ability to form healthy attachments later in life.⁵⁷

Similarly, absent evidence of fraud, misrepresentation or duress, in matters where the image was self-taken or voluntarily and consensually created, there is no evidence that creating the image is an intrinsic form of child abuse.⁵⁸ Additionally, absent nonconsensual impermissible publication, there is no evidence that the permanent record continues the harm to the child through distribution.⁵⁹ Finally, the age differential

52. *Id.* at *4.

53. *Infra* n. xx-xx and accompanying text.

54. *New York v. Ferber*, 458 U.S. 747, 758 (1982).

55. *Id.* at 759.

56. *Id.*

57. *Id.* at 758.

58. *Id.* at 759.

59. *Id.* There is always the concern that the future self may regret the

EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN RELATIONSHIP TO SEXTING AND CENSORSHIP

between the individual capturing the image and the minor pictured in most child pornography cases is absent in teen sexting cases, thus the element of sexual predation is also missing. Given these distinctions, it seems highly unlikely that legislators intended to capture TSIs within the class of child pornographers.

The poor fit between the legislative intent underlying child pornography law and teen sexting conduct is starkly illustrated by the recent Iowa Supreme Court decision in *State v. Canal*.⁶⁰ As demonstrated by the decision to prosecute for sexting conduct,⁶¹ the sentence imposed included imprisonment, fines and mandatory sexual offender registration.⁶² The harsh and unanticipated results of prosecuting teens for sexting conduct under child pornography laws is currently prompting legislatures to enact teen sexting legislation that embodies an appropriate and measured legal response.⁶³ Any such response should recognize a zone of First Amendment protection for teen sexual speech, including TSIs.

Construing TSIs as child pornography does not achieve the statutory intent of the laws designed to protect minors from adult sexual predation. While the United States Supreme Court has yet to address the issue, as previously noted, several state courts have interpreted the definition of child pornography to include TSIs.⁶⁴ As we await guidance from the Supreme Court, a number of scholars have directly and indirectly addressed the issue of whether TSIs constitute child pornography or whether TSIs fall within a zone of protected teen speech.

B. Scholars Agree

decision of the present self. This concern is arguably more pressing when the decision is made by a minor. However, the situation remains factually distinct from that in which adults photograph children to make a profit from the sale of child pornography.

60. *State v. Canal*, 773 N.W.2d 528, 528 (2009).

61. *See supra* note xx-xx and accompanying text.

62. *Canal*, 773 N.W.2d at 530. (“The jury found Canal guilty of knowingly disseminating obscene material to a minor. The court imposed a deferred judgment, a civil penalty of \$250, and probation with the department of corrections for one year. The court also instructed Canal that he must register as a sex offender and ordered that an evaluation take place to determine if treatment was necessary as a condition of his probation.”). *Id.*

63. McLaughlin, *supra*, note xx at xx.

64. *See supra* notes xx-xx and accompanying texts.

14 EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN RELATIONSHIP TO SEXTING AND CENSORSHIP

John A. Humbach suggested four possible outcomes to the question of whether teens have a “constitutional right to record and document their own legal activities, in particular, sexual conduct and nudity... But even pictures and videos that are not obscene may still be illegal if they fall into the broad constitutional category of child pornography.”⁶⁵ Humbach suggests that a fair reading of *Ashcroft*⁶⁶ results in a more limited and cabined definition of child pornography which requires exploitation⁶⁷ of a child made to engage in sexual conduct,⁶⁸ by an adult,⁶⁹ who profits commercially⁷⁰ from the images captured in photos or videos. The resulting harm is both immediate, as a result of the assault to the child’s dignity, autonomy and body,⁷¹ but also encompasses a continuing harm as recognized by the Supreme Court in *Osborne*.⁷² Thus, absent evidence of

65. John A. Humbach, *Sexting and the First Amendment*, 37 HASTINGS CONSTITUTIONAL LAW QUARTERLY 433, 438 (2010). See also Sarah Wastler, *The Harm in Sexting?: Analyzing the Constitutionality of Child Pornography Statutes that Prohibit the Voluntary Production, Possession and Dissemination of Sexually Explicit Images by Teenagers*, 33 HARV. J.L. & GEN. 687, 701 (2010) (“Any attempt to restrict the rights of minors to produce and distribute sexually explicit photographs of themselves must be weighted against the constitutional rights of minors to engage in such sexually expressive speech.”); Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPECTUS 1 (2009); John A. Humbach, *Sexting and the First Amendment*, 37 HASTINGS CONST. L.Q. 433 (2010); Lawrence G. Walters, *How to Fix the Sexting Problem: An Analysis of the Legal and Policy Considerations for Sexting Legislation*, FIRST AMEND. L. REV. 98 (2010).

66. *Ashcroft*, 535 U.S. 251-253.

67. Humbach, *supra* note xx at 464. See also Elizabeth C. Eraker, *Stemming Sexting: Sensible Legal Approaches to Teenager’s exchange of Self-produced Pornography*, 25 BERKLEY TECH. L. J. 555, 585 (2010) (“Meanwhile, it is important to note that the child protection objective underlying the criminalization of child pornography may not justify the regulation of sexting.”).

68. *Id.* at 465.

69. *Id.*

70. *Id.*

71. *Id.* at 466.

72. *Id.* (citing *Osborne*, 495 U.S. at 111).

EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN RELATIONSHIP TO SEXTING AND CENSORSHIP

exploitation, immediate harm, continuing future harm and commercial gain. Humbach posits, “Both *Ferber* and *Osborne* are distinguishable from cases of teen sexting and autopornography, and their reasons do not justify the suppression of material made by teens acting on their own.”⁷³

Humbach’s position that TSIs do not constitute child pornography is shared by the lawyers associated with the Juvenile Justice Center (“JJC”).⁷⁴ The JJC filed an amicus brief in the *Miller* case.⁷⁵ The JJC promoted two central arguments: 1) not all unwise juvenile behavior should be criminalized and 2) prosecuting sexting cases will needlessly involve juveniles in the criminal justice system.⁷⁶ First, the JJC argued that “Sexting represents the convergence of technology with adolescents’ developmental need to experiment with their sexual identity and explore their sexual relationships.”⁷⁷

Characterizing sexting as the most recent example of a teen trend reflecting “normal adolescent behavior, the prosecution of it is contrary to the purpose of the juvenile justice system.”⁷⁸ The JJC argued that the statute criminalizing child pornography, when applied to minors, should be construed to further the twin goals of the juvenile justice system: to shelter minors from the criminal justice system and to “intervene in the lives of juveniles” to “give them room to reform.”⁷⁹ Thus, by threatening to prosecute the teens under the applicable child pornography statutes unless the teens agreed to a specific diversion and adjustment plan, the state used the juvenile justice system as “a sword, rather than a shield”⁸⁰ as the specialized juvenile justice system is designed and intended to be used. The JJC next argued that sexting does not implicate the “compelling child

73. *Id.* at 467.

74. The JJC provides care, treatment and rehabilitation to juveniles involved in the juvenile justice system. Brief of the Juvenile Law Center As Amici Curiae in Support of Appellees, *Miller v. Skumanick*, 2009 WL 5538635 (3rd Cir. 2009) at p.6.

75. *Miller v. Skumanick*, 2009 WL 5538635 (3rd Cir. 2009).

