

ARTICLE

THE PERVERSE LOGIC OF TEEN SEXTING PROSECUTIONS (AND HOW TO STOP IT)

XIYIN TANG*

ABSTRACT

A recent spate of child pornography prosecutions of teenagers engaging in “sexting”—where seductive, partially-nude or fully-nude photographs of one teen are transmitted to a lover, who might in turn send it to friends—lends itself to the tempting conclusion that such prosecutions unconstitutionally contravene the teens’ First Amendment rights and are not the intended targets of child pornography statutes. This Article, however, examines both the Supreme Court’s child pornography jurisprudence and First Amendment doctrine as it relates to minors and concludes that sexting is, in fact, unprotected by the First Amendment because it presents many of the same problems inherent in child pornography. Yet, threatening teens with lengthy jail sentences and criminal prosecutions under statutes designed for sexual deviants does not seem equitable. Therefore, I propose a compromise that is perfectly in line with the Court’s harm-based approach to child pornography: a Romeo-and-Juliet carve-out within child pornography statutes that would exempt teenagers who can legally have consensual sex under applicable state law. By creating a rule that affirmatively reduces a prosecutor’s power to press charges, this carve-out nonetheless keeps the possibility of a child pornography charge open at the outer edges of sexting behavior while foreclosing such opportunities for prosecutorial evangelism in the normative range. By reframing the dialogue away from First Amendment rights and keeping some sexting on the books as a crime, this Article aims to send an age-appropriate message to teens about sex—that it is intimate and not to be traded for entertainment value or as social currency.

INTRODUCTION

In Vladimir Nabakov’s infamous novel *Lolita*, the adult man Humbert Humbert is shocked when he hears that his beloved, presumably innocent, twelve-year-old Lolita has been engaging in sexual relations at summer camp.¹

* Visiting Fellow, Information Society Project at Yale Law School; Associate, Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates; J.D., Yale Law School; B.A., Columbia University. My thanks to Jack Balkin, Brad Rosen, Paul Laskow, and the incredibly talented editors of the *Boston University Journal of Science & Technology Law*. Without them, this Article would not have been possible. The views represented in here are, of course, all my own.

¹ VLADIMIR NABAKOV, *LOLITA* 144–46 (Knopf 1992) (1955).

These exploits, which Lolita describes as a mere game, included the most sordid of *ménage à trois*, conducted in the serene glades of a nearby forest.² If a slightly clumsy reading would suggest that Humbert is morally absolved because he did not deflower her first, a more nuanced reading would find Humbert even more despicable than the hardy thirteen-year-old redhead who had Lolita and her friend in turns, because Humbert, as a grown, adult man, should have known better. More importantly, as an adult, he was *de facto* beyond the world of adolescent game-playing, including sexual exploration with peers. Certainly, even the unreliable narration of Humbert's first person gives way to hints of his realizing this: despite the fact that it is Lolita who first kisses Humbert,³ he

knew, of course, [that] it was but an innocent game on her part, a bit of backfisch foolery in imitation of some simulacrum of fake romance, and since . . . the limits and rules of such girlish games are fluid, or at least too childishly subtle for the senior partner to grasp—[he] was dreadfully afraid [he] might go too far and cause her to start back in revulsion and terror.⁴

But Humbert's story, of course, is of an old-fashioned European sort. Adults these days do not find out about adolescent sex games from some wayward girl whispering impure secrets in one's ears—they find out about it, unfortunately and often enough, from images stored on cell phones and disseminated gleefully among members of the teenager's class. Specifically, these images of teens—sometimes nude, other times clothed in undergarments or posing seductively—are part of the new digital-age form of adolescent game-playing known as sexting. Or, as one court attempted to grapple with the phenomenon, “the subject takes a picture of . . . herself with a digital camera or cell phone camera That picture is stored as a digitized image and then sent via the text-message or photo-send function on a cell phone, transmitted by computer through electronic mail, or posted to an internet website like Facebook or MySpace.”⁵ And this practice is on the rise. “[S]tudies show approximately 20% of Americans age 13–19 have done it.”⁶ Welcome to the new adolescent sexual revolution—it is digitized.

While Lolita engaging in sex acts with a boy her age in the semi-privacy of a secluded glade would not be a crime today, the digitization of teenage sexuality has found an unlikely and frightening antidote: child pornography laws. Once used to criminalize the behavior of sexual deviants not unlike Humbert Humbert, prosecutors now wield these criminal statutes against the

² *Id.*

³ *Id.* at 119.

⁴ *Id.* at 119–20.

⁵ *Miller v. Skumanick*, 605 F. Supp. 2d 634, 637 (E.D. Pa. 2009).

⁶ *Id.*

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very children they are supposedly intended to protect.⁷ This practice is often a scare tactic, designed to underscore the dangers of sexting.⁸ Further, the privacy once accorded the yesteryear games of adolescent sexuality such as “strip poker,” “seven minutes in heaven,” or “truth or dare”—played in bedrooms, closets, or unsupervised parties—has eroded in the era of teen sexting, where ease of dissemination means that an initially intimate picture sent between two lovers can quickly become fodder for gossip and humiliation when things go awry.⁹

Some commentators have noted the inaptness of using child pornography laws to prosecute teenage sexting, and for good reason.¹⁰ Moreover, prosecutorial zeal in nabbing teens under the child pornography statute has been met with, to put it lightly, hostility.¹¹ After all, if one of the main stated goals behind child pornography law is preventing the exploitation of children, it does not make much sense to threaten a ten-year prison sentence on a teenager who had willingly agreed to such “exploitation” in the first place. One recent article on teenage sexting, for example, argues that minors enjoy a First Amendment right to sext and that child pornography laws, both state and federal, should be amended to exclude instances of teen sexting.¹² However, a

⁷ See, e.g., *New York v. Ferber*, 458 U.S. 747, 775 (1982) (“Thus, the [New York child pornography] statute attempts to protect minors from abuse . . .”); *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (“[T]he materials produced by child pornographers permanently record the victim’s abuse.”).

⁸ The prosecutor in *Skumanick*, for example, sent letters to the parents of the teens depicted in sexting images, stating that their children “had been identified in a police investigation involving the possession and/or dissemination of child pornography. The letter also promised that the charges would be dropped if the child successfully completed a six- to nine-month program focused on education and counseling.” *Skumanick*, 605 F. Supp. 2d at 638. In another sexting case, prosecutors threatened the defendant with an ultimatum: life in prison for 140 counts of child pornography, or a plea. See Robert D. Richards & Clay Calvert, *When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case*, 32 HASTINGS COMM. & ENT. L.J. 1, 9 (2009).

