

Julia Halloran McLaughlin*

This Article explores child pornography law in relation to teen sexting conduct. Recently, some teens who engaged in teen sexting have been convicted under child pornography laws and have been required to register as sexual predators. The criminalization of teens for developmentally typical behavior, mimicking the conduct of adults, can result in grave harm to most teens. Furthermore, the application of child pornography laws to teen sexting conduct demonstrates the constitutional overbreadth of the current definition of child pornography. Photographs have an emblematic role in society—capturing and celebrating youth. Moreover, the creation of teen sexting images accompanies a teen’s developmental quest for a sexual identity and individuation. Thus, teen sexting images constitute teen sexual speech and are entitled to some degree of constitutional protection, so long as the images are not obscene. The variable obscenity standard of Ginsberg v. New York has since been modified by the Bellotti v. Baird strict scrutiny standard. Thus, any legislation related to teen sexual speech must be narrowly tailored to protect the minor from harm, or further another compelling state interest. This Article tests the author’s proposed teen sexting legislation under the Bellotti test.

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 demonstrates 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

* I would like to extend my thanks to my colleagues at Florida Coastal School of Law who provided guidance and encouragement to me as I worked on this Article. I would particularly like to thank Rebekah Gleason, Brian Foley, and Lynn McDowell for their time and thoughtful comments on working drafts of this Article. Additionally, I want to thank Jessica Hansen, FCSL Class of 2012, and Thomas Mangan, FCSL Class of 2013, for their dedicated research assistance.

1. For the purposes of this Article, 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, teen sexting images (TSIs) are defined as images that are of one or more individuals between the ages of thirteen and eighteen, including self-images (depicted person or persons); that are captured in a traditional or digital photographic

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 for minors.

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 applicable to TSIs. Additionally, the Supreme Court has recognized legislative authority to further restrict a minor's access to pornography,⁴ 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 a minor's right to engage in sexual speech and attempts to criminalize teen sexting.⁵ Given the absence of empirical evidence of harm and the developmental justification for recognizing a zone of constitutionally protected teen sexual speech, prosecution of teens engaged in teen sexting as pedophiles should cease. Instead, states should draft legislation permitting teens to create and possess TSIs under limited circumstances and treating willful violations as a basis to adjudicate a minor delinquent. Any such statute must satisfy the modified strict scrutiny standard articulated in *Bellotti v. Baird* (*Bellotti II*).⁶ The legislation must be narrowly tailored to achieve the state's compelling interest in protecting minors from harm.

Part I of this Article is divided into two sections. The first section frames the issues by examining existing federal and state child

or video format; that, if shared, are shared among teens between the ages of thirteen and eighteen; and that are not obscene as defined under applicable state and federal law.

3. See *infra* notes 8–9 and accompanying text.

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

5. In an earlier article, Julia McLaughlin, *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. This earlier article identified a zone of teen privacy, but did not fully develop the First Amendment justifications for the creation, possession, and limited distribution of TSIs. *Id.* at 173–75. In my first article, I examined the current case law, legislation, and pending legislation dealing with TSIs, *id.* at 150–68, and proposed model legislation based upon my research. *Id.* at 175–79. In this Article, I delve into the First Amendment constitutional justifications for the private creation, possession, and limited distribution of TSIs. It furthers teen sexting scholarship by reasoning that teen sexting should typically be deemed a status offense, handled through juvenile justice diversion programs, without detention or sex offender registration. 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.

6. *Bellotti v. Baird* (*Bellotti II*), 443 U.S. 622 (1979).

pornography statutes and federal case law.⁷ The second section provides a brief summary of the state response to teen sexting. After providing this context, Part II focuses on the element of harm associated with child pornography and demonstrates that the definition of child pornography now requires evidence of harm or potential harm to the child pictured. Part III justifies the inclusion of TSIs as speech and explores the developmental justification for creating a zone of protected teen sexual speech. Part IV identifies the appropriate constitutional standard of review to protect this zone. Finally, Part V illustrates the need for a separate teen sexting 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.

I. CHILD PORNOGRAPHY LAW AND TEEN SEXTING

A. Summary of Federal Law

While the First Amendment guarantees freedom of speech, not all speech is of equal societal value. In *Roth v. United States*, the Supreme Court recognized an adult's right to possess pornography so long as it was not obscene.⁸ In *Miller v. California*,⁹ the Supreme Court identified the controlling definition of obscenity, recognizing that not all pornography constitutes obscenity.¹⁰ Nine years later, in *New York v. Ferber*,¹¹ the Court recognized the ability of the states to enact legislation that protects the welfare of minors and, in furtherance of this interest, to outlaw depictions of minors that portray sexual acts, even if the images did not satisfy the definition

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

8. See 354 U.S. 476, 484–85 (1957).

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

(a) [W]hether “the average person, applying contemporary community standards” would find 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.

Id. (internal citations omitted).

10. See *id.* at 26.

11. See 458 U.S. 747, 764–65 (1982).

of obscenity.¹² 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,¹³ it is an intrinsic form of child abuse,¹⁴ it creates a permanent record of the abuse, and it continues the harm to the child through distribution.¹⁵ Given this evidence of immediate and ongoing harm to children, the *Ferber* Court recognized a state's right to reject the *Miller* obscenity test as too narrow¹⁶ and craft a state-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 authoritatively construed."¹⁷

Thus, the *Ferber* Court created the child pornography exception, another category of speech falling outside of the protections afforded by the First Amendment.¹⁸ Nevertheless, legislation prohibiting child pornography must satisfy some constitutional standards: "[h]ere the nature of the harm to be combated 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."¹⁹

The *Ferber* Court continued to clarify its holding in relationship to the *Miller* obscenity standard:

The *Miller* formulation 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 some element of scienter²⁰ on the part of the defendant.²¹

12. *See id.* at 764.

13. *See id.* at 758 & n.9.

14. *See id.* at 759.

15. *Id.*

16. *Id.* at 761.

17. *Id.* at 764.

18. *See id.*

19. *Id.*

20. 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.

21. *Ferber*, 458 U.S. at 764–65.

The *Ferber* Court noted that “the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection.”²² 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.”²³

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.²⁴ This statute banned not only the use of live children in pornography, but also computer-generated images.²⁵ In 2002, the Supreme Court struck down the computer-generated images portion of the law in *Ashcroft v. Free Speech Coalition*, which linked child pornography convictions to the harm to the child or children used to create the images.²⁶ 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 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

22. *Id.*

23. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499 (1985) (internal quotation marks omitted).

24. Child Pornography Prevention Act of 1996, Pub. L. 104-208, 110 Stat. 3009, 3009–26 (2006) (codified as amended at 18 U.S.C. § 2251 (2006)), *invalidated in part by* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

25. *See id.* 18 U.S.C. § 2256 (2006) defines “child pornography” as “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.*

26. 535 U.S. 234, 256 (2002). 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.

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.*²⁷

The criminal prohibition against producing virtual images is therefore unconstitutional, because no child is actually harmed.

