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THE FIRST AMENDMENT IMPLICATIONS OF SEXTING AT PUBLIC SCHOOLS: A QUANDARY FOR ADMINISTRATORS WHO INTERCEPT VISUAL LOVE NOTES

*Robert H. Wood**

“Each race determines for itself what indecencies are. Nature knows no indecencies; man invents them.” Mark Twain¹

INTRODUCTION

Hypothetical: As a high school administrator, it is your job to patrol the school corridors to ensure the safety of the students and to keep order. Between class periods, you notice a group of male students clustered in the hall laughing raucously at an image on a cell phone. Because your school has a policy that all cell phones are to be turned off during school hours, you step into the group, take custody of the student’s cell phone and direct the student to join you in the principal’s office. As you walk the student to the office, you look at the cell phone and see the image of a female student at the school clad only in her

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¹ MARK TWAIN, NOTEBOOK 288 (Albert Bigelow Paine ed., Cooper Square Publishers 1972) (1896).

underpants with her breasts exposed. What do you do?

Possible responses: (a) ignore the photo because it is not your concern what images are on the phone, only that the phone was turned on during school hours; (b) tell the student that he must delete the photo and either attend a seminar concerning the risks of teenage pregnancy, for example, or be charged with possession of child pornography; (c) upload the image to your computer to save it as evidence, delete the image on the student's cell phone and tell him not to do it again; or (d) turn the phone over to the district attorney for filing of criminal charges against the student.

From an analysis of news stories on this subject,² most administrators faced with similar situations have chosen option (d)—hand the student and his cell phone over to the district attorney, which is essentially a zero tolerance approach to possession of sexual material in school.³

During 2008 and 2009, a number of teenagers were brought up on child pornography charges as the result of an increasingly popular method of flirting amongst high school students called "sexting."⁴ This term is defined as "the practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular phones or over the internet."⁵

The debate over whether child pornography charges are applicable to minors who self produce the images is the subject for another article.⁶ However, because sexting is often detected

² See *infra* note 15.

³ See *infra* Part IV for the author's answer to the hypothetical.

⁴ *Miller v. Skumanick*, 605 F. Supp. 2d 634 (M.D. Pa. 2009).

⁵ *Id.* at 637 (internal quotations omitted); see also http://en.wikipedia.org/wiki/Sexting#cite_note-20.

⁶ L. Steven Grasz & Patrick J. Pfaltzgraff, *Child Pornography and Child Nudity: Why and How States May Constitutionally Regulate the Production, Possession, and Distribution of Nude Visual Depictions of Children*, 71 TEMP. L. REV. 609, 625–26 (1998); Robert H. Wood, *The Failure of Sexting Criminalization: A Plea for Prosecutorial Restraint*, 16 MICH. TELECOMM. & TECH. L. REV. (forthcoming Fall 2009); see also Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL'Y & L. 1

by school administrators who discover the photographs on student cell phones, the question naturally arises whether and to what extent students have a right to engage in this behavior, and the appropriate response for school officials who discover the materials. Instead of weighing the students' First Amendment rights under applicable Supreme Court precedents, many school administrators turn over the confiscated material to local prosecutors who charge the students under state child pornography laws (provided the photos are of students under eighteen). In some cases, the students are branded as sex offenders—a stigma they will likely carry for most of their lives. In essence, the zero tolerance approach to teenage sexuality as expressed through sexting has had dreadful consequences for those students unfortunate enough to get caught.

This Article analyzes the First Amendment implications of this type of student speech and concludes that when balancing the competing interests of school discipline and the constitutional rights of minors, school administrators should accord greatest weight to students' First Amendment rights. By doing so, school administrators will protect minors from the uncertain fates of the criminal justice system where child pornography laws often punish sexting by minors.

Part I of this Article presents some circumstances under which the sexting phenomenon has occurred. Part II analyzes jurisprudence relating to student speech protections. Part III examines judicial limitations on a minor's constitutional right to produce, possess, or view sexually oriented materials. Part IV applies First Amendment principles to the public school student in the sexting context to conclude that zero tolerance to sexting by school administrators is an inappropriate and disproportionate response to adolescent exploration and expression of sexuality.

I. THE RISE OF SEXTING

The national attention given to sexting can be traced in part

(2007); Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL'Y & L. 505 (2008).

to an online survey conducted by the National Campaign to Prevent Teen Pregnancy in partnership with Cosmogirl.com in the fall of 2008.⁷ This survey of 653 teens found that twenty percent of teens between thirteen and nineteen had sent or posted nude or semi-nude photos or video of themselves.⁸ Of young adults between twenty and twenty-six years old, thirty-three percent had sexted.⁹

The survey also sought to explain why teenagers and young adults are engaged in this activity and the answers were quite predictable: flirting and peer-pressure.¹⁰ Seventy-one percent of teen girls and sixty-seven percent of teen boys sent or posted the material to a boyfriend or girlfriend, while twenty-one percent of teen girls and thirty-nine percent of teen boys sent the content to someone they wanted to date or “hook up with.”¹¹ The most common reasons cited by teens for sending sexually suggestive content were to be “fun or flirtatious,” to give someone a “sexy present,” to “feel sexy,” or as a joke.¹² Many of the teens responded that they felt pressured by friends or the opposite sex to send sexual content.¹³

⁷ THE NAT'L CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS, *available at* http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf (last visited Feb. 3, 2010) [hereinafter *Sexting Survey*].

⁸ *Id.* at 1.

⁹ *Id.*; see also Kim Zetter, *Survey: One-Third of Youths Engage in Sexting*, WIRED.COM, (Dec. 3, 2009) <http://www.wired.com/threatlevel/2009/12/sexting-survey/>.

¹⁰ *Id.* at 4.

¹¹ *Id.* at 2. The term “hook up with” is considered slang for anything ranging from meeting with someone, to dating, to having casual sex without strings, depending on the context in which it is used. See Fluther.com, *What Does the Phrase “Hook up” Mean to You?*, <http://www.fluther.com/disc/30292/what-does-the-phrase-hook-up-mean-to-you/> (last visited Feb. 3, 2010).

¹² *Sexting Survey*, *supra* note 7, at 4.

¹³ *Id.* The use of modern technology to capture risqué material is not a novel concept to lawmakers. It is illegal to use digital media to take pictures of the “private areas” of people, particularly women, without their consent under the Video Voyeurism Act of 2004. This Act provides for the imposition of a fine and/or up to one year imprisonment for anyone who “has

Even though sexting is typically voluntary at first, the transmission of nude photographs triggers a host of legal and societal concerns, such as the application of child pornography laws when the creator or possessor of visual images is under eighteen. Such was the case in a number of state jurisdictions.¹⁴ Many of these incidents occurred when teachers or school administrators confiscated cell phones and subsequently discovered the photos.¹⁵

The most publicized sexting case began in October 2008 and involved a Pennsylvania high school where school administrators

the intent to capture an image of the private area of an individual without their consent, and knowingly does so under circumstances in which the individual has a reasonable expectation of privacy” 18 U.S.C. § 1801 (2006). This statute resulted from the practice of “upskirting,” whereby voyeurs would use cell phone cameras or other portable camera devices to capture the image of “the naked or undergarment clad genitals, pubic area, buttocks, or female breast” of a person without her knowledge, typically in public places. *Id.* at § 1801(b)(3); *see also* Lance E. Rothenberg, *Re-Thinking Privacy: Peeping Toms, Video Voyeurs, and Failure of the Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space*, 49 AM. U. L. REV. 1127 (2000).

¹⁴ See Peter Cumming, Address Before the Congress of Humanities and Social Sciences: Children’s Rights, Children’s Voices, Children’s Technology, Children’s Sexuality (May 26, 2009) (transcript available at <http://www.arts.yorku.ca/huma/cummingp/documents/TeenSextingbyPeterCummingMay262009.pdf>) (summarizing the various cases arising in the United States).