⁹ See *infra* note 5 and accompanying text.

¹⁰ See, e.g., Dawn C. Nunziato, *Romeo and Juliet Online and in Trouble: Criminalizing Depictions of Teen Sexuality (c u 18r:g2g 2 jail)*, 10 NW. J. TECH. & INTELL. PROP. 57, 76 (2012) (“A review of the Supreme Court’s child pornography jurisprudence makes clear that sexting prosecutions like those described in Part II cannot withstand constitutional scrutiny. First, typical acts of sexting do not depict sexual abuse or exploitation of children.”).

¹¹ One especially critical article claimed that lawyers and the legal system desperately needed to “catch up” with the way the Internet works; it’s only naked photos on MySpace, and kids everywhere are doing it! See Violet Blue, *Kids Charged for Child Porn / Violet Blue: When Teens Make Their Own Porn, Who’s Being Exploited?*, SF GATE (Jan. 29, 2009, 4:00 AM), <http://www.sfgate.com/living/article/Kids-Charged-for-Child-Porn-Violet-Blue-When-2481315.php>.

¹² Nunziato, *supra* note 10, at 82 (“[Child pornography] laws should be revised to

more complete reading of our child pornography jurisprudence suggests that there are greater considerations at play than just the question of whether the child “consented” to the making of the image.¹³ Furthermore, the conclusion that minors enjoy a First Amendment right to sext seems to disaggregate the specific conflation between the image and the act that gives rise to the image—the speech, and the harm—that has dominated the Supreme Court’s child pornography jurisprudence.¹⁴ In particular, the Court has emphasized the very real harm a sexualized image can present to adolescents as they age. This problem, unfortunately, does not dissipate in the case of consensual sexting. However, sexting certainly presents the outer edge of what the Court would likely uphold as cognizable under a child pornography statute.

The aim of this Article is simple. It argues that the Court’s focus on past and future harms in child pornography cases precludes the suggestion that minors enjoy a First Amendment right to sext. The new sexting craze presents very real problems for teenagers that go beyond mere attempts at, and First Amendment justifications for, self-definition and self-exploration.¹⁵ Yet, threatening teens with lengthy jail sentences and criminal prosecutions under a statute designed for sexual deviants does not seem equitable. Thus, I propose a compromise that is perfectly in line with the Court’s harm-based approach to child pornography: a Romeo-and-Juliet carve-out within the child pornography statute that would exempt teenagers who can legally have consensual sex under applicable state law.

specifically exempt sexting engaged in by consenting teens Non-obscene depictions of nudity or sexual activity created by teens and exchanged voluntarily for noncommercial purposes should be specifically excluded from the definition of child pornography or related crimes. Child pornography and related laws should be amended to exempt sexually themed images that are voluntarily and consensually produced and made available by teens in a noncommercial context.”).

¹³ “Consented” is put in quotes for a reason. See *infra* notes 26–30 and accompanying text.

¹⁴ See Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921 (2001) (arguing that child pornography jurisprudence collapses the speech/conduct distinction central to the First Amendment).

¹⁵ *But cf.* Nunziato, *supra* note 10, at 77 (“In considering the contours of minors’ free speech rights, it is helpful to return to the philosophical underpinnings and justifications for free speech rights in general and to consider how these translate in the context of minors’ interest in free expression. Among the most important justifications for protecting freedom of expression is the integral role this protection plays in self-exploration, self-expression, and self-definition. Although the Court frequently refers to the importance of free speech in establishing the preconditions for democratic self-governance and in advancing the free and open marketplace of ideas, it has also made clear that “[t]he individual’s interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion.” (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 n.12 (1978)) (footnotes omitted)).

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Part I examines the Court's approach to child pornography and its justifications for placing child pornography outside the ambit of First Amendment protection. Part II explores First Amendment jurisprudence as it relates to minors and the underlying tension between independent thinking and inculcation. Part III argues that a synthesis of these two lines of jurisprudence suggests that teenagers do not enjoy a First Amendment right to sext as other scholars have argued. However, in Part III, I also propose a Romeo-and-Juliet carve-out that nonetheless adheres to the Court's collapsing of image and act, based on the logic underlying the Romeo-and-Juliet exceptions in state statutory rape laws. As the opening of this Article with Humbert's mad fantasies may suggest, the degree of coercion and, hence, harm that we attribute to a sex act with a child, increases as the age gap widens. For the same reasons we believe consenting to sex may be impossible for a girl of twelve faced with a scheming Humbert, so I suggest teen sexting and its attendant "consent" issues work in a similar way.

I. THE SUPREME COURT'S HARM-BASED APPROACH TO CHILD PORNOGRAPHY

The Supreme Court, in *New York v. Ferber*, placed child pornography outside the ambit of First Amendment protections, relegating it to the ranks of obscenity, fighting words, and hate speech.¹⁶ As other scholars have pointed out, the *Ferber* opinion is rife with an unapologetic conflation of act and image—because the sexual exploitation of children is bad, we must stop such exploitation by criminalizing the image itself.¹⁷ The Court's reasoning takes a harm-based approach to the past cause of the photograph's making and then the future damage a photograph can cause, a reasoning that goes far beyond the basic issue of the child's own wishes or autonomy. Indeed, the *Ferber* court did not mention whether or not a child may have willingly "consented" to such depictions.¹⁸

¹⁶ *New York v. Ferber*, 458 U.S. 747, 763 (1982).

¹⁷ See Adler, *supra* note 14, at 981 (arguing that "*Ferber* conflated photographs with the underlying illegal action that produced them[,]” thus “collaps[ing] the distinction between representation and reality.”).

¹⁸ I mention this point because it seems crucial to the ultimate argument of whether sexting is protected under the First Amendment (as falling outside the realm of child pornography because it is self-willed and thus cannot constitute abuse) or not. It's possible that the Court did not address the question because it is presumed that a child legally cannot consent. However, most state child pornography statutes set the upper threshold at eighteen, while fixing their age of consent at sixteen. The Court somewhat addresses this anomalous result in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 247 (2002), but merely as a passing point in their overall justifications for striking down the act in question (the Child Pornography Prevention Act of 1996), which outright banned visual depictions of adults who merely *look* like children.