In addition to the federal statutes described above, Congress also passed the Adam Walsh Child Protection and Safety Act (the Adam Walsh Act or AWA) in 2009.²⁸ The first title of this Act, the Sex Offender Registration and Notification Act (SORNA),²⁹ 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.³⁰ The statute requires mandatory sex offender registration if the convicted defendant is over the age of fourteen.³¹ Today, every state has a statute criminalizing the creation, possession, and distribution of child pornography³²—and federal law mandates state-enforced sexual offender registration.³³ Thus, teens engaged in sexting may be charged under child pornography laws and become subject to federally-mandated sex offender registration rules.

27. *Id.* at 236–37 (emphasis added) (citations omitted).

28. 42 U.S.C. § 16911 (2006).

29. The first subchapter of the AWA is entitled the Sex Offender Registration and Notification Act (SORNA). *Id.* § 16913. Some commentators have questioned the constitutionality and wisdom of the 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).

30. *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: "AWA sets forth harsh penalties for a sex offender who simply fails to register as required by SORNA." *Id.* at 318–20 (footnotes omitted).

31. *Id.* at 344–45.

32. *See* 50 State Statutory Surveys: Criminal Laws: Crimes: Child Pornography, 0030 SURVEYS 5 (West 2010).

33. *See* 42 U.S.C. §§ 14071–14072 (2006). States must adopt minimum sex offender registry standards or else face a reduction in federal law enforcement funding. *See id.* § 14071(g)(2).

B. Overview of State Responses to Teen Sexting.

Given the broad directive of *Ferber* requiring that the prohibited conduct be adequately defined, specific definitions of child pornography differ from state to state. Many state statutes require nudity or partial nudity as an element of the crime.³⁴ Some states prohibit the creation, possession, and distribution of sexually suggestive images of minors, thus eliminating the nude or partially nude requirement.³⁵ 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. Teens and their parents have been shocked to discover that the child pornography laws are broad enough to encompass this conduct.³⁶ 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,³⁷ sentenced the teen to one-year probation, a \$250 fine, and required him to register as a sex offender.³⁸

34. For example, many states have adopted a legal standard that gives 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) (“A person commits the offense of child pornography who . . . [depicts or portrays a child] 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) (including within the “child pornography” definition visual depictions where the “lewd exhibition of the uncovered genitals . . . has the purpose of sexual stimulation of the viewer,” and defining sexual conduct to include “acts of exhibiting human genitals or pubic areas”).

35. *See, e.g.*, WIS. STAT. ANN. § 948.01(7)(e) (West 2008) (defining “sexually explicit conduct” to include the “lewd exhibition of intimate parts”).

36. *See, e.g.*, *Miller v. Mitchell*, 598 F.3d 139, 144 (3d Cir. 2010) (describing a District Attorney’s threat to prosecute a teen despite a lack of evidence that she either possessed or distributed the nude photo); *A.H. v. Florida*, 949 So.2d 234, 235 (Fla. Dist. Ct. App. 2007) (upholding the adjudication of a teen-age woman as delinquent for “producing, directing or promoting a photograph or representation that she knew included sexual conduct of a child”); *Iowa v. Canal*, 773 N.W.2d 528, 529–30 (Iowa 2009); *Washington v. Vezzoni*, No. 22361-2-III, 2005 WL 980588, at *1 (Wash. Ct. App. Apr. 28, 2005).

37. 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 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).

38. *Canal*, 773 N.W.2d at 529–30.

In that case, *State v. Canal*, senior Jorje Canal, upon the request of his fourteen-year-old high school friend, sent an electronic photo of his nude erect penis to her, along with a picture of his face and the words “I love you.”³⁹ The jury conviction was recently affirmed on appeal.⁴⁰ The Iowa Supreme Court upheld the jury’s determination that the photo of Canal’s nude penis was obscene.⁴¹ The jury instructions adopted the *Miller* contemporary community standard language modified to reflect the community’s view as to “what is suitable material for minors.”⁴² The jury instructions defined obscene material as:

[A]ny 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*,⁴³ 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.⁴⁴

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

39. *Id.* at 529.

40. *See id.* at 532.

41. *See id.*

42. *Id.* at 530–32.

43. *See infra* notes 145–151 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.

44. *Canal*, 773 N.W.2d at 530–31 (emphasis added) (noting that the definition in the jury instructions matched IOWA CODE ANN. § 728.1(5) (West 2006)).

45. *Id.* at 533.

46. *Id.* *See infra* notes 146–148 discussing the creation and implementation of the variable obscenity standard under *Ginsberg*.

47. A similar price was paid by Phillip Alpert. *See* Elizabeth M. 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, 359–60 (2010).

Perhaps Canal might have succeeded in reversing his conviction had counsel challenged the constitutionality of the variable obscenity standard. Although the *Canal* court relied upon this standard as introduced by the Supreme Court in *Ginsberg*,⁴⁸ the Iowa court did not confront the question of whether the state variable obscenity standard unduly interfered with the minor's right to possess such photos according to the *Bellotti II*⁴⁹ approach.⁵⁰ Additionally, in *Canal*, there was no allegation of harm to the recipient; therefore, the *Ashcroft*⁵¹ element of harm was also absent.

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.⁵² In September 2002, Vezzoni's girlfriend allowed him to take photos of her, including shots of her unclothed breasts and genitals.⁵³ Anthony took the pictures to school and showed them to his classmates.⁵⁴ Even though Vezzoni was sixteen-years-old, the state charged Vezzoni with "one count of sexual exploitation of a minor, one count of dealing in depictions of a minor engaged in sexually explicit conduct, and one count of possession of depictions of a minor engaged in sexually explicit conduct" and prosecuted him as an adult.⁵⁵ Following a bench trial, Vezzoni was found not guilty of sexual exploitation of a minor.⁵⁶ However, he was convicted of possession of and dealing in the depictions of a minor engaged in sexually explicit conduct.⁵⁷ On appeal, Vezzoni argued that the category of banned speech in the statute was unconstitutionally broad because it lacked the word "lewd" and, further it lacked a scienter element.⁵⁸ The court rejected both of the defendant's arguments and affirmed the conviction.⁵⁹ The court summarily rejected the defendant's scienter arguments.⁶⁰ Likewise, in finding the images merely sexually stimulating, rather

48. See *Canal*, 773 N.W.2d at 531.

49. See *infra* notes 157–172 and accompanying text.

50. See *infra* notes 165–167 and accompanying text.

51. See *supra* notes 25–26 and accompanying text.

52. See *State v. Vezzoni*, No. 22361-2-III, 2005 WL 980588, at *1 (Wash. Ct. App. Apr. 28, 2005).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. 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 (1990), amended by WASH. REV. CODE § 9.68A.070 (2010).

58. See *Vezzoni*, 2005 WL 980588, at *3–4.

59. *Id.* at *3.

