

# IGNORING THE FIRST AMENDMENT: CRIMINALIZING LEGALLY CONSENSUAL SEXUAL PHOTOGRAPHS IN *PEOPLE V. HOLLINS*, 2012 IL 112754, 971 N.E.2D 504

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## I. INTRODUCTION

There are only a few categories of unprotected speech recognized by the Supreme Court. One such category is child pornography.<sup>1</sup> In the creation of this category of unprotected speech, the Supreme Court found a compelling governmental interest in “safeguarding the physical and psychological well-being of a minor” from sexual exploitation and abuse that occurs during the production of pornography.<sup>2</sup>

People are generally horrified by the thought of children being exploited for the twisted pleasure of pedophiles.<sup>3</sup> Historically, concern over child sexual abuse has generated a massive response from society, which in turn has led to increased awareness and concern regarding child pornography.<sup>4</sup> In addition, society tends to respond negatively when the courts decide to strike down statutes that protect against child pornography.<sup>5</sup> For instance, when the New York Court of Appeals struck down a child pornography statute for being overbroad, Patrick Trueman, president and chief executive of Morality in Media, said it is “a singular outrage that the highest court in New York has decriminalized the act of viewing child pornography by computer.”<sup>6</sup> This ruling also elicited other media responses

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

2. *Id.* at 756-57.

3. Antonio M. Haynes, *The Age of Consent: When is Sexting No Longer “Speech Integral to Criminal Conduct”?*, 97 CORNELL L. REV. 369, 378 (2012).

4. *Id.*

5. Cheryl Wetzstein, *Backlash Grows at N.Y. Ruling on Viewing of Child Porn*, WASH. TIMES, May 13, 2012, <http://www.washingtontimes.com/news/2012/may/13/backlash-grows-at-ruling-on-viewing-of-child-porn/>. A New York Court of Appeals ruling held it is not illegal to “merely” view online child pornography according to the language of the child pornography statute. *Id.* “The high court unanimously agreed to reverse two of the dozens of child-pornography counts against a former college professor, saying there was no evidence the professor did more than look at some images on his computer.” *Id.*

6. *Id.*

such as “head-spinning headlines like Gawker.com’s ‘Viewing Child Porn Online Officially A-OK in New York State’ and ‘Looking at Child Porn Is Totally Legal in New York State’ by the Atlantic Wire.”<sup>7</sup>

The legislative attempt to remove the “scourge of child pornography,”<sup>8</sup> however, has created an illogical inconsistency regarding enforcement of the child pornography laws. This inconsistency is illustrated in *People v. Hollins*, where the Illinois Supreme Court upheld the conviction of a defendant under the Illinois child pornography statute for taking photographs of himself and his seventeen-year-old girlfriend having sexual relations, while another Illinois statute legalizes consensual sex with any person seventeen or older.<sup>9</sup> Where the underlying act depicted in the picture was legal, and the picture was taken with the individual’s consent, why was it illegal to take the picture? This Note argues that this discrepancy was not adequately addressed by the Illinois Supreme Court given the recent U.S. Supreme Court decision in *United States v. Stevens*,<sup>10</sup> which based the First Amendment protection on whether there is specific illegal conduct to which the speech is integral.<sup>11</sup> *Hollins* failed to address whether the photographs taken by the defendant were protected by the First Amendment after *Stevens*, and that was the decision’s central flaw.

This Note will examine *Hollins* in light of the Supreme Court decision in *Stevens* and the applicability of the First Amendment. Section II of this Note explains the historical legal background leading up to the *Hollins* decision. Section III discusses the factual background, procedural history, and substance of the Illinois Supreme Court’s opinion in *Hollins*. It will also discuss the dissent’s arguments for the application of the First Amendment. Section IV addresses the court’s failure to apply the *Stevens* decision to *Hollins* and the applicability of the First Amendment. It also questions whether the court’s two rationales under the rational basis review will withstand strict scrutiny.

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Morality in Media, Inc. is an American, faith-based, non-profit organization that was established in New York in 1962. It seeks to raise awareness about the purported harms of pornography and other forms of obscenity on individuals, families and society. It also works through constitutional means to curb traffic in obscenity and uphold Judeo-Christian standards of decency in media.

*Morality in Media*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Morality\\_in\\_Media](http://en.wikipedia.org/wiki/Morality_in_Media) (last visited Apr. 26, 2014); see also *About Morality in Media*, MORALITY MEDIA PORN HARMS, <http://pornharms.com/history/> (last visited Apr. 26, 2014).

7. *Id.*

8. Haynes, *supra* note 3, at 373.

9. *People v. Hollins*, 2012 IL 112754, 971 N.E.2d 504; 720 ILL. COMP. STAT. 5/11-1.50 (2010). “A person commits criminal sexual abuse if that person commits an act of sexual penetration or sexual conduct with a victim who is at least 13 years of age but under 17 years of age and the person is less than 5 years older than the victim.” *Id.*

10. 559 U.S. 460 (2010).

11. *Id.* at 468.

## II. LEGAL BACKGROUND

Public policy and society's disdain for sexual abuse of children by pedophiles has shaped the legal background of child pornography laws.<sup>12</sup> By enacting the first statute specifically targeting child pornography, the Protection of Children Against Exploitation Act (PCAEA),<sup>13</sup> Congress's goal was to punish pedophiles who seduce children to appear on film to "whet their own pedophilic appetites."<sup>14</sup> The PCAEA led the states to enact draconian legislation, driven by the intense societal need to rid the country of the "scourge of child pornography."<sup>15</sup>

### A. The Creation of an Unprotected Category of Speech for Child Pornography

"From 1791 to the present,' . . . the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas.'"<sup>16</sup> These traditional categories include obscenity,<sup>17</sup> defamation,<sup>18</sup> fraud,<sup>19</sup> incitement,<sup>20</sup> and speech integral to criminal conduct.<sup>21</sup> Child pornography was not included in this list until the key decision by the U.S. Supreme Court in *New York v. Ferber*.<sup>22</sup> *Ferber* created a new First Amendment exception, removing protection from child pornography images and films.<sup>23</sup>

#### I. *New York v. Ferber*

In *Ferber*, the Supreme Court examined the constitutionality of a New York statute that criminalized and prohibited any person from "knowingly promoting sexual performances by children under the age of [sixteen]."<sup>24</sup> *Ferber* considered whether the state could constitutionally "prohibit the dissemination of material that shows children engaged in sexual conduct regardless of whether such material is obscene" in order "to prevent the abuse

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12. Haynes, *supra* note 3, at 378.