76. Brief of the Juvenile Law Center as Amici Curiae in Support of Appellees, *Miller v. Skumanick*, 2009 WL 5538635 (3rd Cir. 2009) (*hereinafter* JJC Brief).

77. *Id.* at p.8.

78. *Id.* at p. 9.

79. *Id.*

80. *Id.* at 10.

16 EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS
IN RELATIONSHIP TO SEXTING AND CENSORSHIP

protection justification”⁸¹ undergirding child pornography law. The JJC cited *Ashcroft v. Free Speech Coalition*,⁸² for the proposition that the potential for future harm if the virtual images at issue images caused pedophiles to abuse children was an indirect consequence “that does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.”⁸³ Thus, absent evidence of the abuse and victimization of a child, the JJC argued that child pornography laws are inapplicable.

Amy Kimpel⁸⁴ argues that the potential of child pornography chills the teen’s right to sexual self-expression and application of child pornography law to TSI constitutes “content-based censorship.”⁸⁵ The threat of such prosecution chills the internet speech of teens on-line communities formed to explore sexual identity in the safety of cyber chat rooms.⁸⁶

Before the TSIs dominated the headlines, Professor Alan Garfield noted in 2005 that, “... the constitutionality of child protection censorship remains largely a muddle.”⁸⁷ In his article, Professor Garfield identifies a series of relevant considerations to guide policy makers in drafting and enacting constitutional rules, while providing guidance to the judiciary in navigating the extremes between affording great judicial deference to child censorship laws and invalidating such legislation as prohibited in all cases.⁸⁸ Garfield notes that while applying strict scrutiny to child censorship laws, the result is not always invalidity given the court’s recognition that the state has a compelling interest in protecting minors from “patently offensive sex-related material.”⁸⁹ Garfield notes the Court’s decision to forgo evidence that the material under scrutiny is, in fact, harmful to minors under a variable obscenity standard results in a deferential approach to such

81. *Id.* at 11.

82. 535 U.S. 234, 241-242 (2002).

83. JCC Brief at 12.

84. Amy F. Kimpel, *Using Laws Designed to Protect as a Weapon: Prosecuting Minors Under Child Pornography Laws*, 34 N.Y.U. REV. L. & SOC. CHANGE 299 (2010).

85. *Id.* at 327.

86. *Id.* at 330.

87. Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565 (2005).

88. *Id.* at 575-6.

89. *Id.* at 582 citing *Denver Area Educ. Telecomms. Consortium Inc. v. FCC.*, 518 U.S. 727, 743 (1996).

EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN RELATIONSHIP TO SEXTING AND CENSORSHIP

legislation that scholars have derided.⁹⁰

Just as the Court in *Roth* did not demand proof that obscene speech was harmful to adults, so the Court has not demanded evidence that this “variable” obscenity” is harmful to minors.

The Court's willingness to forgo any assessment of the impact of sexual speech is misplaced. While it may be true that the Court did not demand such evidence in its landmark obscenity case, it is also true that many scholars have been harshly critical of the Court's obscenity jurisprudence.

Thus, courts risk similar criticism by failing to require evidence of the harm that is the basis of the prohibition.

In contrast, Professor Garfield encourages the judiciary to demand “empirical evidence of harm from sexual speech”⁹¹ in the context of shielding minors from sexually explicit speech. The evidence of harm presents difficult questions in relationship to sexual speech that does not meet the definition of obscenity. Professor Garfield poses a series of questions: “Is it harmful if it leads minors to engage in protected sex? Is it harmful if children become aware of their sexuality at an earlier age? Is it harmful if children believe it appropriate to have multiple sex partners or for married individuals to have affairs?” In addition to evidence of harm, Professor Garfield suggests that there must also be evidence that most parents would support the suppressive legislation, presenting yet another hurdle given the absence of consensus regarding a minor's access to sexually explicit speech.⁹² Finally, the court must demand some evidence of the nexus between the suppressed speech and the resulting harm according to Professor Garfield.⁹³ Professor Garfield concludes that any such legislation must satisfy narrow tailoring requirements and vagueness and over breadth standards must also be satisfied.

90. *Id.* at 612.

91. *Id.* at 612-3. Garfield notes that the *Ginsberg* court did not demand empirical evidence of harm, rather deeming it a matter of common sense.” *Id.* at 613.

92. *Id.* at 622.

93. *Id.* at 627.

18 EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN RELATIONSHIP TO SEXTING AND CENSORSHIP

In contrast, some scholars continue to advance the state's *parens patriae* interest in protecting minors from the harm associated with child pornography to justify statutes that limit or prohibit a teen's right to create, possess and distribute with consent TSI.⁹⁴

III. THE CONSTITUTION GUARANTEES TO TEENS A MODIFIED ZONE OF PROTECTED INDECENT SPEECH , INCLUDING TEEN SEXTING IMAGES

Historically, children were considered chattel, the property of their father.⁹⁵ As the law evolved, so did its vision of the rights of children and the role of the state in securing these rights. As a natural outgrowth of the state's *parens patriae* role to protect the rights of those lacking power and wealth, the state began to recognize the rights of minors.⁹⁶ The Supreme Court has rejected the fiction that constitutional rights arise at the age of majority.⁹⁷ In fact, minors enjoy a wide variety of constitutional rights enjoyed by adults, including the right to equal protection from racial discrimination,⁹⁸ the right to due process, including most of the rights afforded to adults accused of a crime such as the right to counsel, notice, confrontation, cross-examination, and the privilege against self-

94. See e.g. Jordan J. Szymialis, *Sexting: A Response to Prosecuting Those Growing Up with a Growing Trend*, 44 IND. L. REV. 301, 331-32 (2010) ("located in a digital form, the [TSI] image has access to the Internet, which 'allows for unprecedented voyeurism, exhibitionism and inadvertent indiscretion.'" *Id.*

95. Julia McLaughlin, *The Fundamental Truth About Best Interests*, 54 ST. LOUIS U.L.J. 113, 121 (2009).

96. See Patricia M. Wald, *Making Sense Out Of The Rights Of Youth*, 4 *Human Rights* 13, 15 (1974) (The child's subjugated status was rooted in the same benevolent despotism that kings, husbands, and slave masters claimed as their moral right.) See also Robert M. Horowitz & Howard A. Davidson eds., *Legal Rights of Children* 116 (1984) (describing the state of childhood as "continuing from the age of birth to the age of majority, at which time the young person is presumed to be capable of responsible adult decision making.").

97. *Planned Parenthood v. Danforth*, 428 U.S. 52, 74, 96 S.Ct. 2831, 2843, 49 L.Ed.2d 788 (1976).

98. *Brown v. Board of Educ.*, 347 U.S. 483, 495, 74 S.Ct. 686, 692, 98 L. Ed. 873 (1954)

EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN RELATIONSHIP TO SEXTING AND CENSORSHIP

incrimination,⁹⁹ requiring proof beyond a reasonable doubt if accused of a serious crime¹⁰⁰ and requiring protection against double jeopardy.¹⁰¹ Specifically, with respect to First Amendment rights, the Supreme Court has recognized that minors enjoy access to non-obscene information and enjoy the freedoms of speech, expression and religion.¹⁰² Thus, the question arises whether TSIs fall within the definition of teen speech protected by the First Amendment.