On the past harms of child pornography, the Court deferred to New York’s legislative findings, which noted “a proliferation of exploitation by children as subjects in sexual performances.”¹⁹ The Court did not discuss the specific “exploitation” that occurs in the making of child pornography, but perhaps such a discussion is unnecessary: the opinion is undergirded by the same rationale of an “innocent” childhood unmarred by adult indiscretion that threads through much other First Amendment jurisprudence, such as the captive audience doctrine. Indeed, Justice Brennan noted in concurrence that the “special and compelling interest, and the *particular vulnerability of children*, afford the State the leeway to regulate pornographic material, the promotion of which is harmful to children, even though the State does not have such leeway when it seeks only to protect consenting adults from exposure to such material.”²⁰ Similarly, the “captive audience” doctrine, first articulated in *FCC v. Pacifica Foundation*, allows for government regulation of obscene and profane words at times of the day when children are likely to be in the audience.²¹ “The result turn[ed] . . . on the unique characteristics of the broadcast media, combined with society’s right to protect its children from speech generally agreed to be inappropriate for their years.”²²

Underlying both the *Ferber* and *Pacifica* rationale is the modern conceit of an innocent, pre-sexualized child, an ideal we would like to protect as sacred and preserve as real.²³ The paradox of teen sexting prosecutions, then, is that we are faced with photographic proof of a child’s sexual activity and yet prosecute them under a law premised exactly on the belief that children are pre-sex, pre-profanity, pre-the-ugliness-of-adult-life. Yet there is a perverse logic to this: we rely on the ideal of the innocent child as a romantic fiction, and we desperately wish to preserve this stage of constructed innocence if only so that an adult looking back on her childhood would not say, “Oh, if only I hadn’t done that *then*.” Under this ideal, children are vulnerable, in need of protection not just from the world outside, but also from themselves and their precocious desires.

¹⁹ 1977 N.Y. LAWS, c. 910, § 1.

²⁰ *Ferber*, 458 U.S. at 776 (Brennan, J., concurring) (emphasis added).

²¹ *FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 (1978).

²² *Id.* at 762.

²³ See also WILLIAM BLAKE, *SONGS OF INNOCENCE AND EXPERIENCE* (1866) (the classic Romantic depiction of a stage of childhood innocence moving into a mature stage of knowing adulthood); Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 567 (2005) (“[T]he concept of sheltering children from speech is largely a modern conceit. The concept, after all, presupposes a ‘childhood’—a prolonged period of innocence—that was rare in premodern times and continues to be rare in many parts of the world. Put bluntly, children in the Middle Ages, who slept in their parents’ beds and were married off as close to puberty as possible, did not need sheltering from sexually-explicit speech.” (citations omitted)).

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Furthermore, the extent to which these desires are real or self-willed is unclear, especially in the context of overwhelming social pressure to sext.²⁴ Read against the backdrop of frequent solicitations for images and the dashed hopes of entering into a relationship without them, it becomes easier to apply an exploitative argument to the practice. Feminists have been arguing the exploitation inherent in pornography production involving consensual adult women for years.²⁵ The prominent legal scholar Catherine MacKinnon, for example, argued precisely that a pornographic image and female exploitation are one and the same.²⁶ MacKinnon raised an important point about consent—it is women’s lack of ability to meaningfully consent to participating in pornography that makes such pornography exploitative.²⁷ “[A]ll pornography,” MacKinnon asserts, “is made under conditions of inequality based on sex, overwhelmingly by poor, desperate, homeless, pimped women who were sexually abused as children.”²⁸ If MacKinnon’s broad generalizations about the conditions that contribute to a lack of meaningful consent for adult women have been widely criticized,²⁹ applying the rationale to children is a no-brainer. Minors, after all, cannot *legally* consent—in part because the immature mental state of minors renders them incapable of giving informed consent.³⁰ As discussed in Part III, it is precisely this lack of meaningful consent on the part of minors that has governed the rationale behind statutory rape laws, and it is this lack of consent that I believe should militate against a general First Amendment right to sext.

The *Ferber* court also justified its holding on the future harm a photograph can cause. Underlying the *Ferber* decision and subsequent child pornography doctrine are three considerations I refer to as *permanence*, *dissemination/circulation*, and *demand*. That is, the child’s sexual abuse is *permanently* recorded, that permanent record—a photograph—becomes easily *disseminated* and widely *circulated*, and this network of circulated images in turn creates *demand* for more abuse of more and different children.³¹ *Ferber*’s

²⁴ See *infra* notes 42–47 and accompanying text.

²⁵ See, e.g., ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981); CATHERINE A. MACKINNON, *ONLY WORDS* (1994).

²⁶ See, e.g., MACKINNON, *supra* note 25; see also ANDREA DWORKIN & CATHERINE A. MACKINNON, *PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN’S EQUALITY* (1988).

²⁷ MACKINNON, *supra* note 25, at 20.

²⁸ *Id.*

²⁹ See, e.g., Book Note, *Stripping Pornography of Constitutional Protection*, 107 HARV. L. REV. 2111 (1994) (reviewing MACKINNON, *supra* note 25).

³⁰ Blackstone famously stated that “the consent or non-consent [of a child] is immaterial, as by reason of her tender years she is incapable of judgment and discretion.” 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 212 (1769).

³¹ *New York v. Ferber*, 458 U.S. 747, 759–60 (1982).

concern with “dry[ing] up the market for this material” belies an agenda for norm-setting and an antagonism toward creating perverse norms.³² Markets create demand, more demand creates more product, and as in pornography, the more pervasive a product is, the more it shapes a community’s view of what is acceptable. MacKinnon has attributed this precise erosion of the *Miller* test—a three-factor test that evaluates a regular pornographic work under prevailing community standards³³—as the cause for the normalization of pornography where women are beaten and men dominate.³⁴ Hence, *Ferber*’s reference to halting a “low-profile, clandestine industry” for child porn that becomes “a visible apparatus of distribution” at the market level evinces a strong desire to push that visibility back underground as an anti-norm.³⁵

Anti-norms and norm-creation become especially important in the high school context, where mob mentality rules. That sexting is a widespread practice³⁶ elevates the *Ferber* court’s three concerns (permanence, dissemination/circulation, and demand). A teenager who makes the rash decision to send an intimate self-portrait to a lover might unhappily find this photography sent out by the recipient to a wide network of friends—none of whom were the intended eyes of the shot. Such was precisely the case in a recent sexting prosecution of an eighteen-year-old who

had been battling his 16-year-old girlfriend for some time when she left him an angry voicemail in the middle of the night, and he decided to exact revenge. To that end, he signed into her email account . . . and accessed nude photographs of the girl that she had stored online—photos she, in fact, had once sent to [him]. He then hit ‘select all’ and distributed the photographs to some seventy individuals that his girlfriend had set up as part of her personal email list.³⁷

If the Justices in *Ferber* were worried about “the distribution network for child pornography” three decades ago, certainly the problem is exacerbated today with the increasing speed, ease, and prevalence of social media networks, e-mail, and text messaging. In the anecdote above, Alpert had to do

³² *Id.* at 760.