¹⁵ Shaun Davies, *Kids Face Porn Charges Over Sexting*, 9NEWS, Jan. 17, 2009, <http://news.ninemsn.com.au/article.aspx?id=719928> (describing event where teacher confiscated student’s cell phone for use during school hours and found explicit photos); *Teen Sexting Worries Parents, Schools*, CBSNEWS.COM, Feb. 4, 2009, <http://www.cbsnews.com/stories/2009/02/04/tech/main4776708.shtml> (describing event where high school staff found nude cell phone photos after a 15-year-old girl sent them to classmates); *Castalia Police Look into Complaint of Nude Photos Sent by Cell Phone*, SANDUSKYREGISTER.COM, Mar. 20, 2009, <http://www.sanduskyregister.com/articles/2009/03/19/front/1232333.txt> (describing conflict between teen couple where boyfriend circulated nude photos of girlfriend after an argument); *Two Mason Teenagers Charged in Sexting Case*, WLWT.COM, Mar. 4, 2009, <http://www.wlwt.com/news/18855563/detail.html> (describing instance where administrators confiscated a boy’s cell phone during class and found nude pictures of 15-year-old female classmates).

confiscated the cell phones of several male students who were using them during school hours.¹⁶ The administrators then discovered on the cell phones pictures of “scantily clad, semi-nude and nude teenage girls,” some of whom were enrolled in the school district.¹⁷ The school officials turned the phones over to the local district attorney, who began a criminal investigation that eventually led to the threatened prosecution of over twenty high school students on child pornography charges. Eventually, the parents of all but three of the teenagers agreed to submit their children to a “re-education” program, in addition to six months of probation and drug testing, in exchange for leniency.¹⁸ The parents of the three remaining female students refused to consent to the plea arrangement on the grounds that the photographs of their daughters did not constitute child pornography.¹⁹

One of the photographs at issue depicted two 13-year-old girls from the waist up clad in opaque white brassieres. One girl was pictured talking on the phone, while the other flashed a peace sign.²⁰ The third girl was shown in a second photo having stepped out of the shower, with a towel wrapped around her just under her breasts. Neither photograph depicted any sexual activity or exposed any genitalia.²¹ Further, the pictures were taken by a third person who sent them to other students without the girls’ permission.²² Nevertheless, the prosecutor asserted that the girls were accessories to the production of child pornography under Pennsylvania law because one girl was partially nude and the others had posed “provocatively.”²³

The parents contacted the American Civil Liberties Union,

¹⁶ *Miller v. Skumanick*, 605 F. Supp. 2d 634, 637 (M.D. Pa. 2009) (internal quotations omitted) (quoting Complaint, *Miller v. Skumanick*, 605 F. Supp. 2d 634, 637 (M.D. Pa. 2009)).

¹⁷ *Id.*

¹⁸ *Id.* at 638.

¹⁹ *Id.* at 638–39.

²⁰ *Id.* at 639.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 638.

who represented them in an action pursuant to 42 U.S.C. § 1983 seeking a temporary restraining order from the federal district court to enjoin the prosecutor from bringing criminal charges against their daughters.²⁴ Of particular interest was the plaintiffs' claim that forcing the children to enter a re-education program, where they would be required to write an essay on the errors of their ways, was government compelled speech in violation of the First Amendment.²⁵ In holding that the girls had asserted a constitutionally protected activity sufficient to succeed on the merits at trial, the district court recognized that not only does the First Amendment prevent the government from restricting or suppressing speech, it also prevents the government from "compelling individuals to express certain views."²⁶ If the government takes "action that forces a private speaker to propagate a particular message chosen by the government" it results in compelled speech in violation of the First Amendment.²⁷

In this case, the court believed that the girls made a valid argument that they had not violated the law, and that being forced to write an essay admitting wrongdoing required them to express a belief they did not hold. The re-education program therefore violated their right to be free of government compelled speech.²⁸ The judge withheld judgment on the merits of the plaintiffs' claims that the photographs did not constitute child pornography under Pennsylvania law. Rather, the court merely indicated that the plaintiffs were reasonably likely to succeed on

²⁴ *Id.*

²⁵ *Id.* The plaintiffs asserted that the district attorney's threats constituted retaliatory prosecution in that the girls had a constitutional right to avoid taking the courses. The district attorney responded by threatening to take adverse action, and because the pictures were not child pornography, the protected activity caused the retaliatory action. *Id.* at 643 (citing *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 282 (3d Cir. 2004)).

²⁶ *Id.* at 644 (quoting *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219, 235 (3d Cir. 2004)).

²⁷ *Id.* (quoting *Forum for Academic and Institutional Rights*, 390 F.3d at 236).

²⁸ *Id.* at 645-47.

the merits, which was the evaluative standard for issuing a temporary restraining order.²⁹ As a result of the court's analysis of the plaintiffs' claims, it issued the temporary restraining order against the district attorney.³⁰

The panic over sexting has not only affected students, but has also impacted teachers and administrators. For example, a school administrator was charged with possession of child pornography after he caught a male student with the semi-nude picture of a female classmate on a cell phone. The administrator ordered the student to send him a copy to hold as evidence before it was deleted from the phone.³¹ After a subsequent sex-related misadventure involving the student, his mother was informed of the earlier incident. She became irate that she was not told and complained to the police, who found the picture on the administrator's computer. The administrator was eventually brought up on felony charges, but a judge later dismissed the case on the grounds that the picture did not constitute child pornography.³² Although this was an unusual occurrence, it highlights the difficulties administrators face when confronted with the discovery of risqué photographs on student cell phones.

Sexting in public schools raises new questions under the

²⁹ *Id.* at 645. The court relied on factors set forth by the Third Circuit for consideration of a motion for preliminary injunction established in *Crissman v. Dover Downs Entertainment, Inc.*, 239 F.3d 357, 364 (3d Cir. 2001).

³⁰ *Id.* at 647. The district court's decision was upheld by the Third Circuit in *Miller v. Mitchell*, No. 09-2144, 2010 U.S. App. LEXIS 5501 (3d Cir. March 17, 2010). The court of appeals held that the plaintiffs were entitled to a preliminary injunction because the future prosecution of the plaintiffs in retaliation for their refusal to participate in the re-education program would violate the student's First Amendment right to be free from government coerced speech and the parent's Fourteenth Amendment right to control the upbringing of their children. *Id.* at 25, 35.

³¹ Kim Zetter, "Sexting" Hysteria Falsely Brands Educator as Child Pornographer, WIRED.COM, Apr. 3, 2009, available at <http://www.wired.com/threatlevel/2009/04/sexting-hysteri/>; see also *supra* Introduction (setting forth option (c) as a possible response to the hypothetical proposing a nearly identical situation).

³² Zetter, *supra* note 31.

First Amendment concerning the extent of a student's right to freedom of expression in the public schools.

II. SUPREME COURT JURISPRUDENCE REGARDING MINORS' FREEDOM OF EXPRESSION

The United States Supreme Court has long wrestled with applying the Bill of Rights to minors.³³ The Court has held that minors enjoy many of the same constitutional rights as adults in the contexts of equal protection³⁴ and due process,³⁵ as well as substantive and procedural rights in juvenile courts.³⁶ Further, minors have also been recognized as having a right of sexual privacy in the contexts of abortion and contraception.³⁷ However, the freedom of expression for students in the public school setting remains an area in which the rights of minors are limited. The first of several Supreme Court cases on the subject seemed to provide a level of protection consonant with rights of adults, but later decisions steadily retreated from that viewpoint. Today, free speech rights of students are better defined by the exceptions created by later Supreme Court decisions than the rule favoring First Amendment protection.

A. Tinker v. Des Moines Independent Community School District

In 1969, at the height of public debate over the Vietnam conflict, the Supreme Court handed down its first decision confronting student speech rights.³⁸ In *Tinker*, three students planned to wear black armbands at school to protest the Vietnam

³³ See Emily Buss, *The Parental Rights of Minors*, 48 BUFF. L. REV. 785, 794 (2000).

³⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

³⁵ *Goss v. Lopez*, 419 U.S. 565, 576 (1975).

³⁶ See generally *In re Gault*, 387 U.S. 1 (1967).

³⁷ *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 75 (1976) (finding unconstitutional a state law requirement that minors under the age of eighteen must obtain parental consent before undergoing an abortion).

³⁸ *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

War. However, the school administration heard of their plans and issued an order forbidding the wearing of armbands at school and threatened suspension for any student who refused to comply.³⁹ The three students ignored the administration's order and were accordingly suspended after they refused to remove the armbands at school. An action against the school district shortly followed pursuant to 42 U.S.C. § 1983 seeking an injunction and nominal damages.⁴⁰

The Supreme Court, in an opinion authored by Justice Fortas, held that First Amendment rights were available to teachers and students, who did not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁴¹ The Court did not recognize an unlimited right to freedom of expression for students: conduct that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" was not protected speech.⁴² The Court observed, however, that "personal intercommunication among the students" was an integral part of the school experience and should not be unduly restricted unless it caused a material and substantial disruption in the discipline necessary to the operation of the school.⁴³ The students at issue had engaged in "pure" speech that had not caused disruption in the classroom or elsewhere and that speech was entitled to "comprehensive protection" by the First Amendment.⁴⁴

³⁹ *Id.* at 504.

⁴⁰ *Id.*

⁴¹ *Id.* at 506.

⁴² *Id.* at 512.

⁴³ *Id.* at 512, n.6 (citing *Hammond v. South Carolina State Coll.*, 272 F. Supp. 947 (D.S.C. 1967) (observing that a school is not a public institution like a hospital or jail, but a public place where students are entitled to express their views)).