13. *Id.*

14. *Id.* at 373.

15. *Id.*

16. *Stevens*, 559 U.S. at 468 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382-83 (1992)).

17. *Roth v. United States*, 354 U.S. 476, 483 (1957).

18. *Beauharnais v. Illinois*, 343 U.S. 250, 254-55 (1952).

19. *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

20. *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969).

21. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

22. 458 U.S. 747 (1982).

23. *Id.*

24. *Id.* at 749; N.Y. PENAL LAW § 263.15 (McKinney 1980) ("A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age.").

of children who are made to engage in sexual conduct for commercial purposes.”<sup>25</sup> The Court determined that, although there was a “risk of suppressing protected expression” by letting censorship legislation become unduly burdensome, the states are entitled to “greater leeway in the regulation of” child pornography for several reasons.<sup>26</sup>

First, states have an interest in “safeguarding the physical and psychological well-being of a minor.”<sup>27</sup> Second, the distribution of materials depicting sexual activities of children was deemed “intrinsically related to the sexual abuse of children” because the materials were a “permanent record of the child[]’s participation” in the act, and there is a need to effectively control the distribution of child pornography.<sup>28</sup> Third, the advertising and selling of child pornography offered an economic motive for its production, which was illegal nationally.<sup>29</sup> The *Ferber* Court elaborated, “It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.”<sup>30</sup> Fourth, “[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct [was deemed] exceedingly modest, if not *de minimis*.”<sup>31</sup> Last, classifying child pornography as a category of material outside the First Amendment was not inconsistent with earlier decisions.<sup>32</sup> The Court noted how content-based classifications of speech have frequently been accepted when “the evil to be restricted so overwhelmingly outweighs the expressive interests” at stake within the confines of the classification, and that a case-by-case adjudication is not required.<sup>33</sup> However, before closing its opinion, the Court conceded that case-by-case analysis of the fact situations may be needed to guard against over-breadth.<sup>34</sup>

#### B. Expanding the *Ferber* Rationales Regardless of Age of Consent Laws

Congress reacted to the *Ferber* decision by passing the Child Protection Act of 1984 (CPA), which modified the definition of sexual conduct.<sup>35</sup> The CPA increased the age of children for the purposes of the statute from sixteen

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25. *Ferber*, 458 U.S. at 753.

26. *Id.* at 756.

27. *Id.* at 756-57.

28. *Id.* at 759.

29. *Id.* at 761.

30. *Id.* at 761-62.

31. *Id.* at 762.

32. *Id.* at 763.

33. *Id.* at 763-64.

34. *Id.* at 773-74.

35. Haynes, *supra* note 3, at 380.

to eighteen,<sup>36</sup> thus expanding the definition of child pornography to include individuals not considered in *Ferber*.<sup>37</sup>

Two other cases, *United States v. Bach* and *State v. Senters*, discussed the statutory change in the age from sixteen to eighteen.<sup>38</sup> However, these cases slightly adjusted the rationales used in *Ferber* to uphold the child pornography statutes regardless of the statutory age of consent. *Bach* and *Senters* accepted the government's interest in convenient enforcement of child pornography laws<sup>39</sup> and protecting minors from reputational harm created by the distribution of depictions of sexual acts.<sup>40</sup>

### 1. *United States v. Bach*

In *Bach*, the defendant was convicted for possessing, transporting, and producing visual depictions of a minor engaged in sexually explicit activity and for receiving child pornography.<sup>41</sup> The defendant had taken pictures of a sixteen-year-old male engaged in sexually explicit conduct, which was transferred through e-mail.<sup>42</sup>

The defendant argued the photos of the sixteen year old portrayed noncriminal consensual sexual conduct because, under state and federal law, the age of consent was sixteen and the images were sexually private conduct covered by *Lawrence v. Texas*.<sup>43</sup> The *Bach* court pointed out that *Lawrence* did not involve minors or others "who might be injured or coerced," and the conduct involved in *Lawrence* was very different from the defendant's conduct of engaging in sex with a minor and pressuring him to pose for nude photographs.<sup>44</sup> Additionally, the court stated, "Congress may regulate pornography involving all minors under the age of eighteen if it has a rational basis for doing so."<sup>45</sup> Congress had changed the definition of a minor in 1984 because the previous ceiling of sixteen years of age hindered enforcement of

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36. Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (codified as amended at 18 U.S.C. §§ 2251-53 (2010)).

37. Haynes, *supra* note 3, at 380.

38. See *United States v. Bach*, 400 F.3d 622 (8th Cir. 2005); *State v. Senters*, 699 N.W.2d 810 (Neb. 2005).

39. *Bach*, 400 F.3d at 629.

40. *Senters*, 699 N.W.2d at 818.

41. *Bach*, 400 F.3d at 624; 18 U.S.C. § 2252 (2010).

Any person who -- knowingly transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mails, any visual depiction, if -- the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and such visual depiction is of such conduct.

*Id.* ("minor" means any person under the age of eighteen years").

42. *Bach*, 400 F.3d at 624-25.

43. *Id.* at 628.

44. *Id.* at 628-29.

45. *Id.* at 629.

child pornography laws due to confusion about whether a subject was a minor because children enter puberty at different ages.<sup>46</sup> Therefore, Congress's choice to regulate child pornography by defining a minor as an individual under the age of eighteen was rationally related to the government's legitimate interest in convenient enforcement of the child pornography law.<sup>47</sup>

## 2. State v. Senters

In *Senters*, a twenty-eight-year-old teacher videotaped himself and a seventeen-year-old high school student having consensual sexual relations.<sup>48</sup> In Nebraska, it is unlawful for "a person to knowingly make . . . any visual depiction of sexually explicit conduct which has a child as one of its participants."<sup>49</sup> A child participant was defined as a person under the age of eighteen.<sup>50</sup>

In support of his right to sexual privacy, the defendant relied on *Lawrence v. Texas*.<sup>51</sup> *Lawrence* recognized "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."<sup>52</sup> The *Senters* court recognized there was a split over whether *Lawrence* recognized a fundamental right for sexual autonomy.<sup>53</sup> However, *Lawrence* did not involve minors, and courts considering challenges to laws regulating sexual conduct by alleging a right to sexual privacy have agreed that *Lawrence* is inapplicable to conduct involving minors.<sup>54</sup>

Further, the defendant argued, under another criminal statute, the female student was legally capable of consenting to a sexual act, which they videotaped, and thus, a right to privacy should be triggered.<sup>55</sup> However, the *Senters* court followed the *Bach* holding, concluding, "Congress may regulate child pornography involving all minors under the age of eighteen if it has a rational basis for doing so," regardless of the age of consent.<sup>56</sup>

Moreover, the *Senters* court determined the state has a legitimate reason to eliminate the recording of a sexual act that "may haunt [the child] in future

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46. *Id.*

47. *Id.*

48. *State v. Senters*, 699 N.W.2d 810, 813 (Neb. 2005).