A. TSIs as Speech

In *Miller* the Supreme Court has broadly defined speech to include “illustrations, drawings, paintings, photographs and motion pictures”¹⁰³ which convey messages, ideas, information, communication and expression.¹⁰⁴ However, some have criticized this broad definition of speech.¹⁰⁵ TSIs constitute pure speech. In her essay entitled *In Plato’s*

99. *In re Gault*, 387 U.S. at 30-57, 87 S.Ct. at 1445-59

100. *In re Winship*, 397 U.S. 358, 368, 90 S.Ct. 1068, 1075, 25 L.Ed.2d 368 (1970).

101. *Goss v. Lopez*, 419 U.S. 565, 579, 95 S.Ct. 729, 738, 42 L.Ed.2d 725 (1975)

102. *Matter of Appeal In Maricopa County, Juvenile Action*, 887 P.2d 599, 604-05 (Ariz. App. Div. 1994) (*citing* *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 514 (1969); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

103. *Id.* at 16.

104. *Id.* at 24.

105. *But see* Elizabeth Ryan, *Sexting: How the State can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults*, 96 IOWA L. REV. 357, 366 (2010) (“A sexting image is not speech per se. However a sexting image may qualify as protected expressive conduct.”); Daniel Mark Cohen, *Thirty Years Since Miller v. California, The Legacy of the Supreme Court’s Misjudgment on Obscenity*, 15 ST. THOMAS L. REV. 545, 632 (2003). For example, Daniel Mark Cohen criticizes the court’s definition of the scope of protected speech, “The Court’s erroneous and imprudent choice of the word superfluously broad term ‘works,’ requires the complex, qualifying predicate of the statement. Only one letter need be changed to render a more concise, accurate and meaningful statement of the fact: the First

20 EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS
IN RELATIONSHIP TO SEXTING AND CENSORSHIP

Cave, Susan Sontag explores the communicative power of photography.¹⁰⁶ She describes photographs as “miniatures of the world that anyone can make or acquire.”¹⁰⁷ Families use photography to “portrait chronicle” the connectedness of family.¹⁰⁸ Sontag observes that photos allow the individual to “take possession of the space in which they are insecure.”¹⁰⁹ Moreover, the picture will survive long after the even it records. Thus, the picture immortalizes the event¹¹⁰ and invites the viewer to reverie.¹¹¹

A photograph is both a pseudo presence and a token of absence. Like a wood fire in a room, especially those of people ... are incitements to reverie. The sense of the unattainable that can be evoked by photographs feeds directly into the erotic feelings of those for whom

Amendment protects, not works, but words.” *Id.*

106. Kimpel, *supra* note xx, at 328. It is through Kimpel’s article that I found and read Sontag’s engaging essays on photography.

107. Susan Sontag, ON PHOTOGRAPHY 5, 16, 24 (Picador 2001) (1977). See, e.g., CNN.com, Entertainment, Photographer Defends Miley Cyrus Photo (Apr. 28, 2008), <http://www.cnn.com/2008/SHOWBIZ/Music/04/28/cyrus.photos/index.html?ioref=nextin> (discussing fifteen-year-old star Miley Cyrus's photo shoot with Annie Liebovitz for Vanity Fair, where Cyrus was “topless ... clutching a blanket to her chest”). The photo was attacked by critics as commercially exploitative of Cyrus's sexuality. Acknowledging that the image will garner attention and profit indicates the complex and sometimes schizophrenic nature of some adults' relationship with teen sexuality. Adults are interested enough in teen sexuality that the photo will be profitable but troubled enough that the photo will be denounced as exploitative.

108. Sontag *supra* note xx at 8. See also Kimpel, *supra* note xx, at 328. Kimpel compares the American malaise with gay sexuality in the 1980’s to its current discomfort with teen sexuality, “The experience of a gay man during the AIDS epidemic and that of a child in the current era are markedly different, but they share the experience of having society try to eradicate any evidence of their demographic’s sexuality.” *Id.*

109. Sontag *supra* note xx at 9.

110. *Id.* at 11.

111. *Id.* at 16.

EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN RELATIONSHIP TO SEXTING AND CENSORSHIP

desirability is enhanced by distance.¹¹²

Photos communicate. Whether the photographer and the viewer receive the same message is not a required element to establish non-verbal speech¹¹³ because a dialogue is occurring and only by permitting and fostering the dialogue can communication and understanding arise.

The attraction of sexting to teens should come as no surprise given the communicative power of the photograph. Developmentally, teens are seeking to separate themselves from their parents and claim expanding autonomy, including sexual autonomy.¹¹⁴ The typical absence of dialogue between parents and their children regarding natural sexual maturation creates uncertainty and angst, a sexual space that is unfamiliar and threatening. Through self-created erotic images, teens as the photographers of themselves, take possession of their own bodies and sexuality, thus affording to the teen a sense of power and control.

Additionally, the photo captures “a neat slice of time,”¹¹⁵ immortalizing the teen’s body in its youth, providing a token reminder to the viewer of potential sexual pleasure. Arguably, sexting empowers the teen who creates the image, facilitates individuation and a healthy development of teen sexuality and gives to teens a sense of mastery over their own sexuality. It is difficult to envision a form of speech more elemental, even primordial, than the communication embodied in teen sexting images.

B. Zone of Protected Teen Sexual Speech

112. *Id.*

113. *See e.g.* *Burnham v. Ianni*, 119 F.3d 668 (8th Cir. 1997) (Nonverbal conduct constitutes speech if it is intended to convey a particularized message and the likelihood is great that the message will be understood by those who view it, regardless of whether it is actually understood in a particular instance in such a way. *Citing* *Spence v. State of Wash.*, 418 U.S. 405, 411 (1974).

114. James G. Dwyer, *THE RELATIONSHIP RIGHTS OF CHILDREN* 97-122 (2006) (adult constitutional rights based on two alternative and parallel theories of moral and political philosophy: welfare and autonomy theories).

115. *Id.* at 17.

22 EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN RELATIONSHIP TO SEXTING AND CENSORSHIP

James Dwyer suggests that the legal theoretical framework supporting adult constitutional rights,¹¹⁶ also provides a basis for extending similar, though not identical, rights to minors, increasing the degree of liberty and autonomy afforded to minors as they approach the age of majority.¹¹⁷ Dwyer writes about the legal difficulties created when the interests of the state, parents and the child diverge.¹¹⁸ He suggests that children appear to suffer because “the legal rules governing particular rights about their relational lives do not require state decision makers to act with a single-minded focus on the welfare of the affected children.”¹¹⁹ Although Dwyer focuses on the rights of children involved in custody, abuse and neglect proceedings, Dwyer’s theory of the relationship rights of children is applicable in developing a legal and societal response to teen sexting. Teens approaching the age of majority, are individuating from their parents, beginning to form emotional and intimate relationships with peers and are using technology as a form of flirting and assessing whether further amorous advances might be welcomed.¹²⁰ Thus, whether to engage in teen sexting and with whom is at its core a relationship right initiated by a minor and criminally punished by society without any consideration of the adolescent’s relationship rights.