⁴⁴ *Id.* at 505-06. While Justice Stewart concurred in the judgment, he did not share in the belief that the First Amendment rights of children and adults were the same outside the context of school discipline. He noted, for example, that the Court had decided just one term prior that children did not have the same First Amendment rights as adults when it came to sexually explicit publications. *Id.* at 515 (citing *Ginsberg v. New York*, 390 U.S. 629 (1968)) (finding that a "variable obscenity" standard applied to minors when

It would be seventeen years before another case on school speech came before the Court and the seemingly broad rule of *Tinker* would be circumscribed in the face of indecent speech.

B. Bethel School District No. 403 v. Fraser

At issue in *Fraser* was a high school student who addressed a student assembly to advocate on behalf of a fellow student running for elective office.⁴⁵ During this school-sponsored event, the student described the candidate in sexually laden innuendo. Students in the audience responded with reactions ranging from laughter to embarrassment.⁴⁶ The speaker was subsequently suspended for three days and removed from the list of potential student commencement speakers, having been found to be in violation of a school disciplinary rule prohibiting obscene or profane language.⁴⁷

The Supreme Court took this opportunity to fashion an exception to the relatively broad *Tinker* rule of protecting student speech by holding that the speech at issue in *Fraser* was

evaluating their right to view sexual materials that were not obscene as to adults). See *infra* Part III for discussion of *Ginsberg*. Justice Black furiously dissented, stating that it was “a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases.” *Id.* at 522. Further, he asserted that the Court was handing control of the school system over to the students and that school discipline would suffer accordingly. *Id.* at 524–25.

⁴⁵ *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 677 (1986).

⁴⁶ *Id.* at 678. Excerpts from the speech are as follows:

I know a man who is firm—he’s firm in his pants, he’s firm in his shirt, his character is firm—but most of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he’ll take an issue and nail it to the wall. He doesn’t attack things in spurts—he drives hard, pushing and pushing until, finally—he succeeds. Jeff is a man who will go the very end—even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president—he’ll never come between you and the best our high school can be.

Id. at 687 (Brennan, J., dissenting) (internal quotation marks omitted).

⁴⁷ *Id.* at 678.

“lewd and obscene,” and therefore undeserving of First Amendment protection.⁴⁸ In an opinion authored by Chief Justice Burger, the Court observed that one of the missions of public school education was to instill “fundamental values” such as “habits and manners of civility.”⁴⁹

Noting that even members of Congress had rules prohibiting the use of “indecent language,”⁵⁰ the Court found it no less appropriate that public schools could impose similar limits on student speech.⁵¹ Even though adults might not otherwise be censored for offensive political speech in public places, students did not have constitutional rights that are “co-extensive with the rights of adults in other settings.”⁵² For example, the Court noted its previous decision, *Ginsberg v. New York*, which held that a state could ban the sale of sexually oriented materials to minors even though the First Amendment protected their sale to adults.⁵³ Further, the court previously held in *FCC v. Pacifica Foundation* that the Federal Communications Commission could regulate “indecent,” but not “obscene,” radio broadcasts, because the program was aired at a time when children were in the audience.⁵⁴ Finally, the Court had already recognized that minors had more restricted rights under the First Amendment than adults as to sexual content, which justified the imposition of

⁴⁸ *Id.* at 680.

⁴⁹ *Id.* at 681.

⁵⁰ *Id.* at 681–82 (citing Jefferson’s Manual of Parliamentary Practice adopted by the U.S. House of Representatives, which prohibits the use of “impertinent” speech and “indecent language” in House proceedings).

⁵¹ *Id.* at 683.

⁵² *Id.* at 682. The Court differentiated between the adult defendant in *Cohen v. California*, 403 U.S. 15 (1971), who wore a jacket inscribed “Fuck the Draft” in a courthouse, and students using similar language in a school setting.

⁵³ *Id.* at 684 (citing *Ginsberg v. New York*, 390 U.S. 629 (1968), the same case at the focus of Justice Stewart’s concurrence in *Tinker*, where he wrote separately to reassert that children do not have the same constitutional rights as adults in all areas, such as sexually oriented materials) *see supra* Part II.A; *see also infra* Part III (discussing *Ginsberg*).

⁵⁴ *Id.* at 684–85 (citing *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978)).

penalties for the student's "vulgar and lewd speech" particularly when the comments were unrelated to any political discourse.⁵⁵

C. Hazelwood v. Kuhlmeier.

Within two years, the issue of student speech was back before the Court, this time as a result of the contents of a student newspaper. In *Kuhlmeier*, the student newspaper decided to publish an article on three high school students' experiences with pregnancy, and another article on the impact of divorce on students at the school.⁵⁶ The high school principal, who reviewed the paper prior to publication, was concerned that the article on pregnancy did not adequately protect the identity of the students involved, and that it contained references to birth control and sexual activity that was inappropriate for younger students.⁵⁷ Further, he was concerned that the article on divorce contained negative comments by a student about her father, who the principal believed should have been given an opportunity to respond.⁵⁸ Accordingly, he directed that the articles be deleted from the paper.⁵⁹

A five justice majority of the Supreme Court decided that the student newspaper could not be properly categorized as a "forum for public expression" deserving First Amendment protection. Rather, such a forum was only created when school facilities were opened to use by the general public.⁶⁰ The student newspaper was produced by a journalism class under the direction of a teacher, and as such, was a supervised curricular activity subject to reasonable regulation by school authorities.⁶¹

The Court therefore found the *Tinker* standard inapplicable, because the issue was not whether a school could restrict an individual student's speech content, but instead concerned

⁵⁵ *Id.* at 685.

⁵⁶ *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 263 (1988).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 264.

⁶⁰ *Id.* at 267.

⁶¹ *Id.* at 270.

“whether the First Amendment requires a school affirmatively to promote particular student speech.”⁶² School-sponsored activities such as newspapers and plays were associated with the school, rather than to the viewpoint of a particular student, and educators could therefore exercise greater control over student expression through supervised curricular activity, even if it did not take place in the traditional classroom setting.⁶³ Accordingly, the Court held that educators had a greater degree of control over student speech in school-sponsored activities as long as their restrictions were based on legitimate “pedagogical concerns.”⁶⁴

D. Morse v. Frederick.

The Court did not reexamine the issue of student speech for another nineteen years. When it did in 2007, another divided Court imposed an additional limitation on the *Tinker* standard.⁶⁵ In *Morse*, the Olympic Torch Relay was scheduled to pass in front of a high school in Juneau, Alaska, on its way to the Olympic winter games in Salt Lake City, Utah.⁶⁶ The students

⁶² *Id.* at 270–71.

⁶³ *Id.* at 271.

⁶⁴ *Id.* at 273. In dissent, Justice Brennan, joined by two other justices, bemoaned the majority’s unwarranted abandonment of the *Tinker* standard, concluding that the Court had never previously distinguished between a student’s expression of a personal viewpoint during school hours and expression during a school-sponsored event. Justice Brennan categorized the principal’s justifications for deleting the articles as motivated by a desire to suppress viewpoints he deemed too controversial for a school newspaper. The First Amendment, he said, would not permit such “viewpoint discrimination” and the *Tinker* standard only allowed schools to restrict student speech in the case of disruption or interference with the rights of others. No such showing was evident in this case. *Id.* at 282–83, 288 (Brennan, J., dissenting).

⁶⁵ *Morse v. Frederick*, 551 U.S. 393, 395 (2007). Although Chief Justice Roberts managed to command a majority consisting of Justices Scalia, Kennedy, Thomas, Alito, and Breyer, separate concurrences were issued by Justices Thomas, Alito, and Breyer, who also dissented in part. Stevens’ dissent was joined by Justices Souter and Ginsberg.

⁶⁶ *Id.* at 397.

were allowed out of class to watch the procession as part of a school approved and supervised social event. As the torch bearers and camera crews filming the event passed in front of the school, a group of students unfurled a fourteen foot banner that read “BONG HiTS 4 JESUS,” which was visible to students on the opposite side of the street. The principal, Morse, ran across the street and demanded that it be taken down. One student, Frederick, refused to comply, but the principal confiscated the banner and later suspended Frederick for ten days on the grounds that the banner promoted illegal drug use.⁶⁷

Chief Justice Roberts wrote for the Court that it was consistent with the First Amendment for a high school principal to restrict student speech during school activities if that speech “is reasonably viewed as promoting illegal drug use.”⁶⁸

The Court analyzed the prior student speech cases in order to emphasize that the speech protected in *Tinker* was political in nature, and was “at the core of what the First Amendment is designed to protect.”⁶⁹ The Court then addressed the finding in *Fraser*, that “offensively lewd and indecent speech” was undeserving of First Amendment protections. Although the Court was puzzled by the “mode of analysis” used by the *Fraser* Court, two principles emerged: (1) students and adults do not have co-extensive rights, and (2) the “mode of analysis” employed by the *Tinker* court was not the sole method of analyzing student speech.⁷⁰ Finally, the Court cited *Kuhlmeier* as confirming the Court’s interpretation of *Fraser*: schools may regulate speech used in schools, even though that speech would otherwise be protected in the public arena, and *Tinker* is not the

⁶⁷ *Id.* at 397–98.