49. *Id.*; NEB. REV. STAT. § 28-1463.03 (2008). "It shall be unlawful for a person to knowingly make, publish, direct, create, provide, or in any manner generate any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers." *Id.*

50. *Senters*, 699 N.W.2d at 813; NEB. REV. STAT. § 28-1463.02 (2008). "Child, in the case of a participant, means any person under the age of eighteen years . . ." *Id.*

51. *Senters*, 699 N.W.2d at 815 (citing *Lawrence v. Texas*, 539 U.S. 567 (2003)).

52. *Id.* at 815 (quoting *Lawrence*, 539 U.S. at 572).

53. *Id.* at 815-16.

54. *Id.* at 816.

55. *Id.*

56. *Id.*

years, long after the original misdeed took place.”<sup>57</sup> In addition, it is reasonable to conclude a seventeen year old, “although old enough to consent to sexual relations, may not fully appreciate that today’s recording of a private, intimate moment may be the Internet’s biggest hit next week.”<sup>58</sup> The court concluded its reasoning may not hold up under a strict scrutiny analysis. However, under the traditional rational basis review, it is reasonable to criminalize “the making of recordings depicting persons under [eighteen] years of age engaged in sexually explicit conduct” because it “furthers the goal of protecting those persons from the reputational harm that would occur if the recordings were distributed.”<sup>59</sup>

### C. Reassessing the Unprotected Category of Speech for Child Pornography

Although state courts have continued to uphold and expand the unprotected category of speech recognized in *Ferber*, two cases, *Ashcroft v. Free Speech Coalition*<sup>60</sup> and *United States v. Stevens*,<sup>61</sup> reassessed the categorical approach used in *Ferber*.

#### 1. *Ashcroft v. Free Speech Coalition*

In *Ashcroft*, the Court struck down provisions of the Child Pornography Prevention Act of 1996 (CPPA), which banned materials that appear to be depictions of children engaged in sexual conduct, including virtual child pornography.<sup>62</sup> Congress banned virtual child pornography because it “inflames the desires of child molesters, pedophiles and child pornographers” and “encourage[s] a societal perception of children as sexual objects.”<sup>63</sup> The *Ashcroft* Court noted, in contrast to *Ferber*, the CPPA prohibited speech that “record[ed] no crime and create[d] no victims.”<sup>64</sup> Virtual child pornography, in addition, was not “intrinsically related” to the sexual abuse of children.<sup>65</sup>

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57. *Id.* at 817 (quoting *New York v. Ferber*, 458 U.S. 747, 759 (1982)).

58. *Id.*

59. *Id.* at 817-18.

60. 535 U.S. 234 (2002).

61. 559 U.S. 460 (2010).

62. *Ashcroft*, 535 U.S. at 234.

63. Child Pornography Prevention Act of 1996, Pub. L. No. 104–208, § 121(1)(10)(B), 110 Stat. 3009-26 (codified as amended at 18 U.S.C. § 2252 (2010)). “[I]t inflames the desires of child molesters, pedophiles, and child pornographers who prey on children, thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children who are victimized as a result of the existence and use of these materials . . . .” *Id.*; § 121(1)(11)(A), 110 Stat. 3009-26 (codified as amended at 18 U.S.C. § 2252 (2010)). “[T]he sexualization and eroticization of minors through any form of child pornographic images has a deleterious effect on all children by encouraging a societal perception of children as sexual objects and leading to further sexual abuse and exploitation of them . . . .” *Id.*

64. *Ashcroft*, 535 U.S. at 236.

65. *Id.*

*Ferber*'s judgment about child pornography was based on how it was made, not on what it communicated.<sup>66</sup> *Ashcroft* reaffirmed that speech that is neither obscene nor the product of sexual abuse does not fall outside the protection of the First Amendment.<sup>67</sup> The *Ashcroft* Court also noted eighteen is "higher than the legal age of marriage for many States, as well as the age at which persons may consent to sexual relations."<sup>68</sup> The Court seemed to point out the oddity of proscribing visual depictions of persons engaged in sexual activity who appear to be under the age of eighteen because, in certain instances, it could be consensually legal.<sup>69</sup>

## 2. United States v. Stevens

Although the Supreme Court, in *United States v. Stevens*, did not determine the constitutionality of a child pornography statute, it distinguished the unprotected category of speech for child pornography when it struck down a federal statute criminalizing the "commercial creation, sale, or possession of certain depictions of animal cruelty."<sup>70</sup> The *Stevens* Court explained the First Amendment has permitted restrictions upon the content of speech in a few limited areas and has never included a freedom to disregard traditional limitations.<sup>71</sup> The traditional categories include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.<sup>72</sup> The *Stevens* Court further explained how *Ferber* should be interpreted:

When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on a basis of a simple cost-benefit analysis. In *Ferber*, for example, we classified child pornography as such a category. We noted that the State of New York had a compelling interest in protecting children from abuse, and that the value of using children in these works (as opposed to simulated conduct or adult actors) was *de minimis*. But our decision did not rest on this "balance of competing interests" alone. We made clear that *Ferber* presented a special case: The market for child pornography was "intrinsically related" to the underlying abuse, and was therefore "an integral part of the production of such materials, an activity illegal throughout the Nation." As we noted, "[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Ferber* thus grounded its

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66. *Id.*

67. *Id.*

68. *Id.* at 247.

69. *Id.*

70. *United States v. Stevens*, 559 U.S. 460, 464 (2010).