Teen sexting is one way a minor begins to form an interpersonal relationship with an age appropriate partner. It takes on added developmental significance because “The sense of one’s individuality and importance that arises from positive interpersonal experiences gives rise to the . . . perception that it is worthwhile and morally requisite to engage in self-authorship.”¹²¹ Thus, when teen sexting is viewed as self-authorship, rather than autopornography, a series of rights based questions arise, rather than the series of retributive questions raised by the prosecution of minors as sex offenders. Dwyer notes, “When we account for the developing capacities of persons approaching the age of majority, we call them

116. James G. Dwyer, *THE RELATIONSHIP RIGHTS OF CHILDREN* 97-122 (2006) (adult constitutional rights based on two alternative and parallel theories of moral and political philosophy: welfare and autonomy theories).

117. Dwyer, *supra* note xx at xx.

118. *Id.* at 2.

119. *Id.*

120. American Psychological Association, *Report of the APA Task Force on the Sexualization of Girls* (2007), <http://www.apa.org/pi/women/programs/girls/report-full.pdf> (last visited April 15, 2011).

121. *Id.* at 117.

EXPLORING THE FIRST AMENDMENT RIGHTS OF
TEENS IN RELATIONSHIP TO SEXTING AND
CENSORSHIP

“adolescents” or “mature minors” or something else to denote their relatively advanced but still less- developed-relative-to-adults powers of decision making.”¹²²

IV. TSIS THAT FALL WITHIN A ZONE OF PROTECTED TEEN SEXUAL SPEECH ARE ENTITLED TO PROTECTION UNDER A VARIABLE STRICT SCRUTINY STANDARD.

The Supreme Court has recognized that teenagers may behave in irresponsible ways; however, this conduct is developmentally appropriate, thus rendering teens less culpable for their conduct than adults.¹²³ For example, the court invalidated the juvenile death penalty¹²⁴ and, most recently, invalidated the sentence of juvenile life without parole for non-homicide convictions,¹²⁵ in part, based upon this justification. Research demonstrates that teens are less aware of risks because they are less knowledgeable and lack experience, while at the same time, teens discount the long-term consequences of misconduct because the brain has not fully matured until an adult reaches his early 20’s.¹²⁶ Teen sexting is a logical consequence of the intersection between budding teen libido and technology.¹²⁷ In fact, “A vital part of adolescence is thinking and experimenting with areas of sexuality. It is through experimentation and risk-taking that adolescents develop their identity and discover who they will be.”¹²⁸

122. *Id.* at 126.

123. *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion).

124. *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (*citing* J. Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 *DEVELOPMENTAL REV.* 339 (1992)).

125. *Graham*, 130 S. Ct. 2011 (2010).

126. *Roper*, 543 U.S. at 559.

127. JJC Brief at 8. “Technology allows teenagers to negotiate this important task of exploring their sexual identity while avoiding the embarrassment. (“Technology allows teenagers to negotiate this important task of exploring their sexual identity while avoiding the embarrassment of doing so face to face.”)

128. Lynn E. Ponton & Samuel Judice, *Typical Adolescent Sexual Development*, 13 *CHILD ADOL. PSYCHIATRIC CLINICS N. AM.* 497, 508

24 EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN RELATIONSHIP TO SEXTING AND CENSORSHIP

Given these important developmental differences, the Supreme Court has historically afforded lesser protection to the constitutional rights of minors, “Thus, minors’ rights are not coextensive with the rights of adults because the state has a greater range of interests that justify the infringement of minors’ rights.”¹²⁹

Approximately forty years ago, the Supreme Court attempted to provide some guidance to courts asked to address the constitutionality of statutes affording to minors *sui generis* constitutional protections than that due to adults under the same factual circumstances. Initially, the Supreme Court applied rational basis review to uphold a statute prohibiting the sale of pornography to minors.¹³⁰ The Supreme Court upheld the constitutionality of the statute because, “the state may rationally conclude that exposure to the prohibited material is harmful to young people.”¹³¹ Thus, the Supreme Court upheld the state statute creating a juvenile obscenity standard based upon two state interests, a parent’s right to rear children free from material they deemed harmful, coupled with the state’s interest in legislating to protect the welfare of minors.¹³² The *Ginsberg* court relied upon New York state law to support its decision:

While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore,

(2004).

129. *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 74-75 (1976)(plurality). *See also* *Ginsberg v New York*, 390 U.S. 629, 636-37, 643 (1968) (upholding statute prohibiting sale of pornography to minors while permitting such sale to adults); *Prince v. Massachusetts*, 321 U.S. 158, 167-68 (1944) (state’s interest in protecting minors justified statute prohibiting minors from selling street literature even though such prohibition would be unconstitutional if applied to adults.)

130. *Ginsberg v. New York*, 390 U.S. 629, 643 (1968).

131. *Ginsberg v. New York*, 390 U.S. 629, 643 (1968).

132. *Id.* at 631-34 (statute defined harmful to minors to mean any material when it “predominantly appeals to the prurient, shameful or morbid interests of minors.”). Curiously, *xx*. *Miller* changes standard but silent as to juvenile obscenity standard.

EXPLORING THE FIRST AMENDMENT RIGHTS OF
TEENS IN RELATIONSHIP TO SEXTING AND
CENSORSHIP

altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults.

Thus, the *Ginsberg* court upheld the constitutionality of a statute prohibiting the sale of pornography to minors based upon a variable obscenity standard.¹³³ It is valuable to highlight the limited scope and application of the statute upheld by the *Ginsberg* court. The prohibition did not bar parents from purchasing the magazine for a minor child; applied only to commercial transactions, applied to material “utterly without redeeming social importance for minors.”¹³⁴ Scholars and jurists refer to the *Ginsberg* standard as the variable obscenity standard.¹³⁵ Thus, the

133. Arguably, TSIs could be subject to a variable obscenity standard. The New York statute modified the *Roth* standard and provided: 6. “Harmful to minors” means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

- (a) Considered as a whole, appeals to the prurient interest in sex of minors; and
- (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
- (c) Considered as a whole, lacks serious literary, artistic, political and scientific value for minors.

134. *Ginsberg*, 390 U.S. at 636-37.

136. See e.g. Garfield *supra* note x at xx; *FCC v. Pacifica*, 438 US 726, 767 (1978) (“Although the government unquestionably has a special interest in the well-being of children and consequently “can adopt more stringent controls on communicative materials available to youths than on those available to adults,” *Erznoznik v. Jacksonville*, 422 U.S. 205, 212, 95 S.Ct. 2268, 2274, 45 L.Ed.2d 125 (1975); see *Paris Adult Theatre I v. Slaton*, 413

26 EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN RELATIONSHIP TO SEXTING AND CENSORSHIP

creation, possession and non-commercial distribution of TSIs raises a variety of factually distinct questions left unanswered by the *Ginsberg* court.

Subsequently, the Supreme Court invalidated a similar statute applying the variable obscenity standard. In *Erzoznick v. City of Jacksonville*, the court examined the constitutionality of a statute prohibiting the exhibition of motion pictures containing nudity. The statute provided:

It shall be unlawful ...for any ticket seller, ticket taker, usher, motion picture projection machine operator, ... or any other person connected with or employed by any drive-in theater in the City to exhibit ... any motion picture, slide, or other exhibit in which the human male or female bare buttocks, human female bare breasts, or human bare public [sic] areas are shown, if such motion picture, slide, or other exhibit is visible from any public street or public place.¹³⁶

In examining the constitutionality of this statute, the Supreme Court characterized the statute as content-based censorship. The state justified the statute based upon its broad police power to regulate to protect the welfare of minors. In addressing this argument, the Court commented, “It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults.”¹³⁷ The court further commented, “Nevertheless, minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.”¹³⁸

The Court invalidated the statute as overly broad because:

U.S. 49, 106-107, 93 S.Ct. 2628, 2659-2660, 37 L.Ed.2d 446 (1973) (BRENNAN, J., dissenting), the Court has accounted for this societal interest by adopting a “variable obscenity standard” that permits the prurient appeal of material available to children to be assessed in terms of the sexual interests of minors.)