60. *Id.* at *4.

than obscene, the court raised, but did not address, the question of whether teens have a First Amendment right to create and possess indecent images.⁶¹

II. TEEN SEXTING DOES NOT CONSTITUTE CHILD PORNOGRAPHY

A. No Empirical Evidence of Harm

In each of the above cases,⁶² 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,⁶³ (2) it is an intrinsic form of child abuse,⁶⁴ and (3) it is a permanent record of the abuse and continues the harm to the child through distribution.⁶⁵

A review of Iowa and Washington cases demonstrates that the policy goals underlying the child pornography laws are not implicated, much less advanced, by charging teens as child pornographers. 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.

Similarly, absent evidence of fraud, misrepresentation, or duress in cases 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.⁶⁶ Additionally, absent nonconsensual publication, there is no evidence that the permanent record continues the harm to the child through distribution.⁶⁷ Finally, the significant age differential between the individual capturing the image and the minor pictured in most child pornography cases is missing in teen sexting cases; thus, the element of sexual predation is also missing. Given these distinctions, it seems highly unlikely that legislators intended to place TSIs within the reach of child pornography statutes.

61. *See id.* at *3.

62. *See supra* notes 36–59 and accompanying text.
63. *New York v. Ferber*, 458 U.S. 747, 758 & n.9 (1982).

64. *See id.* at 759.

65. *Id.*

66. *See id.* at 759.

67. *See id.*

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*.⁶⁸ The sentence imposed by the *Canal* Court⁶⁹ included imprisonment, fines, and mandatory sexual offender registration.⁷⁰ 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.⁷¹ 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 Supreme Court has yet to address the issue, as previously noted, several state courts have interpreted the definition of child pornography to include TSIs.⁷² Awaiting 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

John A. Humbach suggests 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.”⁷³ Humbach acknowledges that while obscene teen sexting pictures garner no constitutional protection, “even pictures and videos that are not obscene may still be illegal if they fall into

68. Cf. *State v. Canal*, 773 N.W.2d 528, 528 (Iowa 2009).

69. See *supra* notes 37–50 and accompanying text.

70. *Canal*, 773 N.W.2d at 529.

71. McLaughlin, *supra* note 5, at 159–68.

72. See *supra* notes 36–59 and accompanying texts.

73. John A. Humbach, *Sexting and the First Amendment*, 37 HASTINGS CONST. L.Q. 433, 438 (2010). See also Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMM.LAW CONSPECTUS 1 (2009); Lawrence G. Walters, *How to Fix the Sexting Problem: An Analysis of the Legal and Policy Considerations for Sexting Legislation*, 9 FIRST AMEND. L. REV. 98 (2010); 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. & GENDER 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.”).

the broad constitutional category of ‘child pornography.’”⁷⁴ Humbach also states that a fair reading of *Ashcroft*⁷⁵ results in a more limited definition of child pornography that requires exploitation⁷⁶ of a child made to engage in sexual conduct,⁷⁷ by an adult,⁷⁸ who profits commercially⁷⁹ from the images captured in photographs or videos. The resulting harm is not only immediate, because of the assault to the child’s dignity, autonomy, and body,⁸⁰ but also encompasses a continuing harm as recognized by the Supreme Court in *Osborne v. Ohio*.⁸¹ Thus, absent evidence of 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 materials made by teens acting on their own.”⁸²

Humbach predicts that the law requiring categorical exclusion of child pornography from First Amendment protection will evolve in one of four ways: (1) the *Ferber* categorical exclusion will be interpreted to include teen sexting, (2) the categorical exclusion under *Ferber* will be applied if new research and studies demonstrate that teens involved in sexting suffer serious harm, (3) the categorical exclusion under *Ferber* will continue subject to a case-by-case “as applied” constitutional challenge, or (4) “[t]he scope of the categorical exclusion established in *Ferber* will be clarified and adjusted so that it does not impinge on teenagers’ interests in free self-expression[.]”⁸³

Humbach’s concern with criminalizing conduct engaged in by a majority of the teens in the United States is shared by the lawyers associated with the Juvenile Justice Center (JJC).⁸⁴ The JJC filed an

74. Humbach, *supra* note 73, at 438.

75. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 251–53 (2002).

76. Humbach, *supra* note 73, at 464. See also Elizabeth C. Eraker, *Stemming Sexting: Sensible Legal Approaches to Teenagers’ 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.”).

77. Humbach, *supra* note 73, at 465.

78. *Id.*

79. *Id.*

80. *Id.* at 466.

81. *Id.* (citing *Osborne v. Ohio*, 495 U.S. 103, 111 (1990)).

82. *Id.* at 467.

83. *Id.* at 483.

84. *Id.* at 438. The JJC provides care, treatment, and rehabilitation to juveniles involved in the juvenile justice system. Brief of Juvenile Law Center as Amici Curiae in Support of Appellees at 6, *Miller v. Skumanick*, 598 F.3d 139 (3d Cir. 2009) (No. 09-2144) [hereinafter JJC Brief].

amicus brief in the *Miller* case⁸⁵ that promoted two central arguments: (1) not all unwise juvenile behavior should be criminalized and (2) prosecuting sexting cases will involve juveniles needlessly in the criminal justice system.⁸⁶

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.”⁸⁷ 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.”⁸⁸ 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: sheltering minors from the criminal justice system and “intervening in the lives of child offenders” by “providing them ‘with room to reform.’”⁸⁹ Thus, by threatening to prosecute the teens under the applicable child pornography statutes, the state uses the juvenile justice system “not as a shield but a sword.”⁹⁰

The JJC next argued that sexting does not implicate the “compelling child protection justification”⁹¹ undergirding child pornography law. In its brief, the JJC cited *Ashcroft*⁹² for the proposition that child pornography law is “anchored. . . in the concern for the participants [in the production], . . . the ‘victims of child pornography.’”⁹³ The JJC reasoned that most teen sexting conduct is voluntary and entirely unrelated to pedophilia.

Amy Kimpel argues that the threat of child pornography prosecution chills teens’ rights to sexual self-expression and application of child pornography law to TSIs constitutes “content-based censorship.”⁹⁴ The threat of such prosecution chills the internet speech of teens’ online communities formed to explore sexual identity in the comparative safety of cyber chat rooms, rather than the heat of the moment in Chevy flatbeds.⁹⁵

85. *Miller v. Mitchell*, 598 F.3d 139 (2010).

86. JJC Brief, *supra* note 84, at 1.

87. *Id.* at 5–9 (use of capitalization in original omitted).

88. *Id.* at 9.

89. *Id.*

90. *Id.* at 13.

91. *Id.* at 14–16 (use of capitalization in original omitted).

92. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 241–42 (2002).

93. JJC Brief, *supra* note 84, at 16.

94. 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, 327 (2010).

95. *Id.* at 330.