71. *Id.*

72. *Id.*



analysis in a previously recognized, long-established category of unprotected speech, and our subsequent decisions have shared this understanding.<sup>73</sup>

This explanation placed child pornography not in its own distinct historical category, but under the category of “speech integral to the commission of a crime.”<sup>74</sup> The Court rejected the contention that *Ferber* applied to animal cruelty and then went on to address the statute’s overbreadth as it applied to videos that did not depict animal cruelty.<sup>75</sup>

The interpretation of *Ferber* discussed in *Stevens* is the legal standard for cases challenging the constitutionality of child pornography statutes. This is the standard that should have been applied in the recent Illinois Supreme Court case, *People v. Hollins*.

### III. EXPOSITION OF THE CASE

#### A. Facts and Procedural History

In March 2009, the defendant, Marshall C. Hollins, was charged with three counts of child pornography for photographing a seventeen-year-old girl while engaged in sexual conduct.<sup>76</sup> The defendant was charged under section 11-20.1(a)(4) of the Illinois child pornography statute, which defines “child pornography” as a file, video, or photograph that is or appears to be that of a person under the age of eighteen.<sup>77</sup>

The defendant and the seventeen year old both attended community college together and, in 2008, began a consensual sexual relationship.<sup>78</sup> The defendant was thirty-two years old at the time of the sexual encounters and a

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73. *Id.* at 471.

74. *People v. Hollins*, 2012 IL 112754, ¶ 67, 971 N.E.2d 504, 521 (Burke, J., dissenting).

75. *Stevens*, 559 U.S. at 472-81.

76. *Hollins*, 2012 IL 112754, ¶ 3, 971 N.E.2d at 506 (majority opinion).

77. *Id.* ¶ 12, 971 N.E.3d at 507-08; 720 ILL. COMP. STAT. 5/11-20.1 (2010). The text of the statute was changed July 1, 2011, as follows:

For the purposes of this Section, “child pornography” includes a film, videotape, photograph, or other similar visual medium or reproduction or depiction by computer that is, or appears to be, that of a person, either in part, or in total, under the age of 18 and at least 13 years of age or a severely or profoundly mentally retarded person, regardless of the method by which the film, videotape, photograph, or other similar visual medium or reproduction or depiction by computer is created, adopted, or modified to appear as such. “Child pornography” also includes a film, videotape, photograph, or other similar visual medium or reproduction or depiction by computer that is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the film, videotape, photograph, or other similar visual medium or reproduction or depiction by computer is of a person under the age of 18 and at least 13 years of age or a severely or profoundly mentally retarded person.

*Id.*

78. *Hollins*, 2012 IL 112754, ¶ 49, 971 N.E.2d at 516 (Burke, J., dissenting).

registered sex offender.<sup>79</sup> On one occasion, while engaged in sexual intercourse, the defendant used his cell phone camera to take five photographs of himself and his girlfriend.<sup>80</sup> At the girlfriend's request, the photographs were sent to the girlfriend's e-mail account.<sup>81</sup> The photographs were discovered by the girlfriend's mother, who then contacted the police.<sup>82</sup> The defendant told the police, at the time of the arrest, he knew his girlfriend was seventeen, the legal age of consent in Illinois.<sup>83</sup> However, he admitted that he did not realize the law did not permit pictures depicting the sexual acts of anyone under the age of eighteen.<sup>84</sup>

The defendant filed a motion to find portions of the child pornography statute unconstitutional on the grounds that the penalty for this offense was too harsh and the statute punished and criminalized legal activity.<sup>85</sup> The trial court denied the motion and found the defendant guilty.<sup>86</sup> The defendant appealed, arguing the child pornography statute violated the one-act, one-crime doctrine and was unconstitutional.<sup>87</sup> The appellate court rejected the defendant's arguments and affirmed his convictions.<sup>88</sup>

On appeal, the defendant raised two main arguments: (1) the child pornography statute denied the defendant due process of law under the U.S. and Illinois Constitutions and (2) the child pornography statute violated the Equal Protection Clauses of the U.S. and Illinois Constitutions.<sup>89</sup>

## B. Majority Opinion

The Supreme Court of Illinois held the Illinois child pornography statute was constitutional because there was a rational basis for the statute under the Due Process and Equal Protection Clauses, and the court affirmed the judgments of the appellate and circuit courts.<sup>90</sup>

The defendant conceded that this case did not implicate a fundamental right, thus the rational basis test was appropriate for determining whether the

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79. *Id.* ¶ 5, 971 N.E.2d at 506 (majority opinion).

80. *Id.* ¶ 50, 971 N.E.2d at 516 (Burke, J., dissenting).

81. *Id.* ¶ 51, 971 N.E.2d at 517.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* ¶ 4, 971 N.E.2d at 506 (majority opinion). The court did not elaborate on the type of motion the defendant filed in trial court claiming the statute was unconstitutional.

86. *Id.* ¶¶ 4-9, 971 N.E.2d at 506-07.

87. *Id.* ¶ 9, 971 N.E.2d at 507; *see* *People v. Nunez*, 925 N.E.2d 1083, 1086 (2010). The one-act, one-crime doctrine prohibits multiple convictions based on "precisely the same physical act." *Id.* However, if a defendant commits multiple acts, then multiple convictions may stand, provided that none of the offenses are lesser-included offenses. *Id.*

88. *Hollins*, 2012 IL 112754, ¶ 9, 971 N.E.2d at 507.

89. *Id.* ¶ 11, 971 N.E.2d at 507-08.