³³ The three-factor *Miller* test used in determining whether a work is obscene (and thus not protected by the First Amendment) is: “(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973) (citations omitted).

³⁴ See *MACKINNON*, *supra* note 25, at 87–89.

³⁵ *Ferber*, 458 U.S. at 760.

³⁶ Studies show approximately twenty percent of American teens have engaged in sexting. See *Miller v. Skumanick*, 605 F. Supp. 2d 634, 637 (E.D. Pa. 2009).

³⁷ See *Richards & Calvert*, *supra* note 8, at 4.

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little else than make a one-second decision to hit “select all” to irrevocably send the most intimate of photographs to almost one hundred individuals. Further, in the new hyper-permanence of the digital age, “every online photo, status update, Twitter post and blog entry by and about us can be stored forever. Web sites . . . which collect[] and share[] embarrassing personal revelations from Facebook users, ill-advised photos and online chatter are coming back to haunt people months or years after the fact.”³⁸

The Internet’s meticulous recordation and cell phones’ easy storage of such poorly-thought-out decisions call even more urgently for a legal impetus to halt the distribution and collection of highly personal, intimate photographs of young teens in semi-nude or nude states. The reasoning of *Osborne v. Ohio*, in which the Court took on private possession of child pornography, rings twice as persuasive today than it did in the twentieth century.³⁹ The *Osborne* court decided that since “the materials produced by child pornographers permanently record the victim’s abuse,” [t]he pornography’s continued existence causes the child victims continuing harm by haunting the children in years to come.⁴⁰ Upholding the state’s law, the Court reasoned that “[Ohio’s] ban on possession and viewing encourages the possessors of these materials to destroy them.”⁴¹ Similarly, the knowledge that possessing a nude photograph of your girlfriend qualifies as child pornography possession encourages teens to delete images rather than circulate them to more people (none of whom were likely the intended eyes of the image). The wider the network of distribution and the longer the retention, the more likely the photograph will be discovered, and hence the more imminent the prosecution.

Lastly, the greater the demand and the more widespread the practice of sexting becomes, the greater the coercion. According to a report by the Pew Research Center’s Internet and American Life Project, “sexually suggestive images have become a form of relationship currency.”⁴² The practice of teenage boys soliciting such photos from their female peers has become commonplace.⁴³ Sex has become a form of amusement, passed along to friends for their entertainment value, as a joke or for fun.⁴⁴ Intimate photos that “are shared as a part of or instead of sexual activity, or as a way of starting or maintaining a relationship with a significant other,” are repurposed as gossip

³⁸ Jeffrey Rosen, *The Web Means the End of Forgetting*, N.Y. TIMES, July 21, 2010, <http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html>.

³⁹ *Osborne v. Ohio*, 495 U.S. 103 (1990).

⁴⁰ *Id.* at 11.

⁴¹ *Id.*

⁴² AMANDA LENHART, PEW INTERNET, TEENS AND SEXTING (2009), available at http://www.pewinternet.org/~media/Files/Reports/2009/PIP_Teens_and_Sexting.pdf.

⁴³ *Id.*

⁴⁴ *See id.*

and fodder for increasing social currency and popularity.⁴⁵ Teens report feeling intense pressure to share photos of their most private selves.⁴⁶ One high school girl wrote:

When I was about 14–15 years old, I received/sent these types of pictures. Boys usually ask for them or start that type of conversation And I felt like if I didn't do it, they wouldn't continue to talk to me. At the time, it was no big deal. But now looking back it was definitely inappropriate and over the line.⁴⁷

While sending arousing images to a lover across town is no doubt a modern form of mating and romance, and impetuosity and risky maneuvers are par for the course for teenagers, it is the continued possession and mass-scale dissemination of these images that proves most troublesome. For these precise reasons, applying the (albeit revised, as I suggest *infra*) child pornography statute to instances of sexting would discourage retention and distribution, driving demand for these images underground. Thus if illicit photographs were formerly traded in a highly public way as a form of social currency to gain popularity—in order to be thought of as “cool,” “sexy,” or “desirable”—the regulation of sexting under the criminal law will discourage sex as publicity or commerce.

I have argued above that the harm-based justifications and the conflation of conduct and speech underlying *Ferber* can be applied equally as well to “consensual” sexting. In the following Part, I analyze the Court’s current body of First Amendment jurisprudence as it applies to minors to show that sexting as a form of sexual speech receives, at best, less protection than other forms of speech by minors, and more likely, no protection at all.

II. THE FIRST AMENDMENT RIGHTS OF MINORS: INDEPENDENT THINKING VERSUS INCULCATION

The special characteristics of teenagers outlined above, including moral unformed-ness, self-exploration, and vulnerability, have also served as the driving force behind much First Amendment jurisprudence regarding minors. Specifically, the Court’s doctrine in this area continuously pulls between the poles of independent critical thinking and the goals of self-actualization and self-definition at one end, and at the other, inculcation, indoctrination, and a paternalistic view toward instilling what adult society has collectively determined to be the correct values in minors.⁴⁸ Unsurprisingly, those cases

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 868–69 (3d ed. 2011); see also Stanley Ingber, *Socialization, Indoctrination, or the “Pall of Orthodoxy”: Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 15–20.

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that have most significantly affirmed minors' First Amendment right to engage in inquisitive speech tend toward the former pole, while the latter pole is relevant in several cases with significant applicability in the sexting context. The majority of cases that explore the First Amendment rights of minors occurs in the school context, where interest in inculcation versus critical thinking runs high.⁴⁹ This parallels the sexting phenomenon, since the majority of sexting prosecutions have occurred in the school context, often as a result of cell phones confiscated in class or discovered by school authorities.⁵⁰ Given schools' inculcatory interest, it is also unsurprising that prosecutors often require attendance at an educational program in exchange for a dropped child pornography charge.⁵¹ As we will see in the cases below, school administrators do not merely have an interest in traditional education—the secondary school context is ripe for morals education as well.