Before TSIs dominated the headlines, Professor Alan Garfield noted in 2005 that “the constitutionality of child-protection censorship remains largely a muddle.”⁹⁶ 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.⁹⁷ Garfield notes that the application of strict scrutiny to child censorship laws would not always result in invalidity, because the Court has recognized that the state has a compelling interest in protecting minors from “patently offensive sex-related material.”⁹⁸ Garfield observes that the Court’s decision to forgo evidence that the material under scrutiny is, in fact, harmful to minors under a variable obscenity standard resulted in a deferential approach to such legislation that scholars have since derided:⁹⁹

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.¹⁰⁰

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

Accordingly, Garfield encourages the judiciary to demand “empirical evidence of harm from sexual speech”¹⁰¹ in the context of shielding minors from sexually explicit speech. The evidence of harm presents difficult questions in relation to sexual speech that does not meet the definition of obscenity. Garfield poses a series of questions: “Is it harmful if it leads to minors engaging in protected

96. Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 570 (2005).

97. *Id.* at 575–76.

98. *Id.* at 582 & n.69 (citing *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC.*, 518 U.S. 727, 743 (1996)).

99. *Id.* at 612.

100. *Id.* (footnotes omitted) (citing Kenneth Culp Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 940 (1980) (describing the Court’s “inaccurate factfinding” in the *Paris Theatre Saloon I* obscenity case as “obviously deplorable”)).

101. *Id.* at 612–13. Garfield notes that the *Ginsberg* Court did not demand empirical evidence of harm, rather deeming it a matter of “common sense.” *Id.* at 613.

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?¹⁰² In addition to evidence of harm, 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.¹⁰³ Finally, according to Garfield, the court must demand some evidence of the nexus between the suppressed speech and the resulting harm.¹⁰⁴ Garfield concludes that any such legislation must satisfy narrow tailoring requirements and vagueness and overbreadth standards.¹⁰⁵

In contrast, other scholars continue to advance the state's *parens patriae* interest in protecting minors from the harm associated with child pornography to justify statutes that prohibit a teen's right to create, possess, and distribute consensual TSIs.¹⁰⁶ These scholars focus on the presumed harm¹⁰⁷ to minors engaged in this conduct and limiting the flow of child pornography in the commercial market.¹⁰⁸ These valid concerns must be balanced against the constitutional free speech rights of maturing minors.

III. THE CONSTITUTION GUARANTEES TO TEENS A MODIFIED ZONE OF PROTECTED SEXUAL SPEECH THAT INCLUDES TSIS

Historically, children were considered chattel and the property of their father.¹⁰⁹ 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

102. *Id.* at 626.

103. *Id.* at 622.

104. *Id.* at 627.

105. *Id.* at 629.

106. 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) (“[L]ocated in a digital form, the [TSI] image has access to the Internet, which ‘allows for unprecedented voyeurism, exhibitionism and inadvertent indiscretion.’”); see also Walters, *supra* note 73; W. Jesse Weins & 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, 50 (2009).

107. Mary Graw Leary, *Sexting or Self-Produced Child Pornography? The Dialogue Continues—Structured Prosecutorial Discretion Within a Multi-Disciplinary Response*, 17 VA. J. SOC. POL'Y & L. 486, 521–22 (2010) (relying upon contemporary case law and practical observation to establish harm to teens engaged in teen sexting).

108. Szymialis, *supra* note 106, at 331.

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

rights of minors.¹¹⁰ The Supreme Court has rejected the fiction that constitutional rights arise at the age of majority.¹¹¹ In fact, minors enjoy a wide variety of constitutional rights enjoyed by adults, including: the right to equal protection from racial discrimination;¹¹² the right to due process, including most of the rights afforded to adults accused of a crime such as the rights to counsel, notice, confrontation, cross-examination, and the privilege against self-incrimination;¹¹³ and rights requiring proof beyond a reasonable doubt if accused of a serious crime¹¹⁴ and protection against double jeopardy.¹¹⁵

Specifically with respect to First Amendment rights, the Supreme Court has recognized that minors enjoy the right to access non-obscene information and enjoy the freedoms of speech, expression, and religion.¹¹⁶ Thus, the question arises whether TSIs fall within the definition of teen speech protected by the First Amendment.

A. TSIs Constitute Teen Sexual Speech

In *Kaplan v. California*, the Supreme Court broadly defined speech to include “pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word have First Amendment protection.”¹¹⁷ This protection ends when speech collides “with the long-settled position of this Court that obscenity is not protected by the Constitution.”¹¹⁸ While some have criticized

110. 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 LEGAL RIGHTS OF CHILDREN 116 (Robert M. Horowitz & Howard A. Davidson eds., 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”).

111. *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976).

112. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

113. *In re Gault*, 387 U.S. 1, 30–57 (1967).

114. *In re Winship*, 397 U.S. 358, 368 (1970).

115. *Breed v. Jones*, 421 U.S. 519, 541 (1975) (“We hold that the prosecution of respondent in Superior Court, after an adjudicatory proceeding in Juvenile Court, violated the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment.”).

116. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *In re Appeal In Maricopa Cnty., Juvenile Action No. JT9065297*, 887 P.2d 599, 604–05 (Ariz. Ct. App. 1994) (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212–13 (1975)).

117. 413 U.S. 115, 119–20 (1973).

118. *Id.*

this broad definition of speech,¹¹⁹ TSIs constitute pure speech. This assertion is supported by the recent Supreme Court decision in *Brown v. Entertainment Merchants Ass'n*, which yet again emphasized the broad protections afforded to freedom of speech under the Constitution, including the speech rights of minors.¹²⁰ The *Brown* Court broadly defined the scope of protected speech to include video games, without regard to content:

Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world). That suffices to confer First Amendment protection. Under our Constitution, “esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.”¹²¹

In her essay *In Plato’s Cave*, Susan Sontag explores the communicative power of photography.¹²² She describes photographs as “miniatures of the world that anyone can make or acquire.”¹²³ Families use photography to “portrait-chronicle” the connectedness of family.¹²⁴ Sontag observes that photographs allow individuals to “take possession of space in which they are insecure.”¹²⁵ Moreover, the picture will survive long after the event it records. Thus, the picture immortalizes the event¹²⁶ and invites the viewer to reverie:¹²⁷

119. See Daniel Mark Cohen, *Unhappy Anniversary: Thirty Years Since Miller v. California: The Legacy of the Supreme Court’s Misjudgment on Obscenity*, 15 ST. THOMAS L. REV. 545, 632 (2003) (criticizing the Court’s definition of the scope of protected speech, saying, “[t]he Court’s erroneous and imprudent choice of the 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 fact: the First Amendment protects, not works, but *words*.”). *But see* Ryan, *supra* note 47, at 366 (“A sexting image is not speech per se. However, a sexting image may qualify as protected expressive conduct.”).

120. *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2733 (2011).

121. *Id.* (citing *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 818 (2000)).

122. SUSAN SONTAG, *In Plato’s Cave*, in *ON PHOTOGRAPHY* (1977); *see also* Kimpel, *supra* note 94, at 313 & nn.76–78 & 80.