90. *Id.* ¶ 11, 971 N.E.2d at 508.

statute complied with substantive due process.<sup>91</sup> Therefore, so long as the statute bore a rational relationship to a legitimate legislative purpose and was neither arbitrary nor unreasonable, the statute would be upheld.<sup>92</sup>

Additionally, the defendant alleged, under the Due Process Clauses, the statute did not bear a rational relationship to the public interest to be protected because it denied consenting adults the right to engage in private sexual activities of their choice.<sup>93</sup> The court rejected this argument because the purpose of the child pornography statute was to prevent the sexual abuse and exploitation of children.<sup>94</sup> The defendant argued that this purpose was frustrated because the victim was of a legal age to consent to sex.<sup>95</sup> However, the court determined *Senters* and *Bach* persuasively addressed this argument.<sup>96</sup> Both cases rejected the fundamental right of sexual privacy asserted under *Lawrence* and, applying the rational basis test, found that the legislature had a legitimate interest in protecting children from the danger presented if a recording entered into the public sphere and haunted the child.<sup>97</sup> Therefore, it was reasonable that the legislature wanted to protect children under the age of eighteen from reputational harm if the videos or pictures were distributed.<sup>98</sup> Further, *Hollins* affirmed the holding in *Bach* and *Senters* that the age change Congress made in child pornography laws had a rational relation to the government's legitimate interest in enforcing child pornography laws.<sup>99</sup>

The second argument made by the defendant was that the statute violated the Illinois Constitution's Privacy Clause, which provides a greater privacy protection than the U.S. Constitution.<sup>100</sup> Although the Illinois Constitution recognizes a right to privacy which goes beyond federal constitutional guarantees, this right is not absolute and only unreasonable invasions of privacy are constitutionally forbidden.<sup>101</sup> Additionally, only two instances have been analyzed under a privacy right in criminal prosecutions and both involved the government or its agents actively intruding into the privacy of the defendant, which did not apply here.<sup>102</sup>

Next, the defendant argued, when viewed in the context of the Illinois sex offender statutes, the child pornography statute failed to give the

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91. *Id.* ¶ 15, 971 N.E.2d at 508.

92. *Id.* ¶ 15, 971 N.E.2d at 509.

93. *Id.* ¶ 16, 971 N.E.2d at 509.

94. *Id.* ¶ 18, 971 N.E.2d at 509.

95. *Id.* ¶ 19, 971 N.E.2d at 509-10.

96. *Id.* ¶¶ 20-24, 971 N.E.2d at 510.

97. *Id.*

98. *Id.*

99. *Id.* ¶ 25, 971 N.E.2d at 511.

100. *Id.* ¶ 29, 971 N.E.2d at 512-13.

101. *Id.* ¶ 31, 971 N.E.2d at 513.

102. *Id.* ¶ 32, 971 N.E.2d at 513.

defendant fair notice that his conduct was criminal.<sup>103</sup> It was argued there was an “illogical inconsistency” between the child pornography laws’ inclusion of seventeen year olds as victims and other statutes that allow sexual consent of seventeen year olds.<sup>104</sup> This inconsistency created a potential “legislative trap” for persons with legally consenting sex partners that were seventeen.<sup>105</sup> Additionally, “child,” under the criminal code, had multiple meanings.<sup>106</sup> The court concluded the defendant’s ignorance of the law was no defense because the statute clearly and expressly set out that participants in visual depictions of sexually explicit conduct under the age of eighteen are children.<sup>107</sup> Additionally, this defendant was a convicted sex offender and had prior experience with the legal system.<sup>108</sup>

Last, the defendant claimed the statute violated the Equal Protection Clauses because he belonged to a class of people who engaged in legal sexual activities with consensual partners who chose to photograph those encounters.<sup>109</sup> The court concluded that, because the defendant conceded a fundamental right was not at issue, the equal protection claim was subject to the rational basis test.<sup>110</sup> Therefore, as the court had discussed before, there existed a rational relation to a legitimate purpose.<sup>111</sup> It also found the *Senters* case instructive and, for the reason stated in that case regarding due process, equal protection was not violated.<sup>112</sup>

### C. Dissent

Justice Burke disagreed with the majority’s analysis under the rational basis test. The majority, she stated, “based [its opinion] on [the] defendant’s concession that no fundamental rights, including first amendment rights, [were] implicated by criminally prohibiting the photographs taken by the defendant.”<sup>113</sup>

The dissent argued the majority derived its decision from *Ferber*, which held that photographs are not entitled to First Amendment protections in the category of child pornography because it is an important government objective to prevent sexual exploitation and abuse of children.<sup>114</sup> In *Ferber*, the decision regarding whether the statute was valid rested on whether the

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103. *Id.* ¶ 33, 971 N.E.2d at 514.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* ¶ 34, 971 N.E.2d at 514.

108. *Id.*

109. *Id.* ¶ 39, 971 N.E.2d at 515.

110. *Id.* ¶ 31, 971 N.E.2d at 515.

111. *Id.* ¶¶ 41-42, 971 N.E.2d at 516.

112. *Id.* ¶ 42, 971 N.E.2d at 516.

113. *Id.* ¶ 56, 971 N.E.2d at 517 (Burke, J., dissenting).

114. *Id.* ¶¶ 56-57, 971 N.E.2d at 517.

person who was photographed engaged in sexual conduct and was under a specified age.<sup>115</sup> However, Justice Burke alleged this analysis was no longer valid after *United States v. Stevens*.<sup>116</sup> She argued that *Stevens* altered the way courts should interpret *Ferber* because the Court made it clear that *Ferber* presented a special case in which the market for child pornography was intrinsically related to the underlying abuse and was therefore an integral part of the prosecution of such materials.<sup>117</sup> The dissent suggested, following “*Stevens*, it [was] clear that there [was] no first amendment exception for child pornography, *per se*.”<sup>118</sup> Rather, child pornography was one example of a historical category of speech that has been exempted from First Amendment protection only because it was speech integral to “conduct in violation of a valid criminal statute.”<sup>119</sup> In other words, for a photograph to be child pornography and exempted from First Amendment protection, the photograph must be intrinsically related to the underlying abuse and commission of a crime.<sup>120</sup>

Justice Burke asserted there was nothing unlawful about the pictures taken because the sexual conduct depicted was entirely legal.<sup>121</sup> Therefore, the photographs were not child pornography for the purposes of the First Amendment, and the court could not simply presume a rational basis review was appropriate.<sup>122</sup> The defendant may have conceded that no fundamental rights were implicated, but the court was not required to accept concession on an issue of law by a party.<sup>123</sup> Justice Burke suggested the majority should have addressed *Stevens* because it was decided after *Senters* and *Bach*, so it was clearly relevant to the issues presented, and the *Stevens* decision implied a stricter level of scrutiny in this case.<sup>124</sup>

#### IV. ANALYSIS

In *Hollins*, the Illinois Supreme Court addressed all the rights the defendant alleged, but because the defendant conceded no fundamental right existed, the court failed to address the possibility of a right the defendant did not allege.<sup>125</sup> Based on the defendant’s concession, the *Hollins* court held that no fundamental rights were violated, and therefore, under rational basis

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115. *Id.* ¶ 65, 971 N.E.2d at 519.