⁶⁸ *Id.* at 403. The majority recognized that a problematic factual issue was the meaning of the phrase on Frederick’s banner, which the student maintained was pure nonsense only designed to attract the cameras so he could appear on television. Although the Court found the message to be “cryptic,” it was nevertheless considered reasonable for the principal to interpret the “bong hits” reference as being a pro-drug message. *Id.* at 401.

⁶⁹ *Id.* at 403 (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003)).

⁷⁰ *Id.* at 404–05 (citing *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

sole basis for student speech restrictions.⁷¹

Having demonstrated that *Tinker* may arguably apply only to political speech, the Court turned to the import of the message on Frederick's banner. The Court declined to extend the ruling in *Fraser* to include any speech that was offensive. Nevertheless, the banner did appear to promote illegal drug use, which the Court described as a serious national problem—one which school principals are justified in suppressing at school events when student speech appears to promote or condone drug usage. The principal was therefore justified in suppressing the student's expression.⁷²

⁷¹ *Id.* at 405 (citing *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 263 (1988)).

⁷² *Id.* at 409–10. Justice Thomas concurred with the holding that schools could suppress speech advocating drug usage, but on the grounds that the rule in *Tinker* had no constitutional basis. *Id.* at 410 (Thomas, J., concurring). In a classic originalist interpretation, Justice Thomas drew a bright line between the First Amendment and student speech, based on the history of public school education in the United States beginning in colonial times. For a spirited refutation of originalism, see Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1 (2009). According to Justice Thomas, students did not historically enjoy any speech rights in public schools until the Court's ruling in *Tinker*, and the only limitation on the ability of administrators to enforce school discipline came in the context of corporal punishment that was "clearly excessive." Rather, the doctrine of *in loco parentis* historically gave administrators unrestricted license to control the conduct of students entrusted to their care. Accordingly, he would have overruled *Tinker* and returned to a policy of complete deference to the decisions of school administrators. *Morse*, 551 U.S. at 410–22. Justice Alito, joined by Justice Kennedy in concurrence, stated that they joined the majority only for its reaffirmation of the *Tinker* standard, and that the majority opinion was limited to holding that (1) public schools could restrict speech that could plausibly be interpreted as advocating use of illegal drugs, and (2) a restriction of speech directed to political or social issues such as "the wisdom of the war on drugs or of legalizing marijuana for medicinal use," was unsupportable. *Id.* at 422 (Alito, J., dissenting). Justice Stevens' dissent characterized the banner message as nonsensical—ambiguous at best—and as directed by students to a television camera crew rather than to other students. Although he agreed that the principal should have been shielded from liability, Justice Stevens believed the disciplinary measures employed were uncalled for in light of the fact that the banner "contained [merely] an oblique reference to drugs." In his

E. The Remains of Tinker after Morse: The Boundaries of Minors' Free Expression Rights in School.

In the aftermath of the Court's decision in *Morse*, the *Tinker* standard still remains, although not entirely intact. While critics have suggested that the Court has implicitly abandoned *Tinker*, leaving no "comprehensive First Amendment approach to public education,"⁷³ the Court has yet to explicitly abandon the *Tinker* approach, choosing to carve out exceptions on a case by case basis. Given the Court's continued reliance on *Tinker*, it is still fair to say that "pure speech" by students with an overtly political message, whether it occurs in the classroom, on school grounds or during school-sponsored activities, receives the Court's highest level of protection unless it "materially disrupts classwork or involves disorder or invasion of the rights of others" ⁷⁴

However, the school can still place limitations on the content of speech if it is deemed "vulgar and offensive" or "sexually explicit, indecent or lewd" ⁷⁵ Further, expression regarding politically sensitive topics such as teen pregnancy and the effect of divorce on teens can be suppressed if it is made in the context of school-sponsored events, such as student newspapers or school plays, where the message might be interpreted as sanctioned by the school. ⁷⁶ In that case, an administrator's actions to curb such expression would be considered "reasonably

opinion, the message on the banner neither violated any rule nor advocated illegal conduct. Accordingly, the student's First Amendment rights had been violated. Justice Stevens stated that the fact that the banner contained a reference to "drug paraphernalia," was no justification for abandoning the rule of *Tinker*, which required a showing of disruption to the school's operation or some interference with the rights of others. There was no such showing in the present circumstances. *Id.* at 434-38.

⁷³ Curtis G. Bentley, *Student Speech in Public Schools: A Comprehensive Analytical Framework Based on the Role of Public Schools in Democratic Education*, 2009 B.Y.U. EDUC. & L.J. 1, 34-35 (2009).

⁷⁴ *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

⁷⁵ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683-84 (1986).

⁷⁶ *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

related to legitimate pedagogical concerns.”⁷⁷ Finally, schools are free to limit speech reasonably seen as promoting illegal drug use at school events.⁷⁸

F. Criticism Abounds

The foregoing summary of student speech rights demonstrates that school administrators might reasonably be confused when deciding what constitutes permissible student conduct. As Justice Alito remarked: “Teachers are neither lawyers nor police officers; and the law should not demand that they fully understand the intricacies of our First Amendment jurisprudence.”⁷⁹ It is not surprising, then, that legal scholars have offered alternatives to *Tinker* and its progeny. The Court’s decision in *Morse*⁸⁰ has generated scholarly commentary as divergent as the opinions of those justices who confronted the issue of student speech rights.

One former public school teacher sided with Justice Thomas in arguing that the *Tinker* doctrine should be abandoned in favor of a policy of deference to the policies and decisions of school administrators.⁸¹ Instead of recognizing a presumptive protection of student speech, subject to the “ad hoc exceptions” of *Fraser*, *Kuhlmeier* and *Morse*, Jay Braiman suggests that there be a “presumption of reasonableness” for school disciplinary policies, with the burden of proof placed on the student to prove otherwise.⁸² Finally, Braiman recommends that private law principles of tort and contract law, rather than constitutional doctrine, should govern the relationship between students and school officials.⁸³

⁷⁷ *Id.*

⁷⁸ *Morse v. Frederick*, 551 U.S. 393, 403 (2007).

⁷⁹ *Id.* at 427 (Alito, J., concurring).

⁸⁰ *See supra* Part II.D.

⁸¹ Jay Braiman, Note, *A New Case, an Old Problem, a Teacher’s Perspective: The Constitutional Rights of Public School Students*, 74 BROOK. L. REV. 439 (2009).

⁸² *Id.* at 469.

⁸³ *Id.* at 476.

Another commentator agrees that the courts should defer to the actions of school officials by adopting a presumption of constitutionality.⁸⁴ Curtis Bentley recognizes that the First Amendment is applicable to student speech, but argues that constitutional protection should only be afforded to the extent necessary to protect the “public school’s role in democratic education.”⁸⁵ He defines this role as “the inculcation in young students of the essential democratic values of nonrepression and nondiscrimination.”⁸⁶ Essentially, Bentley advocates a bright line test in favor of judicial protection only for political speech, with the burden shifted to the student to prove that the regulation of student speech would not serve the school’s educational role in a democracy: the “preparation of citizens to be effective and responsible civil participants.”⁸⁷

One intriguing view of the *Morse* decision proposes to abandon *Tinker* and its progeny in favor of a “relaxed *Brandenburg* application.”⁸⁸ Recall that the dissent in *Morse* argued that the promotion of illegal drug use was not one of the categories of speech left unprotected by the constitution, such as “incitement to imminent lawless action” prohibited by the Supreme Court’s decision in *Brandenburg v. Ohio*.⁸⁹ Even though neither the dissent nor the majority in *Morse* suggested that *Brandenburg* was the appropriate test to be applied to student speech, Steven Penaro argues that a modified version should apply to student speech in the school context.⁹⁰ While a strict application of *Brandenburg* would require that the government prove the speaker “intend[ed] to incite an imminent unlawful act” and such an act immediately followed,⁹¹ Penaro

⁸⁴ Bentley, *supra* note 73, at 35.

⁸⁵ *Id.* at 3–4.

⁸⁶ *Id.*

⁸⁷ *Id.* at 32, 35.