123. SONTAG, *supra* note 122, at 5, 16, 24.

124. *Id.* at 8. *See also* Kimpel, *supra* note 94, at 328. Kimpel compares the American malaise with gay sexuality in the 1980s to its current discomfort with teen sexuality: “The experiences 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 entire demographic’s sexuality.” *Id.*

125. SONTAG, *supra* note 122, at 9.

126. *Id.* at 11.

127. *Id.* at 16.

A photograph is both a pseudo-presence and a token of absence. Like a wood fire in a room, photographs—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 desirability is enhanced by distance.¹²⁸

Photos communicate. Whether the photographer and the viewer receive the same message is not a required element to establish non-verbal speech,¹²⁹ 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 seek to separate themselves from their parents and claim expanding autonomy, including sexual autonomy.¹³⁰ 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 the teen a sense of power and control.

Additionally, the photo captures “a neat slice of time,”¹³¹ 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 TSIs.

128. *Id.*

129. *See, e.g.,* *Burnham v. Ianni*, 119 F.3d 668, 674 (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. Washington*, 418 U.S. 405, 411 (1974)).

130. JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 97–122 (2006) (discussing how adult constitutional rights are based on two alternative and parallel theories of moral and political philosophy: welfare and autonomy theories).

131. *See* SONTAG, *supra* note 122, at 17.

*B. A Developmental Justification for Creating a Zone
of Protected Teen Sexual Speech*

James Dwyer suggests that the legal theoretical framework supporting adult constitutional rights¹³² 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.¹³³ Dwyer writes about the legal difficulties created when the interests of the state, the parents, and the child diverge.¹³⁴ He suggests that children appear to suffer because “the legal rules governing particular decisions about their relational lives do not require state decision makers to act with a single-minded focus on the welfare of the affected children.”¹³⁵

Although Dwyer focuses on the rights of children involved in custody, abuse, and neglect proceedings, Dwyer’s theory 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 method of flirting and assessing whether further amorous advances might be welcomed.¹³⁶ Thus, the decision whether and with whom to engage in teen sexting is at its core a relationship right. Current laws that criminally punish this behavior, therefore, ignore this right.

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.”¹³⁷ 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, “[w]hen we account for the developing capacities of

132. DWYER, *supra* note 130, at 97–122 (discussing two alternative and parallel theories of moral political philosophy upon which adult constitutional rights are based: welfare and autonomy theories).

133. *Id.* at 163.

134. *See id.* at 2.

135. *Id.*

136. *See* THE NAT’L CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS 2–4 (2008), *available at* http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf (last visited Oct. 13, 2011) (reporting that “66% of teen girls and 60% of teen boys claimed that they sent sexually suggestive content to be ‘fun and flirtatious’”).

137. DWYER, *supra* note 130, at 117.

persons approaching the age of majority, we call them ‘adolescents’ or ‘mature minors’ or something else to denote their relatively advanced but still less-developed-relative-to-adults powers of decision making.”¹³⁸

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

The Supreme Court has recognized that teenagers may behave irresponsibly; thus, when this conduct is developmentally appropriate, the Court has rendered teens less culpable for their conduct than adults.¹³⁹ For example, the Court invalidated both the juvenile death penalty¹⁴⁰ and, most recently, the sentence of juvenile life without parole for non-homicide convictions¹⁴¹ based in part on this justification.

Research demonstrates that teens are less aware of risks because they are less knowledgeable, they lack experience, and they discount the long-term consequences of misconduct. This discounting occurs because the brain has not fully matured until a person reaches his or her early twenties.¹⁴² Teen sexting is a logical consequence of the intersection between the budding teen libido and technology.¹⁴³ 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.”¹⁴⁴ Given these important developmental differences, the Supreme Court has historically afforded special protection to the constitutional rights of minors: “[t]hus, 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.”¹⁴⁵

138. *Id.* at 125–26.

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

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

141. *See* *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010).

142. *See* *Roper*, 543 U.S. at 569–70.

143. JJC Brief, *supra* note 84, at 6. (“Technology allows teenagers to negotiate this important task of exploring their sexual identity while avoiding the embarrassment of doing so face-to-face.”).

144. Lynn E. Ponton & Samuel Judice, *Typical Adolescent Sexual Development*, 13 CHILD & ADOLESCENT PSYCHIATRIC CLINICS N. AM. 497, 508 (2004).

145. *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 945 (9th Cir. 1997). *See also* *Ginsberg v. New York*, 390 U.S. 629, 636–37, 643 (1968) (upholding a statute prohibiting the sale of pornography to minors while permitting such sale to adults); *Prince v. Massachusetts*,

A. Ginsberg v. New York

Approximately forty years ago, the Supreme Court in *Ginsberg* attempted to provide some guidance to courts addressing the constitutionality of statutes affording to minors *sui generis* constitutional protections differing from those afforded 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.¹⁴⁶ 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.¹⁴⁷ Thus, the 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 the parents deemed harmful¹⁴⁸ and the state's interest in legislating to protect the welfare of minors.¹⁴⁹ 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, 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.¹⁵⁰

Thus, the *Ginsberg* Court upheld the constitutionality of a statute prohibiting the sale of pornography to minors based upon what scholars and jurists have called the variable obscenity standard.¹⁵¹ It

321 U.S. 158, 167–68 (1944) (concluding the state's interest in protecting minors justified a statute prohibiting minors from selling street literature even though such prohibition would be unconstitutional if applied to adults).

146. See *Ginsberg*, 390 U.S. at 643.

147. *Id.*

148. See *id.* at 639.

149. See *id.* at 640. The statute in question defined "harmful to minors" to include material that "predominantly appeals to the prurient, shameful or morbid interests of minors . . ." *Id.* at 632–33. Curiously, *Miller* changes the obscenity standard of *Roth*, but remains silent as to the juvenile obscenity standard established in *Ginsberg*. Cf. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 n.10 (1975).

150. *Ginsberg*, 390 U.S. at 640 (quoting *People v. Kahan*, 206 N.E.2d 333, 334 (N.Y. 1965)).

151. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 767 (1978) ("Although the government unquestionably has a special interest in the well-being of children and consequently

is valuable to highlight the limited scope and application of the statute upheld by *Ginsberg*: the prohibition did not bar parents from purchasing the magazine for a minor child, it only applied to commercial transactions, and it only applied to material “utterly without redeeming social importance for minors.”¹⁵² Thus, the creation, possession, and non-commercial distribution of TSIs raises a variety of factually distinct questions left unanswered by the *Ginsberg* Court.¹⁵³

B. *Erznoznik v. City of Jacksonville*

Subsequently, the Supreme Court invalidated a similar statute applying the variable obscenity standard. In *Erznoznik 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 pubic areas are shown, if

‘can adopt more stringent controls on communicative materials available to youths than on those available to adults,’ 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.” (citations omitted); Garfield, *supra* note 96, at 612.