The most iconic case for the independent critical thinking model of the education of minors is *Tinker v. Des Moines Independent Community School District*, which upheld the right of students to wear black armbands protesting the Vietnam War in class. The Court opined that a student, whether “in the cafeteria, or on the playing field, or on the campus during the authorized hours,” may “express his opinions, even on controversial subjects like the conflict in Vietnam.”⁵² Most significantly, the Court noted that “[s]tudents in school as well as out of school are ‘persons’ under our Constitution. They are possessed of fundamental rights which the State must respect.”⁵³ Indeed, *Tinker* has been cited vigorously as the case par excellence in defense of student's First Amendment rights, including by one scholar who applies its reasoning to justify a minor's First Amendment right to sext.⁵⁴ *Tinker's* reasoning also dominated another case favoring minors' rights to voluntary inquiry in contravention to what adult administrators may think desirable: *Board of Education, Island Trees Union Free School District No. 26 v. Pico*.⁵⁵ *Pico* struck down the removal of certain “anti-American, anti-Christian, anti-Sem[i]tic,” and, most significantly for sexting, “just plain filthy” books from the school's library.⁵⁶ The last category involved books with very explicit

⁴⁹ See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982).

⁵⁰ See Nunziato, *supra* note 10, at 60–64.

⁵¹ See *Miller v. Skumanick*, 605 F. Supp. 2d 634, 638 (M.D. Pa. 2009).

⁵² *Tinker*, 393 U.S. at 512–13.

⁵³ *Id.* at 511.

⁵⁴ See Nunziato, *supra* note 10, at 79; see also 2 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH §§ 17:1, 17:3 (1996); Michael W. MacLeod-Ball, *Student Speech Online: Too Young to Exercise the Right to Free Speech?*, 7:1 I/S: J.L. & POL'Y FOR INFO. SOC'Y 101, 1010 (2011).

⁵⁵ *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982).

⁵⁶ *Id.* at 857.

sexual passages, such as the following one from Eldridge Cleaver's *Soul on Ice* (cited, fittingly, by *Pico*'s dissenters):

There are white men who will pay you to fuck their wives. They approach you and say, "How would you like to fuck a white woman?" "What is this?" you ask. "On the up-and up," he assures you. "It's all right. She's my wife. She needs black rod, is all. She has to have it. It's like a medicine or drug to her." . . . You go with him and he drives you to their home. The three of you go into the bedroom. There is a certain type who will leave you and his wife alone and tell you to pile her real good.⁵⁷

Yet the majority nonetheless insisted that because libraries are choice-based, they "afford [students] an opportunity at self-education and individual enrichment that is wholly optional."⁵⁸ Therefore, school administrators may not "extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway."⁵⁹

Pico provides sound reasoning for the idea that an inculcative model (explored more in depth below) can only go so far. Outside the classroom environment, students must be free to send and receive their own ideas, to formulate their own opinions, and to engage in self-actualization.⁶⁰ In the context of sexting, this includes the right to participate in a peer-defined practice—a movement perhaps symbolic of the new digital age in which privacy has been traded for exhibitionism—that adults simply cannot understand and thus should not be able to regulate.⁶¹ As one journalist chronicled the new Gen Y movement from the eyes of a Gen X-er in an article subtitled, fittingly, *Kids, the Internet, and the End of Privacy: The Greatest Generation Gap Since Rock and Roll*: "Kids today. They have no sense of shame. They have no sense of privacy. They are show-offs, fame whores, pornographic little loons who post their diaries, their phone numbers, their stupid poetry—for God's sake, their dirty photos!—online."⁶² Being naked, whether physically or emotionally, whether on MySpace or on cell phones, is simply the new form of identity-making: nothing is sacred, nothing is

⁵⁷ *Id.* at 897–98 (Powell, J., dissenting) (quoting ELDRIDGE CLEAVER, *SOUL ON ICE* 157–158 (1968)).

⁵⁸ *Id.* at 869 (majority opinion).

⁵⁹ *Id.*

⁶⁰ *Id.* at 867–68.

⁶¹ MacLeod-Ball, *supra* note 54, at 1029 (2011).

⁶² Emily Nussbaum, *Say Everything*, N.Y. MAG., Feb. 12, 2007, at 27, available at <http://nymag.com/news/features/27341/>. This author admits that she, at the tender age of nineteen, was also featured in this article. Perhaps unsurprisingly, looking back on this overshare moment, she no longer stands behind her words that no privacy is a good thing.

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private—not the soul, and certainly not the body.

Yet, First Amendment jurisprudence has traditionally accorded more protection to “stupid poetry” than “dirty photographs,” and to emotional nakedness—overshare, silly ideas, or political nonsense—than physical nudity. The liberal “right to know” model of *Pico* could then perhaps be best justified because many of the books banned were either political or of artistic and literary merit: the Court cites, for example, the removal of Alice Childress’ *A Hero Ain’t Nothin’ But A Sandwich*, which was “anti-American” because it pointed out that George Washington was a slaveholder.⁶³ Other censored books, such as Richard Wright’s *Black Boy* and a collection of stories called *The Best Short Stories by Negro Writers* (edited by Langston Hughes), are literary books of artistic merit.⁶⁴ *Pico* illustrates that the Court has traditionally been hostile to overbroad attempts at censoring artistic, literary, scientific, or politically important speech that may contain sexually explicit passages, even for minors. For example, in *Reno v. ACLU*, the Court struck down provisions of the Communications Decency Act that prohibited transmission of obscene or indecent communications on the Internet to minors.⁶⁵ The Court took issue with the Act’s “definition of the term ‘indecent,’” which “importantly omits any requirement that the ‘patently offensive’ material . . . lack serious literary, artistic, political, or scientific value.”⁶⁶

Exploring one’s sexuality in his or her formative years, especially in light of a new sexualized digital revolution, undoubtedly has value—but exactly what kind of value are we as a society ready to accord it? That *Miller*’s obscenity test pits works containing “literary, artistic, political, or scientific” value against a work appealing purely to the “prurient” interest strongly suggests that sex on its own does not fit into any of the four favored categories.⁶⁷ In the following set of cases dealing with minors’ First Amendment rights to send and receive *sexual* speech, we see the Court flipping the switch from a broad theory of critical independent thinking to a paternalistic inculcative model focused on instilling the “right” values in our youth.

Bethel School District No. 403 v. Fraser involved a high school student who used “an elaborate, graphic, and explicit sexual metaphor” when making a speech about student government nominations.⁶⁸ In upholding the school’s subsequent suspension of the student, the Court espoused the importance of “public education as the inculcation of fundamental values necessary to the

⁶³ *Pico*, 457 U.S. at 873 n.25 (citing ALICE CHILDRESS, *A HERO AIN’T NOTHIN’ BUT A SANDWICH* 43 (1973)).

⁶⁴ See *id.* at 856 (citing RICHARD WRIGHT, *BLACK BOY* (1945); *THE BEST SHORT STORIES BY NEGRO WRITERS* (Langston Hughes ed. 1969)).