⁸⁸ Steven Penaro, *Reconciling Morse with Brandenburg*, 77 *FORDHAM L. REV.* 251, 278 (2008) (emphasis added).

⁸⁹ *Morse v. Frederick*, 551 U.S. 393, 436 (2007) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969)).

⁹⁰ Penaro, *supra* note 88, at 269.

⁹¹ *Id.* at 266.

argues that because these elements are difficult to prove, the strict application of the *Brandenburg* test would provide nearly unlimited protection under the First Amendment.⁹² Instead, he suggests relaxing the requirement of imminence for both the “intent and effects prongs” of the *Brandenburg* test to both protect student speech under the First Amendment and give school officials the ability to sustain an orderly environment.⁹³

The *Morse* decision has also been criticized for failing to assist school administrators in resolving the issue of “where, for free-speech purposes, the school stops and the public square begins.”⁹⁴ In Richard Garnett’s view, the Court has never directly addressed a key issue in the debate over free speech rights: boundaries of what may serve as the “basic educational mission” of the public school system.⁹⁵ This is an important question as the Courts have long justified restriction of minor speech based on the “special characteristics of the school environment,”⁹⁶ but the Court has failed to provide any in-depth explanation of these special characteristics.⁹⁷ To fill this void, Garnett describes public schools as “government-run institutions, charged with forming and shaping students’ values, loyalties, commitments and manners.”⁹⁸ While universities might be considered “First Amendment institutions” which “play a significant role in contributing to public discourse,” Garnett argues that public schools on the kindergarten through secondary levels would more properly be categorized as “anti-First Amendment—or, perhaps, pre-First Amendment—institutions” where the government must take on a more “managerial” role to fulfill its mission of preparing children to be good citizens later

⁹² *Id.*

⁹³ *Id.* at 286.

⁹⁴ Richard W. Garnett, Symposium, *Speech and the Public Schools after Morse v. Frederick: Can There Really Be “Free Speech” in Public Schools?*, 12 LEWIS & CLARK L. REV. 45, 46 (2008).

⁹⁵ *Id.* at 47.

⁹⁶ *Id.* at 51 (citing *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

⁹⁷ *Id.* at 47.

⁹⁸ *Id.* at 55.

in life.⁹⁹

The difficulty with the *Tinker* alternatives proposed above is the overwhelming deference given to school administrators in deciding the limits of permissible student speech, reminiscent of the positions of Justice Black in *Tinker*¹⁰⁰ and Justice Thomas in *Morse*.¹⁰¹ These approaches are also problematic in that they give school officials such wide latitude in instilling the “fundamental values” such as “habits and manners of civility” that was the Court’s objective in *Fraser*.¹⁰² Whose values? Whose habits? One senses the imposition of majoritarian values and habits—a tendency in government institutions that the First Amendment is supposed to prevent.¹⁰³ Furthermore, these suggested frameworks fail to take into account the constitutional protections of human sexuality.¹⁰⁴ However, sexual expression seems to be at the low end of the constitutional spectrum for minors in the First Amendment context, as demonstrated by *Fraser* and *Kuhlmeier*. Considering that decisions related to sex and reproduction are treated by the court as fundamental liberties for adults,¹⁰⁵ it is paradigmatic that minors are treated differently than adults by

⁹⁹ *Id.* at 58–59.

¹⁰⁰ *Tinker*, 393 U.S. at 524–25 (Black, J., dissenting) (arguing that giving students First Amendment guarantees is tantamount to surrendering control of the schools to students).

¹⁰¹ *Morse v. Frederick*, 551 U.S. 393, 410–11 (2007) (Thomas, J., concurring) (asserting that the First Amendment was never understood to protect student speech from a historical perspective).

¹⁰² *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (quoting *Ambach v. Norwich*, 441 U.S. 68, 76–77 (1979)).

¹⁰³ *Id.* at 689–90 (Brennan, J., concurring) (“School officials do not have limitless discretion to apply their own notions of indecency. Courts have a First Amendment responsibility to insure that robust rhetoric is not suppressed by prudish failures to distinguish the vigorous from the vulgar.”) (citing *Thomas v. Bd. of Educ., Granville Central School Dist.*, 607 F.2d 1043, 1057 (2d Cir. 1979)).

¹⁰⁴ The sexual privacy interest of married couples has been recognized by the Court as a fundamental right in *Griswold v. Connecticut*, 381 U.S. 479 (1965). This protection has been extended to the context of abortion by *Roe v. Wade*, 410 U.S. 113 (1973), and to the context of homosexuality by *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁰⁵ *See id.*

the Court when it comes to the extent of their right to express themselves when that expression relates to sex. This is problematic when applying the First Amendment to expression that involves sexting.

III. JUDICIAL LIMITATIONS ON A MINOR'S RIGHT TO SEXUAL EXPRESSION

Adults may freely purchase and trade pornographic material that does not rise to the level of "obscenity" under the *Miller* test,¹⁰⁶ and any governmental restriction in this area will be subject to the Court's strict scrutiny test: the governmental interest must be compelling and it must choose the least restrictive means of furthering that interest.¹⁰⁷ However, a different standard applies to minors.

The seminal case relating to the First Amendment rights of minors in the context of sexually explicit material is *Ginsberg v. New York*.¹⁰⁸ *Ginsburg* impacted juvenile rights in two ways: (1) it adopted the more relaxed rational relationship standard for analyzing statutes seeking to protect minors from exposure to sexual materials; and (2) it endorsed the variable obscenity doctrine so that minors can be shielded from speech that would otherwise be protected under the First Amendment as to adults.

In *Ginsberg* a store owner was convicted for violating a New York criminal obscenity law that prohibited the sale of "harmful materials" to minors under seventeen.¹⁰⁹ The harmful materials were defined by the statute as "any picture, photograph,

¹⁰⁶ *Miller v. California*, 413 U.S. 15, 24–25 (1973) inquires: "(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." *Id.* at 24 (internal quotation marks omitted).

¹⁰⁷ *Sable Communications of Cal. v. F.C.C.*, 492 U.S. 115, 125–26 (1989).

¹⁰⁸ *Ginsberg v. New York*, 390 U.S. 629 (1968).

¹⁰⁹ *See id.* at 631–32 (citing N.Y. PENAL LAW § 484-h).

drawing, sculpture, motion picture film or similar visual representation or image of a person or portion of the human body which depicts nudity [or] sexual conduct . . . when it (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community . . . and (iii) is utterly without redeeming social importance for minors.”¹¹⁰

A sixteen year old boy was sent by his mother to the store owner’s lunch counter on Long Island to buy “girlie magazines” so she could make a complaint to the police.¹¹¹ The Court upheld the shop owner’s conviction by examining the facial validity of the statute, which created an obscenity as to minors standard, even though the same material would not necessarily be considered obscene as to adults.¹¹² The Court explicitly recognized that the types of pictures contained in the magazines were not “obscene” for adults under a long line of cases previously decided by the Court.¹¹³

The Court then embraced the concept that the definition of obscenity might vary according to the group of persons the state sought to protect from harm. Because it was already established that the state had an “exigent interest” in protecting the “health, safety, welfare and morals of its community,” materials the state found only suitable for adults could be considered obscene for the purposes of restricting their distribution to children.¹¹⁴

The Court further justified its adoption of the variable obscenity standard on the grounds that although decisions regarding the exposure of children to sexually related materials were primarily within the scope of parental authority, the state also had an “independent interest in the well-being of its

¹¹⁰ *Id.* at 645–47 (citing N.Y. PENAL LAW § 484-h(1)(f)).

¹¹¹ *Ginsberg*, 390 U.S. at 671–72 (Fortas, J., dissenting).

¹¹² *See id.* at 631.

¹¹³ *Id.* at 634–35 n.3.

¹¹⁴ *Id.* at 636 (citing *Bookcase, Inc. v. Leary*, 218 N.E.2d 668 (2d Cir. 1966); *see also id.* at 636 n.4 (citing William B. Lockhart & Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960), which set forth the “variable obscenity” standard now embraced by the Court).

youth.”¹¹⁵ This interest justified the state in protecting children from such materials even though adults could not be similarly restricted.¹¹⁶

Furthermore, because obscenity was not constitutionally protected speech,¹¹⁷ the Court did not apply the strict scrutiny test normally employed in First Amendment analysis.¹¹⁸ Rather, in determining the statute’s validity, the Court addressed the issue of whether the statute was rationally related to the state’s interest in preventing the harm caused to children by exposure to obscene materials.¹¹⁹ Despite the lack of studies finding a causal link between harm to children and exposure to sexually oriented material, the Court held that the state did not require scientific certainty to support its position that “it was not irrational for the legislature to find that exposure to material condemned by the statute [was] harmful to minors.”¹²⁰ The Court therefore declined to conclude that there was no rational basis for the statute.¹²¹

¹¹⁵ See *Ginsberg*, 390 U.S. at 639–40.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 635 (citing *Roth v. United States*, 354 U.S. 476, 485 (1957)).