152. See *Ginsberg*, 390 U.S. at 646.

153. 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.

such motion picture, slide, or other exhibit is visible from any public street or public place.¹⁵⁴

In examining the constitutionality of this statute, the Supreme Court characterized the statute as content-based censorship.¹⁵⁵ The state justified the statute based upon its broad police power to protect the welfare of minors. In addressing this argument, the Court commented, “[i]t 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.”¹⁵⁶ The Court further commented, “[n]evertheless, 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.”¹⁵⁷

The Court ultimately invalidated the statute as overly broad because:

The ordinance 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.¹⁵⁸

Thus, the *Erznoznik* Court recognized that state lawmakers must comply with First Amendment protections when they seek to limit the flow of information to minors. The state may not prohibit a minor’s right to speech based alone upon the belief that the content is unsuitable.

C. Bellotti v. Baird II

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 degree to which the state may constrain

154. *Erznoznik*, 422 U.S. at 206–07.

155. *Id.* at 213.

156. *Id.* at 212.

157. *Id.* at 213–14 (citation omitted).

158. *Id.* The Court also noted “[w]e 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.’” *Id.* at 213 n.10.

the constitutional rights of minors. The Supreme Court observed, “[t]he question of the extent of state power to regulate conduct of minors not constitutionally regulable when committed by adults is a vexing one, perhaps not susceptible of precise answer.”¹⁵⁹ In an attempt to better articulate the difference, the Supreme Court in *Bellotti II* identified three reasons justifying the adjustment in level of scrutiny for statutes abridging the constitutional rights of minors: “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.”¹⁶⁰

The *Bellotti II* test has since been applied by courts to analyze the constitutionality of other statutes abridging the fundamental rights of minors. For example, in *Nunez by Nunez v. City of San Diego*, while addressing the validity of a curfew statute under the First Amendment, the court applied the *Bellotti II* modified strict scrutiny approach, recognizing that:

Constitutional rights do not mature and come into being magically 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.¹⁶¹

The *Nunez* court applied strict scrutiny to invalidate the juvenile curfew statute by recognizing that the state had a compelling interest “in reducing juvenile crime and juvenile victimization,”¹⁶² but rejecting the statutory scheme as insufficiently narrowly tailored.¹⁶³

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 narrow or reasonable manner.¹⁶⁴ This con-

159. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 692 (1977).

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

161. *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 945 (9th Cir. 1997) (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 74–75 (1976)).

162. *Id.* at 947.

163. *See id.* at 951.

164. *Denver Area Educ. Telecom. Consortium, Inc. v. FCC*, 518 U.S. 727, 760 (1996) (“Consequently, we cannot find that the ‘segregate and block’ restrictions on speech are a narrowly, or reasonably, tailored effort to protect children. Rather, they are overly restrictive, sacrificing important First Amendment interests for too speculative a gain. For that reason they are not consistent with the First Amendment.”) (internal quotation marks and citations omitted).

clusion is reinforced by the Supreme Court's decision in *Brown v. Entertainment Merchants Association*.¹⁶⁵ There the Court expressly held, "whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears,"¹⁶⁶ so long as the speech does not fall within the traditional limited areas such as obscenity, fighting words, or incitement.¹⁶⁷ The Court further opined that "new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated."¹⁶⁸ Therefore, TSIs constitute a new and different form of electronic communication. So long as the images are not obscene under *Miller* or a variable obscenity standard informed by *Bellotti II*, and they are created by and shared among age-appropriate partners, such images fall within an area of speech that enjoys constitutional protection.

Thus, a careful analysis of both the state's interest implicated in legislating teen sexting conduct and the sufficiency of the legislative tailoring remains necessary. The state interest in the welfare of minors 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 "somewhat broader authority" to regulate the conduct of minors.¹⁶⁹

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

A. Model Teen Sexting Legislation

The theoretical framework above can best be understood when applied to a teen sexting statute. While this author has previously proposed the following model teen sexting legislation,¹⁷⁰ the model legislation has not been scrutinized under the First Amendment constitutional framework developed in this Article.

165. *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011).

166. *Id.* at 2733 (internal quotation marks omitted) (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

167. *See id.*

168. *Id.* at 2734.

169. *See Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976).

170. McLaughlin, *supra* note 5, at 175–79.

A separate teen sexting statute is justified because of the legal distinction between child pornography, which is illegal, and legal 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.¹⁷¹ They are reviled by society.¹⁷² Even after serving their sentences, they continue to be ostracized by society.¹⁷³ Pedophiles suffer sentences that can be harsher than those for persons who commit murder.¹⁷⁴ 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 jurisprudence as “[leaving] open issues regarding whether borderline materials depicting children are protected by the First Amendment.”¹⁷⁵ This Article suggests that whether teen sexting images are entitled to constitutional protection depends on content and intent.¹⁷⁶ Absent the elements of predation and harm, TSIs should not fall within the definition of child pornography.

The Supreme Court has held that “depictions of nudity, without more, constitute protected expression.”¹⁷⁷ In relation 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.”¹⁷⁸

171. See Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 923 (2001) (“Pedophiles have emerged as the new communists in our popular imagination.”).

172. See *id.* at 934.

173. See, e.g., Brett Jackson Coppage, *Balancing Community Interests and Offender Rights: The Validity of Covenants Restricting Sex Offenders from Residing in a Neighborhood*, 38 URB. LAW. 309, 309–10 (2006) (describing the use of covenants to keep registered sex offenders out of some communities).

174. See Adler, *supra* note 171, at 934 n.58 (noting that Arizona law mandates a minimum prison sentence of twelve years for violating child pornography laws compared to a ten-year minimum for second-degree murder).

175. Weins & Heistand, *supra* note 106, at 8.

176. *Id.* at 16.

177. *Osborne v. Ohio*, 495 U.S. 103, 112 (1990) (citing *New York v. Ferber*, 458 U.S. 747, 765 n.18 (1982)).

178. Weins & Heistand, *supra* note 106, at 17 (footnotes omitted). Many courts look to the six-factor *Dost* test to decide whether an image is lewd. See *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff'd sub nom.*, *United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987), and *aff'd*, 813 F.2d 1231 (9th Cir. 1987) (factors include: “1) whether the focal point of the visual depiction is on the child’s genitalia or pubic area; 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; 4) whether the child is fully or partially clothed, or nude; 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; 6) whether the visual depiction is intended or

Thus, the image must reflect sexual conduct or include nudity designed to arouse the viewer.¹⁷⁹ 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. Therefore, existing child pornography law criminalizes TSIs created by minors and shared with minors—who are engaged in developmentally appropriate conduct. The *Ferber* definition of child pornography sweeps too broadly and intrudes into the realm of protected teen sexual speech.