⁶⁵ *Reno v. ACLU*, 521 U.S. 844 (1997) (discussing 47 U.S.C. § 223 (1994)).

⁶⁶ *Id.* at 865 (quoting 47 U.S.C. § 223 (1994)).

⁶⁷ *Miller v. California*, 413 U.S. 15, 24 (1973) (citations omitted).

⁶⁸ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677–78 (1986).

maintenance of a democratic political system.”⁶⁹ Further, the Court noted that its own “First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children.”⁷⁰ As if retreating from *Pico*, the Court was quick to point out that even there, “all Members of the Court, otherwise sharply divided, acknowledged that the school board has the authority to remove books that are vulgar,” thereby “[r]ecogniz[ing] the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children . . . from exposure to sexually explicit, indecent, or lewd speech.”⁷¹

There are many points of interest in this dicta. First, the implicit meaning of *Pico* is not absolute freedom of inquiry, but only inquiry into the subjects (politics, art, literature) that ‘matter.’ Pure ‘vulgarity’ or sexual speech without other redeeming qualities doesn’t count. Furthermore, the Court conflates school and home by suggesting that school officials may also act as parents, and that those interests would be similarly aligned.⁷² As other Court jurisprudence has made clear, parents have a Fourteenth Amendment right to raise their child without undue state interference.⁷³ Under an inculcative model where the school’s agenda rules, however, the Court must necessarily assume that those interests are one and the same—that the school’s morals are the parents’ morals.

The same paternalistic appeal to state regulation of teenage morality pervades an earlier Court opinion—much of which provided the reasoning for *Fraser*. In *Ginsberg v. New York*, the Court noted that “[t]he well-being of [the State’s] children is of course a subject within the State’s constitutional power to regulate.”⁷⁴ In the Court’s view, the State’s role was complimentary, not antagonistic, to that of the parents, since “[t]he legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children’s well-being are entitled to the support of laws designed to aid discharge of that responsibility.”⁷⁵ Here, not only are parents and teachers assumed to have aligned interests in the upbringing of children, but we are to believe the State itself designs laws that best aid those goals. Moreover, the State has an “*independent* interest in the well-being of its

⁶⁹ *Id.* at 681 (citing *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979)).

⁷⁰ *Id.* at 684.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Soc’y of the Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

⁷⁴ *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

⁷⁵ *Id.*

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youth.”⁷⁶ The Court stated:

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 standards⁷⁷

By aligning the interests of parents, teachers, and, ultimately, the State itself, the Court takes a paternalistic view to adolescent upbringing that assumes any morals law-making is in the best interests of the child, not as the independent thinker of *Tinker* with full capacity to criticize, engage in speech, and protest as citizens, but as a still-developing being who needs to be shaped into “free and independent well-developed men and citizens.”⁷⁸ Further, the conflation of the school and home environments has deeper meanings for the self-actualization model of teenage development: whether in class or in the bedroom, teenagers are subject to the moralizing reach of the state’s adult hand—it is adult society, including the state, that holds values worth instilling. Teenage experimentation, on the other hand, is accorded little developmental value.

How do we reconcile this tension? The best way to understand the Court’s opposing models of independent thinking versus indoctrination and inculcation in its cases relating to minors would be the distinction between political speech and sexual speech. The former is high and lofty, the latter low and obscene. As Professors William Eskridge and Nan Hunter point out, “*Tinker* was a classic ‘political’ speech case,” and “*Fraser* [was] somewhere in between ‘political’ speech and ‘sexual’ speech.”⁷⁹ Hence, whereas the Court was lenient toward a minor’s First Amendment rights in the former category, they are much more reluctant to allow that argument in the latter, opting instead for a vision of morality where adult notions of decency and propriety dominate.

Yet if sexting is *not* protected by the First Amendment and, in fact, presents precisely the same problems of dissemination and permanence *Ferber* was concerned with, where do we go from here? As evidenced by the backlash surrounding the recent spate of sexting prosecutions,⁸⁰ the current arbitrary regime of prosecutorial zealotry against poor, unsuspecting teens does not work. In the final Part, I propose a compromise that addresses sexting’s harmful implications while allowing young lovers to continue to express

⁷⁶ *Id.* at 640.

⁷⁷ *Id.* (quoting *People v. Kahan*, 206 N.E.2d 333, 334 (N.Y. 1965) (Fuld, J., concurring)).

⁷⁸ *Id.* at 640–41.

⁷⁹ ESKRIDGE & HUNTER, *supra* note 48, at 869–70.

⁸⁰ See *supra* notes 7–11 and accompanying text.

themselves in the new digital age.

III. TOWARD A NEW EXEMPTION FOR THE PROBLEM OF SEXTING: A ROMEO- AND-JULIET CARVE-OUT

The phenomenon of teenage sexting no doubt comprises a larger spectrum of the Generation Y digital revolution, where the banner attitudes of frankness and openness manifest themselves in tell-all blogs and seductive photos, where decorum is tossed carelessly aside in exchange for a share-everything attitude. Yet as we have seen above, the Court's First Amendment jurisprudence, especially as it applies to minors, provides far more protection to political, artistic, scientific, and literary speech than it does to obscenity appealing mostly to "prurient" interests (and, as *Ginsberg* notes, what constitutes the "obscene" may be defined differently for teens than it is for adults⁸¹). Whether sex should or should not be included in the self-definition and actualization that one vision of the First Amendment champions⁸² is up for debate in the adult arena, but *Ferber's* concerns about the particular vulnerability of children provide compelling reasons for negating a First Amendment right to sext as it applies to minors. More importantly, nothing in *Ferber* suggests it would be unconstitutional to apply child pornography laws to the practice of sending and receiving or soliciting naughty photos amongst teens.

Yet, teens will likely continue the practice whether or not the Court recognizes such a right. One solution to the problem could simply be technology-based—for example, two Stanford students have engineered an application called Snapchat that allows individuals to send and receive photos that will be wiped from the phone seconds after viewing.⁸³ Such tools reflect a recognition of the need for "app[s] [that] would allow users to avoid making youthful indiscretions a matter of digital permanence."⁸⁴ But the troubling continuation of child pornography charges sprung upon unsuspecting teenagers, with its scary attendant consequences of harsh prison sentences and long-term sex offender status, should not be taken lightly. Prosecutorial discretion could be one solution—that is, selective enforcement that reinforces the norm against the retention and further dissemination of intimate photos.

⁸¹ *Ginsberg*, 390 U.S. at 636–37 ("It is enough for the purposes of this case that we inquire whether it was constitutionally impermissible for New York . . . to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see. We conclude that we cannot say that the statute invades the area of freedom of expression constitutionally secured to minors.").