¹¹⁸ See *Ginsberg*, 390 U.S. at 641–42.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 641.

¹²¹ *Id.* at 643. Justice Stewart concurred, arguing that just as the state can limit a minor’s right to contract, vote or marry based on lack of capacity, so could the state place limits on a minor’s right to sexually oriented materials, even though that would be constitutionally impermissible for adults. *Id.* at 649–50 (Stewart, J., concurring). Justice Douglas, who was joined by Justice Black, dissented on the grounds that the First Amendment was “designed to keep the state and the hands of all state officials off the printing presses of America” The dissent traced the history of obscenity laws back to the crusade of übermoralist Anthony Comstock and the resultant Federal Anti-Obscenity Act of 1873 to conclude that any definition of obscenity was “highly subjective, turning on the neurosis of the censor.” In his view, the only basis for the government to engage in censorship was a constitutional amendment creating a national censorship authority. Cases such as *Ginsberg* forced the Court into that role, and left censorship decisions to a group of judges were supremely unqualified to act as a board of censors. *Id.* at 655–56 (Douglas, J., dissenting).

Justice Fortas added his own dissent, protesting that the Court had abdicated its duty to decide whether the materials at issue in the case were

Pacifica Foundation v. FCC, added another dimension to the Court's approach to adolescents and sexual materials.¹²² In *Pacifica*, the Federal Communications Commission (FCC) found that a radio station's broadcast of a monologue by comedian George Carlin entitled "Filthy Words" violated 18 U.S.C. § 1464, which prohibited a radio station from broadcasting "obscene, indecent or profane language."¹²³ The FCC decided that the broadcast contained "patently offensive" language relating to sexual and excretory activity, which could be considered indecent within the meaning of the statute because it was broadcast during the afternoon hours when children could be exposed to it.¹²⁴

A plurality of the Supreme Court supported the FCC's determination, finding that the monologue was indecent "as broadcast" because (1) broadcasting received limited First Amendment protection due to its "pervasive presence" in the homes of the public; and (2) broadcasting was easily accessible to children.¹²⁵ Relying on its prior decision in *Ginsberg*, the Court confirmed that the government had a justifiable interest in the "well-being of its youth" that supported this special treatment of the broadcast medium.¹²⁶ Although the Court's decision in *Pacifica* has recently come under renewed scrutiny,¹²⁷ the FCC continues to restrict the use of indecent language on the rationale of harm to children.

The lower level of judicial scrutiny and the variable

obscene, using the rather slight excuse that counsel had failed to raise the issue. He believed that the Court had overly expanded the power of the state in an area that was the domain of the family, and the statute read so broadly that it could equally apply to great works of art as to girlie magazines. *Id.* at 673-74 (Fortas, J., dissenting).

¹²² *Pacifica* was cited by the Court in *Fraser* as justification for allowing school officials to restrict speech considered vulgar or indecent. *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 676 (1986); *see also supra* note 54 and accompanying text.

¹²³ *Pacifica v. F.C.C.*, 438 U.S. 726, 730-31 (1978).

¹²⁴ *Id.* at 731-32.

¹²⁵ *Id.* at 748-49.

¹²⁶ *Id.* at 749-50.

¹²⁷ *See F.C.C. v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009).

obscenity standard adopted by the Court in *Ginsberg* and *Pacifica* combined with the misguided paternalism of *Fraser* appear to be an abdication of judicial scrutiny regarding government control over exposure of minors to sexual material.¹²⁸ However, there now appears to be some question regarding the continuing validity of the *Pacifica* decision. The Court's recent decision, *Fox v. FCC*, held that the FCC's adoption of a new policy forbidding the use of the "fleeting expletive" in the broadcast context was neither arbitrary nor capricious within the meaning of the Administrative Procedures Act.¹²⁹ Although the Court did not reach the issue of the validity of the FCC restrictions under the First Amendment, much was said about it in concurrence and dissent. Justice Thomas wrote separately to concur with the result, but questioned whether the scarcity of broadcast frequencies and the accessibility of broadcast materials to children justified application of the *Pacifica* rational review standard.¹³⁰ Namely, Thomas argued that broadcast frequencies were no longer in short supply as they were when *Pacifica* was decided due to technological advances, so there was no longer any justification for treating broadcast stations any differently than other media.¹³¹

Further, Justice Thomas noted that the Court had more recently refused to apply a lesser standard of First Amendment scrutiny for broadcast speech in the context of telephone dial-in services, cable television and the Internet.¹³² Nor was broadcast television the "uniquely pervasive" form of media it had once

¹²⁸ See S. Elizabeth Wilborn, *Teaching the New Three Rs—Repression, Rights and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119,154 (1995) ("The deferential approach set forth in *Hazelwood* is a virtual abdication of the judicial obligation to protect the First Amendment rights of students.").

¹²⁹ *F.C.C. v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1812 (2009) (interpreting 5 U.S.C. § 706(2)(a) of the Administrative Procedures Act).

¹³⁰ *Id.* at 1820 (Thomas, J., concurring).

¹³¹ *Id.* at 1821.

¹³² *Id.* (citing *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1994); *Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115 (1989)).

been due to the advent of the bundling of broadcast channels with unregulated satellite and cable services, as well as the ability to access programming through the Internet, cell phones and other wireless devices.¹³³ He concluded that he was “open to reconsideration of . . . *Pacifica* in the proper case.”¹³⁴

Justice Ginsburg joined the dissent of Justice Breyer, who would have found the FCC’s change in policy arbitrary and capricious,¹³⁵ but she wrote separately to note her disagreement with the FCC’s new policy, which could not “hide in the long shadow the First Amendment casts”¹³⁶ Essentially, Ginsburg appeared to agree with Thomas that there was no longer any justification for restricting all speech on the basis of spectrum scarcity, nor did all speech need to be restricted, including that of adults, because of some vague threat of harm to children.

Just as the basis for the *Pacifica* decision seems anachronistic, *Ginsberg* has also been criticized on the basis that its “brick and mortar” approach does not fit in an electronic world.¹³⁷ One scholar examined the attempts by Congress to protect children from indecent materials on the Internet and the subsequent court decisions that found them unconstitutional.¹³⁸ Kevin Saunders observed that although the Court in these cases found the government’s interest in shielding children from indecent materials compelling, the statute appeared insufficiently tailored to that goal, because too much adult speech would be filtered as well. He suggested several technological approaches to address the problem.¹³⁹

Although *Ginsberg* and *Pacifica* have not been overruled, they have been generally recognized as unsuitable to modern

¹³³ *Id.* at 1822.

¹³⁴ *Id.*

¹³⁵ *Id.* at 1829 (Breyer, J., dissenting).

¹³⁶ *Id.* at 1828 (Ginsburg, J., dissenting).

¹³⁷ Kevin W. Saunders, *www.Sam’s_Stationery_and_Luncheonette.com: Bringing Ginsberg v. New York into the Internet Age*, 2007 B.Y.U. L. REV. 1661, 1675 (2007).

¹³⁸ *See generally id.*

¹³⁹ *Id.* at 1669–70.

culture and technology. However, minors continue to have much less freedom in the context of sexual expression, which makes application of the First Amendment to sexting difficult, as the following analysis will show.

IV. SEXTING AND THE FIRST AMENDMENT

A. The Appropriate Constitutional Analysis for Sexting

The Constitutional implications of sexting by students in the public school environment involve a complicated intersection between the *Tinker* line of student speech cases and the *Ginsberg/Pacifica* cases on obscenity/indecency as to minors, as well the implications of the *Ferber* obscenity decision, which held that child pornography is a category of obscene expression unprotected by the First Amendment.¹⁴⁰ No court has yet faced this analytical minefield, leaving school administrators without guidance when facing this relatively new phenomenon. It is no wonder that the reaction of most administrators has apparently been to refer the matter to the police so the administration is relieved of any further responsibility.¹⁴¹ However, administrators are probably as divided as the courts when facing the issue of how to respond to teenage sexuality and freedom of sexual expression in schools. For example, the *Ginsberg* Court was heavily divided on the variable obscenity standard as to minors because the minority believed that defining obscenity is a subjective task, and decisions regarding the exposure to or tolerance of sexual materials are best left to parents.¹⁴² On the other hand, the Court has asserted that the public school system has a duty to instill “habits and manners of civility” as well as “teaching students the boundaries of socially appropriate behavior.”¹⁴³

Unfortunately, there is no simple, uniform response to the

¹⁴⁰ *New York v. Ferber*, 458 U.S. 747, 764 (1982).