136 *Erzoznick v. City of Jacksonville*, 422 U.S. 205, 212 (1975).

137 *Id.* at 213.

138 *Id.* at 214.

EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN RELATIONSHIP TO SEXTING AND CENSORSHIP

It is not directed against sexually explicit nudity, nor is it otherwise limited. ...Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.¹³⁹

Thus, the *Erzornick* court recognized the applicability of First Amendment precedent to speech that is not obscene as to minors. The state may not prohibit a minor's right to speech based alone upon the belief that the content is unsuitable.

The constitutionality of legislation limiting the rights of minors to seek abortions in the 1970s and 1980s refocused the Supreme Court's attention on the question of the degree to which the state may constrain the constitutional rights of minors. The Supreme Court observed that, "The question of the extent of state power to regulate the conduct of minors not constitutionally regulable when committed by adults is a vexing one, perhaps not susceptible of precise answer."¹⁴⁰ In an attempt to better articulate the justification for adjusting the level of scrutiny in relationship to statutes abridging the constitutional rights of minors, the Supreme Court identified three reasons in *Bellotti v. Baird*.¹⁴¹

The *Bellotti II* court described the applicable standard as follows:

We have recognized three reasons
justifying the conclusion that the

139 *Id.* at 934. ("We have not had occasion to decide what effect *Miller* will have on the *Ginsberg* formulation. It is clear, however, that under any test of obscenity as to minors not all nudity would be proscribed. Rather, to be obscene 'such expression must be, in some significant way, erotic.'").

140. *Population Center Intern'l*, 431 U.S. at 692.

141. 443 U.S. 622, 634 (1979) (*hereinafter Bellotti II*).

28 EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS
IN RELATIONSHIP TO SEXTING AND CENSORSHIP

constitutional rights of children cannot be equated with those of adults: **the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.** (emphasis added).¹⁴²

Each of these considerations interests recognizes the state's *parens patriae* interest in protecting children from harm. The *Bellotti II* Court further reasoned that due to immature decision making, emotional immaturity and preserving the important role of parental decision-making “an analysis of minors’ rights should consider whether there exists a compelling state interest that would justify the lesser protection of a minor’s rights.”¹⁴³ Thus, an analysis of minor’s rights should determine whether “**the state has a more compelling interest in protecting the minor from harm, not whether the rights involved are less fundamental.**”¹⁴⁴ The test permits a degree of added restriction of rights only in cases where the state can demonstrate a compelling need for greater protection of the minor (than of an adult) from the potential harm associated with exercising the right at

142. *Id.*

143. *Id.* at 934. Although Justice Powell wrote a plurality opinion, the *Bellotti II* factors have been widely accepted and applied by subsequent courts. See e.g. *State v. Doe*, 231 P.3d 1016, 1027+, 148 Idaho 919, 919+ (Idaho Mar 26, 2010); *Roper v. Simmons*, 125 S.Ct. 1183, 1224, 543 U.S. 551, 620, 161 L.Ed.2d 1, 1, 73 USLW 4153, 4153, 05 Cal. Daily Op. Serv. 1735, 1735, 18 Fla. L. Weekly Fed. S 131, 131 (U.S.Mo. Mar 01, 2005); *R.B. ex rel. V.D. v. State*, 790 So.2d 830, 833+ (Miss. Jul 19, 2001);

144. *H.L. v. Matheson*, 450 U.S. 398, 441 n. 32 (1981) (Marshall dissenting). Not all courts are in agreement with this interpretation of *Bellotti II*. For example in *Hutchins by Owens v. District of Columbia* 144 F.3d 798, 808 (D.C. App. 1998) , the court noted, “These factors have not proven decisive, however, as courts have differed about their meaning and application. *Compare Schleifer*, 963 F. Supp. at 542 (“[T]he *Bellotti* factors justify a less stringent standard of review in this case.”), and *City of Panora v. Simmons*, 445 N.W.2d 363, 368-69 (Iowa 1989) (en banc) (same), with *Johnson*, 658 F.2d at 1073 (concluding that the *Bellotti* factors did not justify a lessened standard of review); *Nunez*, 114 F.3d at 945-46 (same); and *Waters v. Barry*, 711 F. Supp. 1125, 1136-37 (D.D.C.1989) (same). This difference is reflected in my opinion and that of Judge Tatel.

EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN RELATIONSHIP TO SEXTING AND CENSORSHIP

issue, an interest that is absent once the minor attains adulthood.

The *Bellotti II* decision adopts strict scrutiny, rather than the rational relationship test of *Ginsberg*,¹⁴⁵ as the appropriate constitutional standard to determine whether a law may constrain the constitutional rights of a minor according to the *Bellotti II* factors even if such a law would be unconstitutional as applied to adults. In the *Bellotti II* case, by requiring the availability of a judicial by-pass option to obtain an abortion absent parental consent, the Supreme Court sought to guard against the state's arbitrary deprivation of a mature minor's fundamental right to bodily autonomy. The minor's right remained fundamental. The state's compelling interest in protecting a vulnerable minor from immature decisions through court oversight while protecting parental authority represents what may be characterized as a variable strict scrutiny standard.

The *Bellotti II* test has since been applied by courts to analyze the constitutionality of statutes abridging the fundamental rights of minors. For example, in addressing the validity of a curfew statute, the court applied strict scrutiny recognizing that:

Constitutional rights do not mature and come into being only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. The Court indeed, however long has recognized that the state has somewhat broader authority to regulate the activities of children than of adults. It remains, then, to examine whether there is any significant state interest in [the effect of the statute] that is not present in the case of an adult.¹⁴⁶

It follows that even when the state establishes a compelling interest to constrict the rights of a minor based upon the content of TSIs, it must do so in a narrowly, or least restrictive manner.¹⁴⁷ Thus, a careful analysis of both

145. *Bellotti II*, 443 U.S. at 934.

146. *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, xx (9th Cir. 1997).

148. *Denver Area Educ. and Telecom. Con., Inc.*, 518 U.S. 727, (1996) (The importance of the interest at stake here-protecting children from

30 EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN RELATIONSHIP TO SEXTING AND CENSORSHIP

the state interests implicated in legislating teen sexting conduct and the sufficiency of the tailoring remain necessary. These state interests should be analyzed in light of the overarching theoretical framework surrounding the First Amendment rights of minors as they approach adulthood, adolescent brain science and the Dwyer theory of increasing juvenile rights and responsibilities. Additionally the limitations placed on state intervention under *Bellotti II* must be recognized because the state enjoys only “some broader authority” to regulate the conduct of minors.¹⁴⁸

V. TEEN SEXTING LEGISLATION MUST SATISFY THE VARIABLE STRICT SCRUTINY STANDARD.

A. Model Teen Sexting Legislation

The theoretical framework above can best be understood when applied to a teen sexting statute. In a previous article, this author proposed model teen sexting legislation¹⁴⁹ and would now like to take this opportunity to apply the First Amendment constitutional framework developed in this article to the draft legislation. The fourth section of this article illustrates the need for a separate TSI statute, sets forth a formerly proposed teen sexting model statute and applies the *Bellotti II* test to determine its constitutionality in relationship to a teen’s First Amendment rights.