Thus, a unique and distinct legal response to teen sexting is required. It should be crafted to take into account the expanding constitutional rights of minors after they reach puberty and as they approach adulthood. Teen sexting legislation must satisfy the First Amendment variable obscenity standard announced in *Ginsberg*¹⁸⁰ as well as the modified strict scrutiny standard announced by *Bellotti II*.¹⁸¹ Affording modified strict scrutiny protection to TSIs reflects an autonomy-based model that gives greater First Amendment protection to a teen¹⁸² as the teen matures and approaches adulthood.¹⁸³

designed to elicit a sexual response in the viewer”). This issue has been further complicated by the Third Circuit ruling in *United States v. Knox*, holding that the definition of lewd in relationship to child pornography does not even require nudity. 32 F.3d 733, 745–46 (3d Cir. 1994) (“Hence, as used in the child pornography statute, the ordinary meaning of the phrase ‘lascivious exhibition’ means a depiction which displays or brings forth to view in order to attract notice to the genitals or pubic area of children, in order to excite lustfulness or sexual stimulation in the viewer. Such a definition does not contain any requirement of nudity, and accords with the multi-factor test announced in *United States v. Dost* for determining whether certain material falls within the definition of 18 U.S.C. § 2256(2)(E).”) (footnote omitted).

179. See generally Weins & Heistand, *supra* note 106, at 26–27 (discussing the meaning of lewd).

180. *Ginsberg v. New York*, 390 U.S. 629, 635–37 (1968).

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

182. Additionally, teen privacy rights are also implicated. See, for example, any law review articles examining the right to sexual privacy of teens. Amanda M. Hiffa, “OMG TXT PIX PLZ: The Phenomenon of Sexting and the Constitutional Battle of Protecting Minors from their own Devices,” 61 SYRACUSE L. REV. 499, 521 (2011) (arguing, “The Carey decision stands not only for the right of minors to enjoy sexual privacy, but also recognizes the reality that minors are sexually active.”); 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, 332 (2010) (“Branding sexually active minors who seek to memorialize their private intimate conduct as criminals delegitimizes the relationships and sexual autonomy of adolescents.”); Nicole Phillis, *When Sixteen Ain’t So Sweet Anymore: Rethinking the Regulation of Adolescent Sexuality*, 17 MICH. J. GENDER & L. 271, 283 (2011) (“After highlighting the substantive due process infringements and public policy concerns, this Article argues that states should consciously reject the protectionism-versus-enablement paradigm in the regulation of adolescent sexuality and adopt a more comprehensive and internally-consistent body of law.”).

183. See *Bellotti II*, 443 U.S. at 634.

When 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 an adult—the act is legally protected.¹⁸⁴ When a minor engages in the same conduct, the minor is guilty of a crime under child pornography law. As previously argued, the criminal statute is improperly applied to teens given the absence of the defining characteristic: immoral sexual attraction to a child that causes harm to that child.

In fact, the act of teen sexting properly falls within the definition of a status offense.¹⁸⁵ The child pornography statute prohibits teens from engaging in conduct that, like underage drinking, running away, and violating curfew, would otherwise be legal for adults. Thus, neither criminal prosecution nor delinquency adjudication is the proper response to all teen sexting.¹⁸⁶ Several scholars have proposed model statutes,¹⁸⁷ while others have outlined the content and policy goals of ideal statutes.¹⁸⁸ This Article follows in that tradition by proposing the following legislation, which has been published elsewhere:¹⁸⁹

Teen Sexting Conduct

I. Statutory Intent.

A. The intent of this statute is:

184. Even if legal, however, sexting creates risks for indiscriminate adults. For a discussion of the Anthony Weiner sexting scandal, which led to Congressman Weiner's ultimate resignation despite the legal age of all parties involved, see generally *Congressman Weiner Resigns*, MSNBC (June 17, 2011, 8:03 AM), http://www.msnbc.msn.com/id/43425251/ns/politics-capitol_hill/.

185. One definition of status offense is "a nondelinquent/noncriminal offense; an offense that is illegal for underage persons, but not for adults." U.S. Dep't. of Justice, *Statistical Briefing Book, Glossary*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, available at <http://www.ojjdp.gov/ojstatbb/glossary.html> (last visited Sept. 20, 2011). Status offenses are identified by state statute and typically include truancy, running away, and curfew violations. *Id.* The definition of a status offense is subject to the constitutional challenge of vagueness and overbreadth when it includes a category that is subjective. See, e.g., Julie J. Kim, *Left Behind: The Paternalistic Treatment of Status Offenders Within the Juvenile Justice System*, 87 WASH. U. L. REV. 843, 864 (2010).

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

187. See, e.g., Julia Halloran McLaughlin, *Crime and Punishment: Teen Sexting in Context*, 115 PENN. ST. L. REV. 135, 175–79 (2010); Szymialis, *supra* note 106, at 335–38; Walters, *supra* note 73, at 136–39; Weins & Hiestand, *supra* note 106, at 50–53.

188. See, e.g., Eraker, *supra* note 76, at 589–92; Leary, *supra* note 107, at 542–65; Ryan, *supra* note 47, at 376–82.

189. McLaughlin, *supra* note 5, at 175.

- a) to exempt Teen Sexting Images from the state and federal definition¹⁹⁰ 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 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 dependent

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

to initiate an investigation regarding the need for supervision.¹⁹¹

IV. Violation.

- A. A person who is between the ages of 13 and 18¹⁹² commits a delinquent act if, the teen without the consent¹⁹³ 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 not depicted; or
 4. by otherwise sharing it with a person or persons not depicted.¹⁹⁴
- IV. The consequences of statutory violation shall be determined based on the mens rea involved.
 - A. If the actor recklessly¹⁹⁵ creates, possesses, or distributes a Teen Sexting Image without the consent of the depicted person or persons, the actor:

191. 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 fifteen and eighteen 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.

192. 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. The model statute identifies the age of thirteen, the age most minors enter seventh grade, and the average age minors reach sexual maturity, as the appropriate age. Additionally, this statute extends juvenile court jurisdiction to eighteen-year-old-teens who create, possess, or distribute teen sexting images because many high school seniors do not graduate until after they reach age eighteen.

193. The term "consent" raises a host of definitional problems because verbal consent may not be freely given. Thus, a teen that consents does so verbally and is supported by the objective conduct of the minor. *Cf.* Kelly C. Connerton, Comment, *The Resurgence of the Marital Rape Exemption: The Victimization of Teens by Their Statutory Rapists*, 61 ALB. L. REV. 237, 277-78 (1997).

194. This portion of the statute is designed to deter negligent publication of third-party TSIs and to educate teens regarding the potential consequences of this conduct.

195. 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, Comment, *Reflections on Willful, Wanton, Reckless, and Gross Negligence*, 48 LA. L. REV. 1383, 1400 (1988).

- 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.¹⁹⁶

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 the Proposed 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”¹⁹⁷ in protecting a minor from the potential harms associated with sexting than it does in protecting adults. Even where such an interest exists, under the *Bellotti II* test, the teen rights involved remain fundamental and the statute in question must be narrowly tailored.¹⁹⁸

196. 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. The statute identifies the age of thirteen, the age most minors enter seventh grade and the average age minors reach sexual maturity, as the appropriate age.