⁸² See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879–881 (1963) (regarding the self-fulfillment model of the First Amendment).

⁸³ See Ken Auletta, *Get Rich U.: There are no walls between Stanford and Silicon Valley. Should there be?*, THE NEW YORKER, Apr. 30, 2012, available at http://www.newyorker.com/reporting/2012/04/30/120430fa_fact_auletta.

⁸⁴ *Id.*

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The rule could be that one out of every 200 sexters will get caught, and, of those, one out of every ten will be prosecuted and punished. Students who value the activity greatly enough that it outweighs the perceived low probability/high severity nature of the punishment can therefore continue to engage in it.⁸⁵ Those who do not value the activity as much or see it as integral to their identity will likely be deterred from doing so. Regardless, the criminalization of sexting sends a strong message: we as a society do not condone such behavior.

However, prosecutorial discretion remains just that—discretion. Under current state and federal child pornography statutes, prosecutors can choose to prosecute all cases or none. The uncertainty inherent in sexting prosecutions, where prosecutors may either embark upon a 100 percent rate of prosecutorial evangelism simply to “make a point” and others may decide against doing so at all for fear of public backlash,⁸⁶ renders deterrence inefficient—it will either under- or over-deter by making the probability of punishment difficult to predict.⁸⁷ Better still would be to create a rule affirmatively reducing their ability to do so, keeping the possibility of a child pornography charge open at

⁸⁵ For a detailed economic discussion of the criminal cost/benefit calculation that takes into account probability and severity of punishment, see Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1206–08 (1985).

⁸⁶ Part of the uncertainty inherent in sexting cases is that child pornography law itself incites widespread public passion. On one hand, prosecutors don’t want to seem “soft on porn.” See John Heilemann, *Big Brother Bill*, WIRED, Oct. 1996, available at <http://www.wired.com/wired/archive/4.10/netizen.html>. On the other hand, applied in the case of sexting, such a hardline stance may prove unpopular and thus backfire, as in the *Mitchell* case. See *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010) (holding that the prosecutor’s presented choice of an educational class or else child pornography prosecution was unconstitutional retaliation).

⁸⁷ My assertion follows the classic economic “cost of punishment” model $E=pf$, where E is expected cost of punishment, p the probability of punishment and f the cost of punishment if it is given. Assuming that would-be criminals can and *do* make rough economic calculations that take into account opportunity cost, cost of punishment, and benefit from engaging in criminal activity, that p in the sexting context is completely uncertain makes such calculations more difficult. If, on the other hand, it is well-known that every case of sexting that does *not* fall into the Romeo-and-Juliet exception I propose will likely be punished, we can at least expect that p will fall somewhere over the 0.5 line. Teens can take this number into account when deciding whether they value the activity enough to engage in it. Currently, because the calculation is incomplete without some sense of what p would be, teens might either be overdeterred (if they judge by the high-profile sexting prosecutions that almost every sexting case is prosecuted) or underdeterred (if they assume it can’t happen to them since every high-profile sexting case is high-profile exactly for its seeming injustice). For an answer to the typical objection that teens, like criminals, lack the ability to perform such calculations because they are de facto irrational actors, see Paul H. Rubin, *The Economics of Crime*, in *THE ECONOMICS OF CRIME* 13, 16 (Ralph Andreato & John J. Siegfried eds., 1980).

the outer edges of sexting behavior while foreclosing such opportunities for prosecutorial evangelism in the normative range.

Thus, I propose a simple solution that is perfectly in line with *Ferber's* purposeful conflation of act and image, conduct and speech: a Romeo-and-Juliet exception within the child pornography statute that mirrors the pre-existing Romeo-and-Juliet exception to statutory rape for consensual sexual activity between minors of similar ages.⁸⁸ A specific state's carve-out within its child pornography statute should mirror its existing consensual statutory rape exception in scope. For example, Texas' existing statutory rape statute states that it is an "affirmative defense to prosecution [for statutory rape]" if (1) the actor was not more than three years older than the victim and at the time of the offense was not a registered sex offender, and (2) the victim was a child of fourteen years of age or older.⁸⁹ Likewise, a sexting incident in the state of Texas would be subject to the proposed Romeo-and-Juliet exception only in cases where the image circulated between two people of no more than three years apart, with the teen who photographed herself/himself being fourteen or older. Furthermore, the exception would *not* apply in cases where the image circulates beyond the two parties.

This proposal takes a conduct-based approach to the image-centric nature of sexting. It recognizes that images arouse desire, and that the sending and receiving of erotic images between lovers are, like foreplay and flirtation, just another way of expressing lust, love, or longing. Sexted images are used in lieu of, in supplement to, or in anticipation of sex, and become an easy and efficient way of doing so across sizable distances. For these reasons, sexting belongs in the realm of privacy law, not First Amendment law. The two are, of course, not mutually exclusive; as the Court points out in *Griswold*, if a privacy right can be said to exist in the Constitution at all, it may exist in the penumbra of the First Amendment, which upholds the right of free association between people.⁹⁰ But intimate associations are fundamentally different from the way the freedom of association right has been articulated by the Court, in which "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."⁹¹ Intimate associations between two people, on the other hand, are not formed in the espousal and advocacy of belief systems, but rather form a zone of privacy through which a couple should have the liberty to conduct themselves as they please, including through the transmission of erotic images.

Recognizing a limited right to sext as a privacy right rather than a First Amendment right marks several important advancements. First, it does *not*

⁸⁸ My thanks to Brad Rosen, who teaches a class on Privacy Law at Yale, for this wonderful suggestion.

⁸⁹ TEX. PENAL CODE ANN. § 22.011(e) (West 2009).