A separate teen sexting statute is justified because of the legal distinction between child pornography, which is illegal, and non-obscene pornography, picturing adults. The distinction is based entirely upon the age of those pictured, without regard to the age of the individual creating, possessing or distributing the image. Adults aroused by child pornography are referred to as pedophiles.¹⁵⁰ They are reviled by society.¹⁵¹ Even after

exposure to patently offensive depictions of sex; the accommodation of the interests of programmers in maintaining access channels and of cable operators in editing the contents of their channels; the similarity of the problem and its solution to those at issue in *Pacifica*; and the flexibility inherent in an approach that *permits* private cable operators to make editorial decisions, lead us to conclude that § 10(a) is a sufficiently tailored response to an extraordinarily important problem.

148. *Bellotti II*, 433 U.S. at xx.

149. Mclaughlin, *supra* note xx at xx.

150. Amy Adler, *Inverting the First Amendment*, 149 UNIV. PA. LAW

EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN RELATIONSHIP TO SEXTING AND CENSORSHIP

serving their sentences, they continue to be ostracized by society.¹⁵² Pedophiles suffer sentences that can be harsher than those who kill in the course of committing a crime.¹⁵³ Thus, the law reflects a tremendous animus against pedophiles. In contrast, TSIs represent a token of age appropriate sexual expression between sexually mature teens. Other scholars have characterized Supreme Court child pornography law as “leaving open issues regarding whether borderline materials depicting children are protected by the First Amendment.”¹⁵⁴ The authors suggest that whether teen sexting images are entitled to constitutional protection depends upon the content of the image.¹⁵⁵

The Supreme Court has expressly held, “depictions of nudity without more, constitute protected expression.”¹⁵⁶ In relationship to child pornography, the distinction between “protected and unprotected speech . . . is twofold: (1) whether the child is engaged in sexual conduct; or (2) whether the nudity depicted is lewd.¹⁵⁷ Thus, the image must reflect sexual conduct or include nudity designed to arouse the viewer.¹⁵⁸ Because child pornography law focuses on content and the age of the minor depicted, rather than the identity and age of the creator and the relationship between the party creating the image, the minor depicted and the viewer, existing child pornography law criminalizes TSIs created by minors, shared with minors, engaged in developmentally appropriate conduct, arguably sweeping too broadly and intruding into the realm of protected teen sexual speech.

REV. 921, 924 (2001) “Pedophiles have emerged as the new communists in our popular imagination.”).

151 *Id.* at xx.

152. *Id.* at xx.

153. *Id.* at xx.

154. W. Jesse Weins and Todd C. Hiestand, *Sexting, Statutes, and Saved by the Bell: Introducing a Lesser Juvenile Charge with an “Aggravating Factors” Framework*, 77 TENN. L. REV. 1 (2009).

155. *Id.* at 16.

156. *Id.*

157. *Id.* at 17. Many courts look to the six factor *Dost* test to decide whether an image is lewd. See *Dost v. xx* (factors include xxx). This issue has been further complicated by the Third Circuit ruling in *United States v. Knox*, xx, holding that the definition of lewd in relationship to child pornography does not even require nudity, “quote”.

158. *Id.* at 25.

32 EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN RELATIONSHIP TO SEXTING AND CENSORSHIP

Thus, a unique and distinct legal response to teen sexting is required. It should be crafted to take into account the expanding teen constitutional rights of minors after they reach puberty and as they approach adulthood. It must survive strict scrutiny under the First Amendment variable obscenity standard announced in *Ginsberg*¹⁵⁹ and modified by *Bellotti II*.¹⁶⁰ Adopting this approach reflects an autonomy based model affording greater first amendment¹⁶¹ protection to a teen as the teen matures and approaches adulthood.¹⁶²

When a teen creates a nude or partially nude digital self-image and sends it to an age-appropriate potential intimate partner, the teen is deemed a criminal for replicating adult amorous behavior in relationship to an age appropriate partner. Thus, if an adult creates a nude or partially nude digital image and sends it to a desired sexual partner, so long as the image is not obscene, the image is welcomed and the desired partner is above the age of consent, the act is legally protected. When a minor engages in the same conduct, the minor is guilty of a crime under the child pornography law. As previously argued, the criminal statute is improperly applied to the teen given the absence of the defining characteristic: immoral sexual attraction to a child.

In fact, the act of teen sexting should properly fall within the definition of a status offenses.¹⁶³ Like underage drinking, running away and curfew violations, the child pornography statute, as applied to teens, prohibits teens from engaging in conduct that would otherwise be legal between age appropriate adults. Thus, neither criminal prosecution nor delinquency adjudication is always the proper response to teen sexting conduct that falls outside of the protected zone.¹⁶⁴ Several scholars have proposed model statutes.¹⁶⁵ Others have outlined the content and policy

159. *Ginsberg*, 390 U.S. at 636-37.

160. *Belotti II*, 443 U.S. at 634. This doctrine is often relied upon to resolve disputes between a parent and a child in medical decision-making disputes.

161. Additionally, teen privacy rights are also implicated. See e.g. any law review articles examining right to sexual privacy of teens.

162. *Belotti II*, 443 U.S. at 634.

163. I am working on this important footnote.

164. This paper reflects my additional thoughts with respect to teen sexting and reinforces and further justifies the proposed statute I advanced in my earlier article.

165. In progress.

EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN RELATIONSHIP TO SEXTING AND CENSORSHIP

goals of ideal statutes.¹⁶⁶ The author's legislation provides as follows:

Teen Sexting Conduct

- I. Statutory Intent.
 - A. The intent of this statute is to:
 - a) exempt Teen Sexting Images from the state and federal definition¹⁶⁷ of child pornography;
 - b) to create a consistent legal response;
 - c) to educate teens regarding the creation, possession, and distribution of Teen Sexting Images;
 - d) to promote early intervention;
 - e) to create a diversionary program to educate teens who create and share Teen Sexting Images without the intent to harm those depicted;
 - f) to punish and deter teens who create, possess, or distribute Teen Sexting Images with the intent to cause emotional harm, to embarrass, or to stigmatize those depicted; and
 - g) to require that Teen Sexting is redressed within the juvenile justice system.
- II. Definition of a Teen Sexting Image
 - A. A "Teen Sexting Image" is an image:
 - a) that is of one or more individuals between the ages of 13 and 18, including self-images (depicted person or persons);
 - b) that is captured in a traditional or digital photographic or video format;
 - c) that, if shared, is shared among teens between the ages of 13 and 18; and
 - d) that is not obscene as defined under applicable state and federal law.
- III. Permitted Conduct.
 - A. Teens between the ages of 15 and 18 may voluntarily create and

¹⁶⁶ In progress.

¹⁶⁷ This goal will require companion federal legislation recognizing this exception to the federal sex offender registration rules.