¹⁴¹ See sources cited *supra* note 15.

¹⁴² See *Ginsberg v. New York*, 390 U.S. 629, 656, 674 (1968) (Douglas, J., dissenting) (Fortas, J., dissenting).

¹⁴³ *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 681 (1986).

issue of sexting by students, which is precisely why a zero tolerance approach—responding to student sexting by simply turning the student over to the police, without evaluating the constitutional considerations—is not the answer. Administrators who are faced with sexting issues must balance many interests in deciding what action to take, including the protection of students from sexual exploitation or harm, the orderly conduct of the school environment, and the preservation of students’ constitutional liberties. The following legal analysis is intended as a guideline for the development of school policies in that regard.

To determine whether a particular photograph in the possession of a student deserves protection under the First Amendment requires a multi-faceted inquiry: (1) has it disrupted the educational mission of the school, promoted illegal and/or dangerous activity in the context of a school-sponsored activity, or been a public display of “vulgar and offensive” or “sexually explicit, indecent or lewd” material; (2) if so, does it constitute obscene material, such as child pornography, under an applicable statute; (3) if not obscene under the adult standard, does it fall within the obscenity as to minors prohibition under an applicable statute? If the answer to the first query is “no,” then even if the material would arguably constitute child pornography, the administrator should err on the side of protecting the minor’s free expression rights, rather than putting the child at risk for criminal liability. If the material meets any of the foregoing criteria, then the administrator would not be violating the minor’s First Amendment rights by prohibiting the expression and administering discipline for its presence in school. It is advisable though that, in most circumstances, the administrator issue such discipline not by turning the offending material over to the authorities, but rather by turning it over to the child’s parents, who are better suited to determine what material is or is not appropriate for their own child.

The first inquiry concerns the non-commercial possession or distribution of pictures in a school setting where minors’ constitutional rights are not co-extensive with adults or even as great as minors’ rights outside of the school environment. The

lesson from *Tinker* is that students do not lose their constitutional rights upon entering the school grounds.¹⁴⁴ The *Tinker* Court specifically held that “personal intercommunication among students” was a protected activity if no disruption has occurred.¹⁴⁵ However, sexually themed pictures on cell phones or other devices do not typically constitute the kind of “pure” political speech envisioned by the *Tinker* Court. One must then determine whether possession or distribution of the picture “materially disrupts classwork or involves disorder or invasion of the rights of others”¹⁴⁶ If the picture has been created and displayed voluntarily, there should be no claim of invasion of personal rights by the student who is pictured. Further, if no “disruption” occurs as a result of the viewing or distribution, *Tinker* would arguably protect the activity.

Under these circumstances, administrative discipline would only be appropriate if the possession or distribution of these photographs fit into one of the exceptions to *Tinker*.¹⁴⁷ The exception most likely to apply in this scenario would be the one carved out in *Fraser*,¹⁴⁸ where it was held permissible to discipline a student for lewd and vulgar sexual remarks during an address to an assembly.¹⁴⁹ If such pictures are distributed to an audience of students on school grounds or during a school-sponsored event, administrators may arguably take action to discipline the offenders under the *Fraser* exception. On the other hand, if the picture is merely displayed on a student’s cell phone, perhaps to a limited number of fellow students, the *Fraser* prohibition would not necessarily be applicable, nor would it be desirable considering the importance of not unduly restricting “personal intercommunication among students.”¹⁵⁰

Accordingly, on the more innocuous end of the spectrum is

¹⁴⁴ See *supra* note 42 and accompanying text.

¹⁴⁵ *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969).

¹⁴⁶ See *supra* Part II.A.

¹⁴⁷ See *supra* Part II.F.

¹⁴⁸ See *supra* Part II.B.

¹⁴⁹ *Id.*

¹⁵⁰ *Tinker*, 393 U.S. at 512 (internal citation omitted).

the student who has his or her phone confiscated for use during school hours and a prying teacher discovers racy photographs of a fellow student on the phone.¹⁵¹ More egregious is the situation where the boyfriend argues with his girlfriend and sends nude photos intended solely for private use to the rest of the high school student body, resulting in substantial disruption in classes, as well as embarrassment to the girlfriend.¹⁵² These two scenarios arguably do not merit the same response, although perpetrators in both such circumstances have been handed over to the police and charged with possession or distribution of child pornography.¹⁵³ Under this more appropriate policy, only the latter of these circumstances would be subject to discipline, as the communication would not warrant protection under the First Amendment.

If the communication is not protected by the First Amendment, the administrator would then need to determine whether it constituted child pornography. It is well settled that child pornography is a category of obscene material that does not merit protection under the First Amendment.¹⁵⁴ What constitutes child pornography must be properly defined under state law, be limited to visual depictions of sexual conduct by children below a certain age, the type of prohibited sexual conduct must be adequately described, and the law must contain an element of scienter.¹⁵⁵ The fact that a minor takes a photograph of him or herself nude or semi-nude and sends it to a friend should not typically justify prosecution under child pornography laws, which are meant to shield children from adult predators. However, that is a matter of prosecutorial discretion because the majority of child pornography laws do not typically

¹⁵¹ See Davies, *supra* note 15; *Two Mason Teenagers Charged In "Sexting" Case*, *supra* note 15; text accompanying note 15.

¹⁵² See *Castalia Police Look Into Complaint of Nude Photos Sent By Cell Phone*, *supra* note 15 and accompanying text.

¹⁵³ See Davies, *supra* note 15; *Two Mason Teenagers Charged In 'Sexting' Case*, *supra* note 15; *Castalia Police Look Into Complaint of Nude Photos Sent By Cell Phone*, *supra* note 15.

¹⁵⁴ *New York v. Ferber*, 458 U.S. 747, 764 (1982).

¹⁵⁵ *Id.* at 764-65 (footnote omitted).

differentiate between minors who produce or possess the photos and adults.

For example, under the New York statute prohibiting child pornography upheld by the Court in *Ferber*, sexual conduct was defined as “actual or simulated intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals” involving a child under sixteen.¹⁵⁶ The Pennsylvania statute at issue in the sexting case similarly defined child pornography in those terms for minors under eighteen.¹⁵⁷

If the conduct depicted in the pictures does not meet the sexual conduct definition of the state’s child pornography statute—i.e., it does not show sexual activity or genitalia—the material is not obscene as to adults under *Ferber*. However, that does not necessarily mean the pictures are protected by the First Amendment. The variable obscenity standard adopted by *Ginsberg* holds that materials not considered obscene as to adults could nevertheless be considered obscene as to minors, and thus subject to control.¹⁵⁸ Therefore, a state statute can arguably hold children who voluntarily and non-commercially exchange photographs—which would not fit the definition of child pornography—to a different standard than adults and survive constitutional scrutiny, which was the subject of the *Ginsberg* decision.¹⁵⁹ On the other hand, if such exchange is voluntary and non-commercial, it would arguably be protected under the First Amendment. No court has addressed this issue as of yet.

B. Why Zero Tolerance Of Sexting Is Poor Policy

While the *Ginsberg* Court held that despite a lack of scientific certainty, it was not irrational to conclude that exposure to sexual materials is harmful to minors,¹⁶⁰ such

¹⁵⁶ *Id.* at 751.

¹⁵⁷ *Miller v. Skumanick*, 605 F. Supp. 2d 634, 637–38 (M.D. Penn. 2009) (citing 18 PENN. STAT. § 6312 (2008)).

¹⁵⁸ *See supra* Part III.

¹⁵⁹ *Ginsberg v. New York*, 390 U.S. 629, 629 (1968).

¹⁶⁰ *Id.* at 641–43.

communications are arguably a typical and vital aspect of normal sexual development.¹⁶¹ Citing numerous law review articles on both sides of this issue, the Court deferred to the collective wisdom of the state legislature in regards to shielding minors from pornography.¹⁶² However, minors do not suddenly develop their sexuality upon reaching the magic age of eighteen or graduating from high school. It is a process that begins at birth and continues throughout childhood as they go through various physical and mental developments.¹⁶³ Sexual behavior that is common among children from ages seven to twelve includes “[l]ooking at pictures of naked or partially naked people” and “[v]iewing/listening to sexual content in media”¹⁶⁴ If this is normal behavior in grade school children, our society should not be shocked by the same behavior in high school students who have passed the age of puberty. As far back as 1953, the Kinsey Report found that forty-five percent of women and fifty-seven percent of men had engaged in some kind of sexual play by age twelve.¹⁶⁵ More recent studies found even higher percentages of early sexual activity.¹⁶⁶ Therefore, adopting a zero

¹⁶¹ See, e.g., THE NATIONAL CHILD TRAUMATIC STRESS NETWORK, SEXUAL DEVELOPMENT AND BEHAVIOR IN CHILDREN: INFORMATION FOR PARENTS AND CAREGIVERS 1-3 (2009), available at http://nctsn.org/nctsn_assets/pdfs/caring/sexualdevelopmentandbehavior.pdf.