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

198. See *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 945–46 (9th Cir. 1997); see also *Planned Parenthood v. Danforth*, 428 U.S. 52, 74–75 (1976) (plurality opinion); Brenda D. Hofman, *The Squeal Rule: Statutory Resolution and Constitutional Implications—Burdening the Minor’s Right of Privacy*, 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

The first criterion of the *Bellotti II* test permits state regulation that might otherwise be unconstitutional as applied to adults to protect the “peculiar vulnerability of children.”¹⁹⁹ However, this state interest wanes as the minor approaches adulthood. At least one court has considered whether this factor refers to the physical weakness of minors as compared to adults, describing minors as “smaller, weaker, and less capable of taking care of themselves[.]”²⁰⁰ This interpretation suffers because many adults may also fall into this category if they are elderly, weak, or ill.²⁰¹ Thus, this justification alone is insufficient to explain the disparate treatment of teens and adults.²⁰²

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.²⁰³ This *Bellotti II* factor is cited in cases examining Miranda warnings given to minors²⁰⁴ and in cases supporting the idea of invalidating a minor’s confession on the ba-

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.”).

199. *Bellotti*, 443 U.S. at 623–24.

200. *City of Panora v. Simmons*, 445 N.W.2d 363, 372 (Iowa 1989) (Lavorato, J., dissenting).

201. *See id.*

202. *See id. But cf. Schleifer ex rel. Schleifer v. City of Charlottesville*, 159 F.3d 843, 848 (4th Cir. 1998) (“Courts have recognized the peculiar vulnerability of children, and the Supreme Court long ago observed that streets afford dangers for children not affecting adults. Those dangers have not disappeared; they simply have assumed a different and more insidious form today. Each unsuspecting child risks becoming 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. 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.”) (internal quotes and citations omitted).

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

204. Recently, on June 16, 2011, Justice Sotomayor delivered an opinion regarding the rights of a minor to *Miranda* warnings. Justice Sotomayor stated:

This case presents the question whether the age of a child subjected to police questioning is relevant to the custody analysis of *Miranda v. Arizona*, 384 U.S. 436 (1966) [parallel citation omitted]. It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child’s age properly informs the *Miranda* custody analysis.

sis that the minor does not fully understand the due process rights afforded to suspects before trial.²⁰⁵

The precedent described above expands the constitutional protections available to minors, rather than limiting them. 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 the protection afforded to adults. This line of reasoning justifies providing greater protection to the constitutional rights of minors, while also holding them less culpable.

Additionally, teens who sext are unlikely to consider seriously the long-term consequences of their conduct.²⁰⁶ Like a coerced confession or waiver of rights, the press of a button launching a TSI into cyber space without malicious intent should not result in criminal charges. After all, the *Bellotti II* standard is meant to afford more protection to minors, not less.

In assessing the constitutionality of any law limiting the First Amendment rights of a teen, courts must finally assess the third *Bellotti II* factor by determining whether the state 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 furthered when the state observes the boundary of family privacy and autonomy, thus promoting family autonomy and legitimizing limited government intrusion when needed.²⁰⁷ The state must be vigilant in preserving this boundary and avoiding the perception of undue state interference under the guise of supporting parents. Absent restraint, minors may lose faith in the government's commitment to the freedoms guaranteed by the Constitution:²⁰⁸

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.²⁰⁹

205. See, e.g., *Hardaway v. Young*, 302 F.3d 757 (7th Cir. 2002).

206. See *supra* notes 140–146 and accompanying text.

207. *City of Panora v. Simmons*, 445 N.W.2d 363, 372–73 (Iowa 1989) (Lavorato, J., dissenting).

208. *Id.* at 373.

209. *Id.* (citations omitted).

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." . . . The right to rear children without undue governmental interference is a fundamental component of due . . . , and "[f]amily autonomy is as much a right of children as of their parents." Custody, care, and nurture reside first in parents, though the right is not absolute and is subject to reasonable regulation and compelling state interests.²¹⁰

Thus, the third prong of *Bellotti II* does not favor state legislation of teen sexting conduct, much less the criminalization of such conduct.

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* modified strict scrutiny standard. Given the foregoing analysis, it is likely that a court would find that its *parens 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 may not give proportionate weight to the potential harm that might result 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.²¹¹ 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 relation to TSIs, the statute at issue must, nevertheless, be narrowly tailored. One circuit court identified the following factors for

210. ACLU v. City of Albuquerque, 992 P.2d 866, 877–78 (N.M. 1999) (citations omitted).

211. See *supra* note 96 and accompanying text.

courts to consider when assessing whether a statute is sufficiently narrowly tailored: (1) the precise facts that prompted the legislature to enact the legislation, (2) the logical connection between the factual premises and the statutory remedy, and (3) the breadth of the remedy.²¹² Clearly, child pornography laws sweep too broadly by treating 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 violates all three prongs of the narrowly tailored test, the Author's proposed statute fares well under this test.

The facts prompting teen sexting legislation are reviewed in detail in a variety of recent law review articles.²¹³ Given the potential for criminal prosecution under child pornography laws, legislative reform is needed. The model statute in this Article 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 proposed legislation is measured, contains an educational component, and permits continuing oversight within the juvenile court system.

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.

212. *Hutchins v. District of Columbia*, 188 F.3d 531, 542 (D.C. Cir. 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.")

213. *See, e.g., supra* note 73.

CONCLUSION

Recently, some teens that engaged in sexting have been convicted under child pornography laws, sent to prison, and required to register as sex offenders. These teens have suffered criminal prosecution for developmentally typical behavior, replicating the conduct of adults, without evidence that the images in question caused the type of serious harm that child pornography laws were designed to deter and punish. The successful application of child pornography laws to criminalize teen sexting conduct demonstrates the constitutional overbreadth of the prevailing definition of child pornography.

Photographs capture and celebrate youth. Teen sexting images are communication and should be considered forms of protected teen sexual speech. The permissible limitation of the constitutional rights of teens explored in *Ginsberg*, in relation to the First Amendment, and later revisited in *Bellotti II*, in relation to privacy and autonomy, established a modified strict scrutiny standard as the appropriate standard to apply to laws that impinge upon the constitutional rights of maturing minors. Thus, any legislation related to teen sexual speech must be narrowly tailored to protect the minor from harm or further another compelling state interest. The statute proposed in Part V above is designed to satisfy the modified strict scrutiny standard announced by the *Bellotti II* Court. It offers to state legislators a measured and thoughtful response to teen sexting conduct by: (1) creating a zone of protected teen sexual speech, (2) limiting jurisdiction to the juvenile courts, and (3) requiring evidence of a teen's intent to harm or embarrass a third-party as a predicate for a delinquency adjudication. Legislative reform is vital because the broad definition of child pornography is being used by prosecutors to brand teens as sexual predators, to trigger mandatory sex offender registration laws, and to expose teens to the condemnation reserved for those, who in fact, have been convicted of wrongfully sexualizing of children.