34 EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS
IN RELATIONSHIP TO SEXTING AND CENSORSHIP

privately possess Teen Sexting Images so long as they do not violate Section IV of this Statute.

- B. Teens between the ages of 13 and 14 may voluntarily create and privately possess Teen Sexting Images so long as they do not violate Section IV of this Statute. However, the court shall have the discretion to direct the state agency designated to supervise children in need of services or deemed dependant to initiate an investigation regarding the need for supervision.¹⁶⁸

IV. Violation.

- A. A person who is between the ages of 13 and 18¹⁶⁹ commits a delinquent act if, the teen without the consent¹⁷⁰ of each depicted person:
- a) Creates a Teen Sexting Image;
 - b) Possesses a Teen Sexting Image; or
 - c) Distributes a Teen Sexting Image:
 - 1) to a person not depicted;
 - 2) by posting it on a public web page;
 - 3) by electronically sharing it with a person or persons

168. The distinction between older teens and younger teens is designed to recognize the increasing role of teen autonomy and creates a zone of absolute privacy for teens between the ages of 15 and 18 who have the ability to consent to sex in a majority of the states within the United States. For younger teens, the legislation expressly recognizes the court's discretion to order state oversight if there is a concern regarding knowing consent, maturity and the teen's ability to comprehend the long-term consequences of the conduct.

169. Legislators must decide whether to exempt all minors from sex-offender prosecution or only those who possess images of minors deemed old enough to participate voluntarily and knowingly in the conduct pictured. I identified the age of 13, the age most minors enter 7th grade, and the average age minors reach sexual maturity, as the appropriate age. Additionally, this statute extends juvenile court jurisdiction to 18 year-old-teens who create, possess, or distribute teen sexting images because many high school seniors do not graduate until after they reach age 18.

170. The term "consent" raises a host of definitional problems because verbal consent may not be freely given. Thus, a teen who consents does so verbally and is supported by the objective conduct of the minor. Phipps, *supra* note 243, at 377.

EXPLORING THE FIRST AMENDMENT RIGHTS OF
TEENS IN RELATIONSHIP TO SEXTING AND
CENSORSHIP

- not depicted; or
- 4) by otherwise sharing it with a person or persons not depicted.¹⁷¹

IV. The consequences of statutory violation shall be determined based on the mens rea involved.

A. If the actor recklessly¹⁷² creates, possesses, or distributes a Teen Sexting Image without the consent of the depicted person or persons, the actor:

- a) Shall be enrolled in a mandatory diversion program;
- b) Shall not be adjudicated delinquent; and
- c) Shall not be required to register as a sex offender.

B. If the actor intentionally creates, possesses, or distributes a third-party Teen Sexting Image with or without the consent of the depicted person or persons, and with the specific intent to cause emotional harm, to embarrass, or to stigmatize any depicted person or persons, the actor:

- a) Shall be adjudicated delinquent;
- b) Shall have phone and internet use monitored for a reasonable period of time;
- c) Shall undergo education regarding privacy rights, the internet, and the legal meaning and importance of consent in relationship to matters of sexual intimacy;
- d) Shall not be tried as an adult; and
- e) Shall not be required to register as a sex offender.¹⁷³

171. This portion of the statute is designed to deter negligent publication of third-party Teen Sexting Images and to educate teens regarding the potential consequences of this conduct.

172. This standard assumes “that all tortious conduct can be placed on a scale of unreasonableness, comprised of ordinary negligence, a middle tier of recklessness, and intentional conduct.” Edwin H. Byrd, III, *Reflections on Willful, Wanton, Reckless, and Gross Negligence*, 48 LA. L. REV. 1383, 1400 (1988).

173. Legislators must decide whether to exempt all minors from sex-offender prosecution or only those who possess images of minors deemed old enough to participate voluntarily and knowingly in the conduct pictured. I identified the age of 13, the age most minors enter 7th grade and the average age minors reach sexual maturity as the appropriate age.

36 EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS
IN RELATIONSHIP TO SEXTING AND CENSORSHIP

V. Subsequent violations of this Statute by the same teen shall be handled by the judge in juvenile court under Section IV (B).

B. *Bellotti II* applied to Teen Sexting Legislation

Should such a statute be enacted, it must pass constitutional muster. The first step of this analysis is “to determine whether the state has a more compelling interest”¹⁷⁴ in protecting a minor from the potential harms associated with sexting than it does in protecting adults. Even where such interests exist, under the *Bellotti II* test, the teen rights involved remain fundamental and the statute in question must be narrowly tailored.¹⁷⁵

The first criteria of the *Bellotti II* test permits state regulation, that might otherwise be unconstitutional as applied to adults, to protect the peculiar vulnerability of children. However, this state interest wanes as the minor approaches adulthood. Some courts have considered whether this factor refers to the physical weakness of minors as compared to adults, describing minors as “smaller, weaker and less able to care for themselves.”¹⁷⁶ This interpretation suffers because many adults may also fall into this category if they are elderly, small or ill.¹⁷⁷ Thus, this justification alone is insufficient to justify disparate treatment of teens and adults.¹⁷⁸

174.

175. *Bellotti II*, 443 U.S. at 634; *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 74-75 (1976)(plurality). *See also* *Brenda Hoffman*, 1984 Duke L.J. 1325, 1341 (1984)(“The state’s interest in protecting its young people from harm, however, does not affect the fundamental nature of the minor’s right, but rather, is a separate factor to be weighed in order to evaluate whether the right is burdened justifiably. In itself, the state interest does nothing to diminish the fundamental nature of the minor’s constitutional right.’).

176. *City of Panora v. Simmons*, 445 N.W.2d 363 (Iowa 1989).

177. *Id.* at 372.

178. *Id. But see Schleifer by Schleifer v. City of Charlottesville* 159 F.3d 843, 848 (4th Cir. 1998). Courts have recognized “the peculiar vulnerability of children,” *Bellotti II*, 443 U.S. at 634, 99 S.Ct. 303-5, and the Supreme Court long ago observed that “streets afford dangers for [children] not affecting adults.” *Prince*, 321 U.S. at 169, 64 S.Ct. 438. Those dangers have not disappeared; they simply have assumed a different and more insidious form today. Each unsuspecting child risks becoming

EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN RELATIONSHIP TO SEXTING AND CENSORSHIP

Under the second *Bellotti II* factor, a court must consider whether the inability to make critical decisions in an informed, mature manner presents the court with a compelling state interest to restrict a minor's constitutional rights, in this instance the right to create, possess or distribute TSIs. This *Bellotti II* factor is cited in cases invalidating a minor's *Miranda* warnings¹⁷⁹ and in cases invalidating a minor's confession on the basis that the minor does not fully understand the due process rights afforded to suspects before trial.¹⁸⁰

The precedent described above expands the constitutional protection available to minors, rather than delimiting it. Thus, the immaturity of minors seemingly entitles them to preferential treatment under the law and provides to them even greater protection of their substantive and procedural due process rights than that afforded to adults. This line of reasoning justifies providing greater protection to the constitutional rights of minors, while holding them less culpable. Additionally teens are unlikely to consider seriously the long-term consequences of their conduct.¹⁸¹ Like a coerced waiver of rights, the press of a computer button, launching a TSI into cyber space without malicious intent should not result in criminal prosecution. After all the *Bellotti II* standard is to afford more protection to minors, not less.