116. *Id.*

117. *Id.* ¶ 66, 971 N.E.2d at 520.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* ¶ 68, 971 N.E.2d at 521.

122. *Id.*

123. *Id.* ¶ 69, 971 N.E.2d at 521-22.

124. *Id.* ¶ 70, 971 N.E.2d at 522.

125. *Id.* ¶ 69, 971 N.E.2d at 521-22.

review, the statute was constitutional because: (1) protection of minors from reputational harm and (2) convenience in enforcement of child pornography laws were rationally-related governmental interests.<sup>126</sup> However, the court failed to address a pertinent issue addressed in the dissent: whether the photographs were protected by the First Amendment, considering they depicted a legally consensual sexual act. Failing to address this issue is the decision's central flaw.

#### A. Applicability of the First Amendment

The *Hollins* court heavily relied on the *Bach* and *Senters* interpretation of the *Ferber* holding.<sup>127</sup> However, *Bach* and *Senters* did not base their opinions on the *Stevens* interpretation of *Ferber* to determine whether child pornography laws were constitutional.<sup>128</sup> Given the fact that *Stevens* directly interprets the *Ferber* holding, the opinion should have been taken into consideration by the Illinois Supreme Court.<sup>129</sup>

Before *Stevens*, *Ferber* was given a broad reading which created a categorical exclusion for child pornography and exempted the category from First Amendment protection. This category includes any sexually explicit pictures of persons under a specified age.<sup>130</sup> This approach was used by the *Hollins* majority to uphold the child pornography statute. Under this approach, the court did not consider whether the sexual conduct was legal and consensual, nor whether there were significant differences between sexually abusing a nine or ten-year-old child in order to create and distribute commercial child pornography.<sup>131</sup> So long as the person photographed is under the specified age, the photographs receive no First Amendment protection and the state's decision to criminalize their creation is subject only to rational basis review.<sup>132</sup>

However, the *Ferber* Court clearly did not intend to create so broad of an exception to First Amendment protection, noting, "There are, of course, limits on the category of child pornography . . . unprotected by the First Amendment."<sup>133</sup> While the Court did not comprehensively define child

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126. *Id.* ¶¶ 20-26, 971 N.E.2d at 510-12 (majority opinion).

127. *Id.* ¶¶ 20-24, 971 N.E.2d at 510-11.

128. *Stevens* was decided in 2010, but *Bach* and *Senters* were both decided in 2005. *Id.* ¶ 69, 971 N.E.2d at 521. *Stevens* would not have been applied as precedent when the *Bach* and *Senters* courts upheld the child pornography statutes as constitutional under *Ferber*. *Id.*

129. *Stevens* could be considered dicta, considering the main issue in *Stevens* dealt with the First Amendment protection of "crush videos," not child pornography, but in consideration of *Ashcroft's* interpretation of *Ferber*, *Stevens* reiterates a narrower interpretation of *Ferber* that should have been addressed by *Hollins*.

130. *Hollins*, 2012 IL 112754, ¶¶ 67-68, 971 N.E.2d at 518 (Burke, J., dissenting).

131. *Id.* ¶ 64, 971 N.E.2d at 519.

132. *Id.*

133. John A. Humbach, *Sexing and the First Amendment*, 37 HASTINGS CONST. L.Q. 433, 455 (2010).

pornography, it did give some guidance by stating, “The nature of the harm to be combated requires that the . . . offense be limited to works that visually depict sexual conduct by children below a specified age.”<sup>134</sup> In addition, the Court did not elaborate on the scope of limitations the word “suitably” might allow when it stated, “The category of ‘sexual conduct’ proscribed must also be suitably limited and described.”<sup>135</sup> The term “suitably” left the door open for courts to later decide what classes of depictions deserve constitutional protection and need to be kept out of the broad reach of the new categorical exclusion.<sup>136</sup> For instance, the Court had already consistently held that depictions of children involving “nudity, without more, constitutes protected expression.”<sup>137</sup> *Ferber* also left the door open for a case-by-case analysis in instances of over-breadth, which also implied the Court did intend for there to be limitations on the categorical approach when over-breadth was an issue.

After *Ferber* was decided, this broad categorical exclusion had not been limited, and cases like *Bach* and *Senters* consistently affirmed the broad categorical approach. However, *Stevens* changed this categorical analysis and made it clear there is no First Amendment exception for child pornography per se.<sup>138</sup> Instead, child pornography is one example of the historical category of speech that is an integral part of the conduct in violation of a valid criminal statute. In order for a photograph to be child pornography and exempted from First Amendment protection, the photograph must be an integral part of the conduct in violation of a valid criminal statute.<sup>139</sup>

*Ashcroft* also confirmed this narrow reading of *Ferber*. In *Ashcroft*, the Court distinguished *Ferber* in language that seemed to suggest the category of child pornography exempt from First Amendment protection was not only justified but also shaped by reference to the particular harms that motivated its creation.<sup>140</sup> The *Ashcroft* Court stated, “*Ferber*’s judgment about child pornography was based upon how it was made not on what it communicated” and the “production of the work, not its content, was the target of the statute.”<sup>141</sup> The *Ashcroft* Court viewed crime prevention as the core reason why it should deny constitutional protection to child pornography materials, and noted how there should be a closer connection between targeted speech and imminent criminal acts before the speech can be justifiably

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134. *Id.*

135. *Id.* at 456.

136. *Id.*

137. *Osborne v. Ohio*, 495 U.S. 103, 112 (1990) (citing *New York v. Ferber*, 458 U.S. 747, 765 (1982)). However, lower court decisions both before and since have held that, even without nudity, photographs can constitute child pornography as “lascivious display of the genitals.” *See, e.g., United States v. Knox*, 32 F.3d 733, 754 (3d Cir. 1994); *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986); *United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987).

138. *Hollins*, 2012 IL 112754, ¶ 67, 971 N.E.2d at 520 (Burke, J., dissenting).

139. *Id.* ¶ 68, 971 N.E.2d at 520.

140. *Humbach*, *supra* note 133, at 461.

141. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 236, 249 (2002).

suppressed.<sup>142</sup> While *Ferber* seemed to imply child sexual abuse and exploitation as harms, *Ashcroft* saw both exploitation and abuse as crimes.<sup>143</sup>

The *Stevens* Court reconciled *Ferber* and *Ashcroft* by concluding the creation of child pornography is a criminal act, and the depiction is the subject of a previously recognized category of unprotected speech.<sup>144</sup> Absent this connection between the visual representation and the crime, the First Amendment protection is presumed if an expressive activity is claimed.<sup>145</sup> *Stevens* explains *Ferber* as a special case because the underlying child pornography market was “intrinsically related” to the underlying crime of sexual abuse.<sup>146</sup> *Ferber* did not affirm a new exception to the First Amendment, but was a special example of the historically unprotected category of speech integral to the commission of a crime.<sup>147</sup> This fact was clearly indicated when the *Stevens* Court notably left child pornography absent from the list of “historic and traditional categories” barred from First Amendment protections.<sup>148</sup> Therefore, there should be a presumption of constitutionality if the underlying conduct depicted is not illegal, and the initial question should be whether there is specific illegal conduct to which the speech is integral.<sup>149</sup> This *Stevens* rule clearly should have been applied in *Hollins*.

Applying the reasoning from *Stevens*, the defendant in *Hollins* did nothing unlawful by taking photographs of consensual sexual conduct because the underlying conduct was entirely legal; no crime had been violated by the act. By applying a narrow interpretation of *Ferber*, the *Hollins* court should have realized the underlying crime in child pornography is the sexual abuse and exploitation of children, which is integral to depictions of the act. Here, the underlying crime of sexual abuse or exploitation is absent because the act depicted is legal in the State of Illinois. The defendant was not exploiting or abusing a minor, prevention of which are the main reasons child pornography laws exist, but was having legal, consensual sexual relations. The photographs were not child pornography as defined by the Supreme Court and should not have been excluded from First Amendment protection because the specific conduct, consensual sex, which is integral to the expression depicted in the photographs, is legal.

The dissent in *Hollins* pointed out precisely where the *Hollins* majority was led astray. The dissent stated, “despite the availability of *Stevens*, and

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142. Humbach, *supra* note 133, at 462.

143. *Id.* at 463.

144. Carman Naso, *Sext Appeals: Reassessing the Exclusion of Self Created Images From First Amendment Protection*, 7 CRIM. L. BRIEF 4, 11 (2011).

145. *Id.*

146. *The Supreme Court 2009 Term, Leading Cases*, 124 HARV. L. REV. 239, 247 (2010).

147. *Id.*

148. Haynes, *supra* note 3, at 393.

149. *Id.* at 395.



despite its clear relevance,” the defendant expressly conceded the photographs were not entitled to First Amendment protection.<sup>150</sup> However, “a court of review is not required to accept a concession by a party on an issue of law.”<sup>151</sup> “*Stevens* is binding authority, and the decision goes to a core issue in this case—the level of scrutiny to apply to the defendant’s constitutional challenge.”<sup>152</sup> Therefore, the court should have applied strict scrutiny because the conduct depicted was not integral to the sexual abuse or exploitation of a minor, but was merely a depiction of legal, consensual sex.

## B. Applying Strict Scrutiny

To survive strict scrutiny, the content-based restriction must be narrowly tailored to achieve a compelling government interest using the least restrictive means.<sup>153</sup> The *Hollins* majority offered two distinct interests for child pornography laws, which include any sexually explicit depictions of anyone under the age of eighteen. These interests are (1) the protection of minors from reputational harm and (2) the convenience in enforcement of child pornography laws.<sup>154</sup> The statute is not narrowly tailored to achieve these interests and the interests are not necessarily compelling government interests for the reasons discussed below.

### 1. Protection of Minors from Reputational Harm

*Hollins* argeed with *Senters* by finding that the state had a legitimate reason for banning the photographic depiction of anyone under the age of eighteen engaged in sexually explicit conduct.<sup>155</sup> The court found, even if the intimate act was intended to remain private, there was a danger the recording may find its way into the public sphere, haunting the child for the rest of his or her life.<sup>156</sup> It reasoned persons sixteen or seventeen years old, although old enough to consent, may not fully appreciate the recording of a private intimate moment.<sup>157</sup> Also, if the conduct was not recorded, it could not be distributed.<sup>158</sup> Therefore, the goal of protecting persons under the age of eighteen from reputational harm if the recordings were distributed was a

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150. *People v. Hollins*, 2012 IL 112754, ¶ 69, 971 N.E.2d 504, 521 (Burke, J., dissenting).

151. *Id.* ¶ 70, 971 N.E.2d at 521.

152. *Id.* ¶ 70, 971 N.E.2d at 522.

153. *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813 (2000).

154. *Hollins*, 2012 IL 112754, ¶¶ 22-23, 971 N.E.2d at 510-11.

155. *Id.* ¶¶ 22-23, 971 N.E.2d at 510.

156. *Id.* ¶ 21, 971 N.E.2d at 510.

157. *Id.*

158. *Id.* ¶ 22, 971 N.E.2d at 510.

reasonable means for criminalizing the creation of these recordings of sexually explicit conduct.<sup>159</sup>

The law criminalizing any depictions of sexually explicit content of anyone under the age of eighteen may be a reasonable means of protecting minors from reputational harm, but the reasoning is less compelling under strict scrutiny. In *Senters*, the court recognized that its reasoning may not be sustainable under strict scrutiny.<sup>160</sup> The main reason for child pornography laws originally expressed in *Ferber* was the prevention of exploitation and abuse of children in the making of child pornography. In *Hollins*, there was a lack of exploitation and abuse considering the images were taken with consent and the underlying act was legal. The images were also meant to be kept private. People may be haunted by images that show them doing things they later decide were foolish, but this interest of protecting someone who has legally consented to a sexual act and taken pictures is not on par with the serious concerns that underlie *Ferber*.<sup>161</sup> Exploitative pornography and consensual pornography, in terms of the harm they involve, are two very different genres: the circumstances of production are entirely different.<sup>162</sup> *Ashcroft* and *Stevens* support the proposition that the law should not impose on expressive matter whose production does not implicate the concerns *Ferber*'s categorical exclusion was meant to address. For instance, allowing states to impose legal sanctions on those that are legally able to consent to sex "suggests that there is something more dangerous about the representation of sex than the act of sex itself."<sup>163</sup>

Furthermore, if the aim is to keep images private, there is no underlying abuse or exploitation. If a legal act is memorialized in a private manner by the parties, it is simply a private extension of the legal act and not an activity worthy of criminalization.<sup>164</sup> Although there is a risk of dissemination, there is not a compelling government interest in preventing dissemination if there is no underlying abuse or exploitation, because the abuse and exploitation that the government is ultimately concerned with preventing does not exist. Therefore, when there is an absence of abuse or exploitation, legislatures should not have a right to regulate the content of depictions of consensual sexual acts.