⁹⁰ *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

⁹¹ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

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allow the intended recipient of an image to go ahead and disseminate that image to others, thus relieving *Ferber's* chief concerns of distribution and market demand. If the recipient were to do so, the sender, as one scholar has already suggested, may bring a breach of privacy action against the recipient-turn-distributor.⁹² Second, by refocusing the lens from *Ferber's* emphasis on child abuse to a privacy model of liberty and autonomy,⁹³ it circumvents the First Amendment distinctions between political and sexual speech while obviating *Ferber's* concerns of child exploitation. Specifically, it recognizes that teens, though not fully mature, are nonetheless capable of having human, sexual desires, and that acting out on those desires does not mean opening oneself up to exploitation. This idea is already inherent in existing Romeo-and-Juliet exceptions for statutory rape, which allows teens to sexually experiment within limited boundaries—which brings me to my last point: the greater the age difference, the greater the likelihood of coercion.⁹⁴

The Model Penal Code urges that it is “harsh and unreasonable to punish a person for engaging in sexual activity with a willing partner whom society regards as a fit associate in a common educational and social endeavor.”⁹⁵ However, whereas sexual activity amongst peers is seen as valuable in contributing to self-identity formation and actualization, “[a]n age difference requirement [of three or four years, depending on the state] creates a presumption that conduct is inherently coercive when a large age disparity exists between children.”⁹⁶

Whether or not *actual* coercion always occurs in the case of a much-older teen engaging in sexual relations with a much-younger one, the Romeo-and-Juliet exceptions for sexting nonetheless provide a sensible normative range within which teens may freely sext with one another without fear of being labeled sexual deviants. This exception makes intuitive sense: as I have argued above, sending and receiving images are just another facet of an already intimate or budding relationship between two adolescents, supplementing and augmenting in-person sexual activity or seductive and flirtatious text messages, phone calls, or e-mails. But if a thirteen-year-old and an eighteen-year-old

⁹² See Nunziato, *supra* note 10, at 65–67.

⁹³ See generally *Griswold*, 381 U.S. 479; *Roe v. Wade*, 410 U.S. 113 (1973). These cases are the two most prominent Supreme Court cases addressing the idea of personal liberty as a right included within the guarantee of personal privacy.

⁹⁴ See Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1, 133 (1997) (“[A]ge difference provisions address the issue of criminalization of sexual activity involving only minors. States specifying an age difference without setting a minimum age of the offender demonstrates one attempt at addressing juvenile offenders by indicating that an age difference of three or four years is enough to create culpability for the older child.”).

⁹⁵ See MODEL PENAL CODE § 213.3 cmt. 2, at 386 (1962).

⁹⁶ Phipps, *supra* note 94, at 133 n.540 (1997).

already do *not* enjoy a Constitutional right to engage in sexual relations, nor can they claim any such right to send photographic images in the fostering of one. Further, by criminalizing just the outer edges of sexting behavior (assuming that most sexting takes place between peers of similar ages, and that most are over the minimum threshold of fourteen years old⁹⁷) the exception limits prosecutorial overreach by ensuring that only a small number of teens ‘caught’ with naughty pictures can actually be charged.⁹⁸ Thus, it appropriately sets a hard-and-fast rule in exchange for the current regime of arbitrary prosecutions and overly harsh penalties.

CONCLUSION

One of the foremost justifications offered in defense of the value of the First Amendment is the “marketplace of ideas” theory—a “free trade in ideas” where the “best test of truth is the power of the thought to get itself accepted in the competition of the market.”⁹⁹ Yet, sex is not commerce, and sex pictures—those offered exclusively to titillate—should not be used as currency in that marketplace, with the most sexually exhibitionist winning out in some contemporary high school vision of popularity as overshare. To such seemingly traditionalist views, some may respond that nothing is sacred on the Internet—why should sex be any different? And yet this is precisely what I have argued against in this Article. After all, part of the strength of the argument for sex as self-actualization or self-definition rests precisely on its sacred, special nature. Sex, like romance and love, is not a rational agent in some greater speech-based scramble for truth or market power. Sex seems to be worth more than that.

The concern over the recent spate of sexting prosecutions stems from over-enforcement; yet the answer is not to simply cease enforcement completely. The justifications of boredom and casual amusement that teens themselves

⁹⁷ See Lenhart, *supra* note 42, at 4 (“The oldest teens in our sample—those aged 17—are the most likely to report having sent a sexually suggestive image via text with 8% of 17-year-olds having sent one, compared to 4% of those age 12.”).

⁹⁸ Some might argue that any criminalization of sexting would simply make the activity more desirable, rather than less. See, e.g., Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209 (2001). And indeed, Foucault had acknowledged that the repression of sexual desire itself simply spreads that desire, “arouses it, draws it out.” MICHEL FOUCAULT, *HISTORY OF SEXUALITY* 72 (1978). Yet Foucault would contend that we give the law far too much credit—for Foucault, this act of sexualization occurs far more in other spheres of power (the school, the home, the church) than it does in the law. For these reasons, I find the expressive theory of law much more appealing in this context—that law can in turn influence norms. Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 377 (1999) (discussing how criminalization can influence preference-formation).

⁹⁹ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

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offer up for sexting do not demand such a shift. If anything, the “no big deal” attitude prevalent among adolescents signals a corrupted understanding of what it means to be a free citizen in the real world.¹⁰⁰ Freedom does not entail merely doing whatever one likes at all times; in a world where nothing is considered private, freedom, too, can be eroded.¹⁰¹

By reframing an adolescent’s right to sext as a privacy right subject to the traditional concerns of coercion and protection that govern sexual activity with minors, we may place appropriate boundaries on criminal prosecutions without condoning the morality of sexting itself. Consequently, by shifting the norm toward *less* sharing, we may also preserve *Ferber* and subsequent child pornography jurisprudence’s chief concerns about the harm a widely-circulated image can enact upon a child as he or she ages, the damaging permanence a picture gives to a mere split-second decision. Romeos and Juliets today have, for better or worse, far broader forms of self-expression than they did in Shakespeare’s time. The real question is how society can best regulate such new and evocative practices. The solution this Article poses addresses the dynamic frontier of teenage self-expression, while acknowledging the societal concerns and pressures facing policymakers and parents today.

¹⁰⁰ See Lenhart, *supra* note 42, at 6 (“Teens who receive sexually suggestive images on their cell phones are more likely to say that they use the phone to entertain themselves when bored; 80% of sexting recipients say they use their phones to combat boredom”); *id.* at 7 (“Another younger high school-aged girl wrote, ‘Yeah, it happens a lot, my friends do it all the time, it’s not a big deal. Sometimes people will get into fights with their exs, and so they will send the nudes as blackmail, but it’s usually when or after you’ve been dating someone.’”).

¹⁰¹ The Fourth Amendment and the First Amendment interact in interesting ways. The Court has held that “a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.” *Kyllo v. United States*, 533 U.S. 27, 31–33 (2001). Thus, what we *expect* to be private counts—an erosion of privacy or our reasonable expectations of such no doubt occurs if intimate details like love-making, normally relegated to the privacy of the home, are increasingly viewed and treated as public spectacle. Further, the Court has recognized that if Fourth Amendment rights were to erode, First Amendment rights and general personal freedom will be chilled. See *United States v. Jones*, 132 S. Ct. 945 (2012) (Sotomayor, J., concurring) (“Awareness that the Government may be watching chills associational and expressive freedoms.”).