In assessing the constitutionality of any law limiting the first amendment rights of a teen, the court must finally assess the third *Bellotti II* factor by determining whether the interest in supporting the parental role in child rearing is sufficiently compelling, in association with the other considerations identified by the *Bellotti II* court. This goal is typically

another victim of the assaults, violent crimes, and drug wars that plague America's cities. Given the realities of urban life, it is not surprising that courts have acknowledged the special vulnerability of children to the dangers of the streets. *Nunez v. San Diego*, 114 F.3d 935, 947 (9th Cir.1997); *In Re Appeal in Maricopa County, Juvenile Action No. JT9065297*, 181 Ariz. 69, 887 P.2d 599, 606 (1994) (*Maricopa County*); *People in Interest of J.M.*, 768 P.2d 219, 223 (Colo.1989) (en banc); see also *Bykofsky*, 401 F. Supp. at 1257. Charlottesville, unfortunately, has not escaped these troubling realities. Two experienced City police officers confirmed to the district court that the children they observe on the streets after midnight are at special risk of harm.

179.

180. *Hardaway v. Young*, 302 F.3d 757 (7th Cir. 2002).

181. *Supra* notes xx-xx and accompanying text.

38 EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN RELATIONSHIP TO SEXTING AND CENSORSHIP

furthered when the state observes the boundary of family privacy and autonomy, thus furthering family autonomy and legitimizing limited government intrusion when needed.¹⁸² The state must be vigilant to preserve this boundary and avoid the perception of undue state interference in the guise of supporting parents. Absent restraint, minors lose faith in the government's commitment to the freedoms guaranteed by the Constitution.¹⁸³

For children to have a true sense of all the liberties and privileges this country has to offer, they must be allowed to experience them to the greatest extent possible. A government that promotes this principle is a government that is worthy of respect in the eyes of children. A government that ignores this principle does a disservice to all of us.¹⁸⁴

The scope of a minor's right to use technology to participate in teen sexting presents an issue at the core of family privacy and should be resolved on a family by family basis.

In addressing the constitutionality of a curfew case, the New Mexico Supreme Court reasoned,

The third *Bellotti II* factor not only demonstrates that there is a fundamental right at stake, but is also a substantive basis for holding the curfew unconstitutional.... "A long line of cases has established the Court's view that child-rearing is the role of parents, not impersonal political institutions." Note at 1178. ... The right to rear children without undue governmental interference is a fundamental component of due process, *Ginsberg v. New York*, 390 U.S. 629, 639, 88 S. Ct. 1274, 20 L.Ed.2d 195 (1968), and "[f]amily autonomy is as much a right of children as of their parents." Note at 1179. Custody, care, and nurture reside first in parents, *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), though the right is not absolute and is subject to reasonable regulation and compelling state interests. *Runyon*

182. *City of Panora v. Simmons*, 445 N.W.2d 363 (Iowa 1989).

183. *Id.* at 373.

184. *Id.*

EXPLORING THE FIRST AMENDMENT RIGHTS OF
TEENS IN RELATIONSHIP TO SEXTING AND
CENSORSHIP

v. McCrary, 427 U.S. 160, 178, 96 S.Ct. 2586, 49 L.Ed.2d
415 (1976).

Thus, the third prong of *Bellotti II* does not favor state interference.

Any statute dealing expressly with TSIs is a content based restriction limiting the free speech rights of teens. Therefore, such legislation must comply with the *Bellotti II* standard. Given the foregoing analysis, it is likely that a court would find its *patriae* interest in protecting minors from the harmful consequences of rash decisions would justify limiting, to some extent, a minor's right to create, possess and distribute TSIs. Such legislation is justified because teens are prone to impulsive decisions and do not give proportionate weight to the potential harm that might arise from their conduct. To the extent that the state relies upon protecting minors from harm, this interest should be supported by empirical evidence that establishes a nexus between the censored speech and the alleged harm.¹⁸⁵ Moreover, the legislation should shield minors from prosecution when possible, rather than facilitate it.

Assuming that the state meets its *Bellotti II* burden and establishes a compelling interest to limit a minor's first amendment rights in relationship to TSIs, the statute at issue must, nevertheless, be narrowly tailored. In order to satisfy the narrow tailoring prong, one district court identified the following factors to assess whether a statute is sufficiently narrowly tailored: 1. Examine the precise facts that prompted the legislature to enact the legislation, 2. Examine the logical connection between the factual premises and the statutory remedy, 3. Examine the breadth of the remedy.¹⁸⁶

Clearly child pornography laws sweep too broadly and treat minors who mimic adult conduct as felons. The prosecution of teens for TSIs requires more narrowly tailored laws. While prosecuting teens engaged in teen sexting as child pornographers is violative of all three prongs of the

185. See *Garfield*, supra note x and accompanying text.

186. *Hutchins v. District of Columbia*, 188 F.3d 531 ,542 (C.A.D.C. 1999) (“In judging the closeness of the relationship between the means chosen (the curfew), and the government's interest, we see three interrelated concepts: the factual premises upon which the legislature based its decision, the logical connection the remedy has to those premises, and the scope of the remedy employed.”).

40 EXPLORING THE FIRST AMENDMENT RIGHTS OF TEENS IN RELATIONSHIP TO SEXTING AND CENSORSHIP

narrowly tailored test, the author's proposed statute fares far better under this test.

The facts prompting teen sexting legislation are reviewed in detail in a variety of recent law review articles.¹⁸⁷ Given the potential for criminal prosecution under child pornography laws, legislative reform is needed. The model statute seeks to marry the facts prompting legislative action with the proposed remedy by creating a recognized zone of teen privacy and distinguishing between reckless and intentional conduct. The model statute limits jurisdiction to the juvenile court, exempts teens from prosecution under state and federal child pornography laws and limits the adjudication of teens as delinquent to cases in which there is evidence of a "specific intent to cause emotional harm, to embarrass, or to stigmatize any depicted person or persons..." Thus, the legislative response is logically related to the goal of creating a measured response to teen sexting conduct with an educational component for harm due to reckless conduct and the option of adjudicating a minor delinquent where the facts evidence an intent to harm or embarrass a third party.

Finally, the model statute is narrowly tailored to educate and deter conduct that is malicious. The *Bellotti II* court's *focus* on the differences between adults and minors and the state's regulatory interest should be considered in defining the scope of illegal and unacceptable teen sexting content. Clearly, any TSIs rising to the level of the *Miller* obscenity standard should be prohibited. Additionally, legislators should treat the violation of teen sexting laws as a status offense absent evidence of intent to harm others. Finally, any TSIs created or distributed without the consent of those pictured with the intent to harm or embarrass should likewise be prohibited. Upon the first offense, the minor should suffer no threat of confinement and juvenile court jurisdiction should be exclusive and mandatory.

CONCLUSION

The forgoing discussion is designed to provide some guidance to lawmakers, law enforcers, parents and teens as each confronts the reality of TSIs and seek to craft appropriate legal and family responses. Teens should be protected from prosecution as child pornographers because their conduct is not blameworthy. It lacks the element of predation.

187. *See supra* note xx.

EXPLORING THE FIRST AMENDMENT RIGHTS OF
TEENS IN RELATIONSHIP TO SEXTING AND
CENSORSHIP