¹⁶² *Ginsberg*, 390 U.S. at 642 n.10.

¹⁶³ See, e.g., The National Child Traumatic Stress Network, *supra* note 161, at 1-3.

¹⁶⁴ *Id.* at 2 (citation omitted).

¹⁶⁵ Dana M. Northcraft, Book Review, *A Nation Scared: Children, Sex, and the Denial of Humanity: A Review Essay on Judith Levine's Harmful to Minors: The Perils of Protecting Children from Sex*, 12 AM. U. J. GENDER SOC. POL'Y & L. 483, n.24 (2004) (citing ROBERT CROOKS & KARLA BAUR, OUR SEXUALITY 383 (6th ed. 1996)).

¹⁶⁶ *Id.* Northcraft discusses how Levine links the modern moral panic over minor sexuality to the unusual confluence of two radically different groups: the religious right and sexually conservative feminists, who joined forces in response to the 1986 Meese Commission. *Id.* at 494. The religious right contends that sex is only permissible in the context of marriage and supports abstinence-only sex education. *Id.* at 494-95. The “sex-conservative feminists” raise concerns about sexual abuse, which resulted in increased concerns about sexual abuse of children. *Id.* at 496. Further, the 1986 Meese

tolerance approach to such perfectly natural human behavior is irrational and unrealistic.

Furthermore, the uncertainty concerning the constitutionality of sexting in public schools makes a zero tolerance approach perilous at best. Zero tolerance policies have come under increasing scrutiny because of their ineffectiveness. Zero tolerance is understood as a policy “that applies a prescribed, mandatory sanction for an infraction—typically expulsion or suspension—with minimal, if any, consideration of the circumstances or consequences of the offense”¹⁶⁷ The result of these policies has not been a decrease in crime, but a rise in student expulsions.¹⁶⁸ School crime rates have been stable for twenty years, while suspensions have almost doubled during that time.¹⁶⁹ Consequently, not only are these policies ineffective in reducing crime, but they have led to an increase in juvenile prosecutions due to the requirement that these students be referred to law enforcement.¹⁷⁰ Further, a comprehensive study by Harvard University “concluded that the policy is unfair, breeds distrust and confrontations between students and teachers and denies core educational and developmental needs of students.” Accordingly, the profound long-term impact of

Commission “conclud[ed] that pornography was tantamount to violence against women.” *Id.* at 497 (internal citation omitted). Thus both groups have impacted public opinion and legislative policy with the result that mainstream sex and reproductive health advocacy groups have been compromised in their work. *Id.* at 497–98.

¹⁶⁷ Eric Blumenson & Eva Nilson, *One Strike and You’re Out? Constitutional Restraints on Zero Tolerance in Public Education*, 81 WASH. U. L.Q. 65, 68 (2003). The advent of zero-tolerance policies is traced to the federal Gun Free Schools Act of 1994, which required states to adopt mandatory expulsion policies for students caught with weapons in school, as well as referral to law enforcement. All fifty states enacted the required policy in order to retain federal funding, but a majority of states extended zero-tolerance to other school infractions, such as the use of drugs, alcohol and tobacco, sometimes even if the behavior occurred outside of school grounds.

¹⁶⁸ *Id.* at 71.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 74.

denying an education to millions of students is not justified by zero tolerance policies that have not been proven effective.¹⁷¹ Not only has the social utility of zero tolerance been questioned, but its constitutionality has been challenged as well.¹⁷² As previously observed by the Court, one cannot reasonably expect school administrators to master such legal nuances.¹⁷³ A better solution lies in a policy that prioritizes its students' free expression rights such that students are protected from unnecessary harms.

CONCLUSION

The application of zero tolerance policies to First Amendment expression that neither unduly disrupts the school environment, nor constitutes child pornography, is a disproportionate approach that negatively affects minors and a society that purports to obey the maxim: "let the punishment fit the crime."¹⁷⁴

¹⁷¹ *Id.* at 86.

¹⁷² *See id.* at 87–116 (discussing thoroughly the constitutional right to an education). For example, one commentator asserts that a school policy banning students from possessing contraceptives or other legal medications is a violation of a student's right to privacy under the Fourteenth Amendment. Elisabeth Frost, Note & Comment, *Zero Privacy: Schools are Violating Students' Fourteenth Amendment Right of Privacy Under the Guise of Enforcing Zero Tolerance Policies*, 81 WASH. L. REV. 391, 393–94 (2006). Another commentator has noted that although such constitutional challenges to zero tolerance based on substantive and procedural due process are unlikely to succeed unless the school action is "wholly arbitrary," zero tolerance policies are ineffective, and cause children to lose educational opportunities, subjecting them to psychological trauma, and often, the adult criminal justice system. Alicia C. Insley, Comment, *Suspending and Expelling Children From Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1073–74 (2001).

¹⁷³ *See supra* note 80 and accompanying text.

¹⁷⁴ Although this exact phrase is properly attributed to a line from a song in *The Mikado* by Gilbert and Sullivan. *See* WIKIPEDIA, *THE MIKADO/A MORE HUMANE MIKADO* (Mar. 5, 2009), http://en.wikisource.org/wiki/The_Mikado/A_more_humane_Mikado, the concept has been embodied in law since the Code of Hammurabi. WIKIPEDIA, *RETRIBUTIVE JUSTICE* (Jan. 21,

The notion that “indecent” materials are harmful to minors but not adults is the dominant theme that has run through court decisions since *Ginsberg*. However, even *Ginsberg* recognized that there was no evidence supporting such a stance.¹⁷⁵ In light of our knowledge regarding human sexuality,¹⁷⁶ the idea that legislatures have the right to place arbitrary majoritarian moral restrictions on adults and youth under the doctrine of *in loco parentis* seems increasingly anachronistic, as well as unrealistic in light of the facts.

As Justice Alito advocated in *Morse*, it is dangerous for school administrators to assume that they act in place of a student’s parents when a child attends school.¹⁷⁷ Public schools are part of state government and operate under the same Constitutional constraints as any other organ of the state, except to the extent authorized by the *Tinker* exceptions.¹⁷⁸ It is particularly inappropriate that the state exert parental control over the sensitive area of teenage sexuality. The parents of the Pennsylvania teenagers in *Skumanick* illustrate how parental views can be vastly different from those of state authorities.¹⁷⁹

However, if schools are truly acting *in loco parentis*, as Justice Thomas asserted,¹⁸⁰ they should be kind and loving parents who appreciate the stresses of adolescent development and remember what it was like when they first passed a love note in class. The majority of pictures adolescents are sending each other are no more than visual love notes, as the teen survey indicates.¹⁸¹ It would be a harsh parent indeed who threw their child into the remorseless jaws of the criminal justice system for harmless sexual experimentation. The better practice is for school administrators to contact the student’s parents with the information and allow such personal choices to be made by

2009), http://en.wikipedia.org/wiki/Retributive_justice.

¹⁷⁵ See *supra* note 121 and accompanying text.

¹⁷⁶ See *supra* notes 164–66 and accompanying text.

¹⁷⁷ *Morse v. Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring).

¹⁷⁸ *Id.*

¹⁷⁹ See *supra* note 20 and accompanying text.

¹⁸⁰ *Morse*, 551 U.S. at 413 (Thomas, J., concurring).

¹⁸¹ See *supra* Part I.

those whose responsibility it is to make these decisions. If the activity causes disruption or harm to another student, disciplinary action should be taken within the confines of the school system. If students, or their parents, want to take further action, they can make the decision to pursue a civil or criminal remedy on their own.

In response to the hypothetical posed at the beginning of this article, a reasonable school administrator should never turn the child over to the police and risk stigmatizing them for the rest of their lives unless there is real evidence of child abuse or pedophilia, in which case the child needs protection, not prosecution. On no account should an administrator make copies of the picture, for whatever reason, or risk being faced with child pornography charges like the hapless well-meaning administrator in Virginia.¹⁸² Forcing the student into a re-education program could subject the school to a lawsuit by the students and parents for compelled speech in violation of the First Amendment like the prosecutor in Pennsylvania.¹⁸³ What is left is option A: instruct the student to turn off the phone for use during school hours because the student arguably has a First Amendment right to the material on his or her phone. Further, just as any teenager of an older generation would have been mortified to have their paper love notes read aloud, so should the present generation be given respect for their privacy.

¹⁸² See *supra* note 32 and accompanying text.

¹⁸³ See *supra* Part I.