However, in comparison, courts have limited some constitutionally proscribed rights in instances involving victims of rape to protect the victim's

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159. *Id.*

160. *State v. Senters*, 699 N.W.2d 810, 817 (Neb. 2005).

161. Humbach, *supra* note 133, at 466.

162. *Id.* at 467.

163. John Tehranian, *Sanitizing Cyberspace: Obscenity, Miller, and the Future of Public Discourse on the Internet*, 11 J. INTELL. PROP. L. 1, 4 (2003).

164. Claudio J. Pavia, *Constitutional Protection of "Sexting" in the Wake of Lawrence: The Rights of Parents and Privacy*, 16 VA. J.L. & TECH. 189, 49 (2011) (quoting *A.H. v. State*, 949 So. 2d 234, 239 (Fla. Dist. Ct. App. 2007)).

sexual reputation. Rape-shield statutes have been held constitutional in order to protect a person's sexual reputation, even when the statutes at issue are in conflict with a constitutional right.<sup>165</sup>

One such right is a defendant's right to confront a witness.<sup>166</sup> It has long been recognized by courts that rape-shield statutes do not infringe on a defendant's constitutional confrontation rights.<sup>167</sup> Courts balance the competing interests of the defendant's right of confrontation and the state's public policy for enacting the rule in determining the constitutionality of rape-shield statutes.<sup>168</sup> Rape-shield statutes were enacted to prevent a defendant from harassing and humiliating a victim at trial with evidence of sexual experience or reputation for sexual activity.<sup>169</sup> Thus, the courts limit the use of the victim's sexual history to only sexual conduct involving the defendant because evidence of sexual reputation involving other persons is irrelevant as to whether the victim consented and has no probative value.<sup>170</sup>

Furthermore, courts may restrain the publication of information pertaining to a victim in a rape case because the state has a significant interest in protecting the privacy of rape victims from intrusion by the press. In *People v. Bryant*, in-camera transcripts containing information about the victim's sexual history were accidentally released to the media by the trial court.<sup>171</sup> The trial court reacted by restraining the publication of information contained in the transcripts.<sup>172</sup> This case was widely watched by the media because it involved a well-known athlete. The Supreme Court of Colorado held that, within the context and circumstances of the case, the victim's sexual conduct reported in the in-camera transcripts, if released by the press, would irretrievably affect the victim and her reputation; thus, she was entitled to the protections provided by the rape-shield statute.<sup>173</sup> This included the prohibition against further release of the in-camera proceedings.<sup>174</sup>

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165. See *People v. Sandoval*, 552 N.E.2d 726 (Ill. 1990); see also *People v. Bryant*, 94 P.3d 624 (Colo. 2004).

166. *Douglas v. Alabama*, 380 U.S. 415, 418 (1965); *Davis v. Alaska*, 415 U.S. 308, 316 (1974). The primary interest secured by the Confrontation Clause is the right of cross examination because it is the principal means by which the believability of a witness and the truth of his testimony are tested. *Douglas*, 380 U.S. at 418-19.

167. *Sandoval*, 552 N.E.2d at 734.

168. *Id.* at 735 (quoting *People v. Ellison*, 463 N.E.2d 175, 183 (Ill. App. Ct. 1984)).

169. *Id.* (noting that the policy reasons affirmed by courts are as follows: Such evidence of past sexual history with persons other than the defendant has no bearing on whether she consented to sexual relations with the defendant, exclusion of such evidence keeps the jury's attention focused only on issues relevant to the controversy at hand, and lastly, the exclusion promotes effective law enforcement because victims can report crimes of rape and sexual assault without fear of having the intimate details of their past sexual activity brought before the public).

170. *People v. Cornes*, 399 N.E.2d 1346, 1352 (Ill. App. Ct. 1980).

171. *People v. Bryant*, 94 P.3d 624, 627 (Colo. 2004).

172. *Id.* at 628.

173. *Id.* at 636.

174. *Id.*

Rape-shield statutes are allowed to limit some constitutionally proscribed rights in order to protect victims from further reputational harm in limited circumstances because courts balance the competing interests an individual has in the right and the state's public policy for enacting the statute and have determined the right should be limited. This conclusion suggests the interest a defendant has in the First Amendment right to create sexually expressive material should be balanced against the state's interest in protecting the minor's reputation. However, in comparison to the reputational harm the *Hollins* court was trying to protect, there is a very distinct difference from the protection prescribed within rape-shield statutes.

The *Hollins* court protected the sexual reputation of a legal and willing participant in a sexual act who consensually memorialized that act; in essence, the minor was not a victim. The minor was consensually participating in the creation of the sexually expressive material. Cases involving rape and sexual assault encompass unwilling participants. The prevention of the memorialization of a victim's sexual reputation in a court record is more compelling because this memorialization harasses and humiliates an unwilling participant versus a willing participant. Also, *Hollins* did not involve heightened media attention that would broadcast the sexual conduct of the minor worldwide. Although there is a possibility of dissemination of the pictures, the damage of the minor's reputation would not be as significant or as widely known.

However, the U.S. Supreme Court has been reluctant to limit the state's interest when it comes to sexual autonomy.<sup>175</sup> This hesitancy gives the state's interest in protecting the minor's reputation more weight. Nevertheless, the protective interest in *Hollins* does not rise to the level of needed protection the rape-shield statutes provide because *Hollins* involved a legally willing participant, whose First Amendment right to create sexually expressive material would also be limited by this protection.<sup>176</sup>

Therefore, the state's interest in protecting a minor's reputation does not outweigh the First Amendment right to create sexually expressive material between two willing and legal participants. Considering the absence of exploitation and abuse, the *Hollins* rationale of protecting a minor's sexual reputation is still not compelling enough to limit the First Amendment right of the defendant.

## 2. Convenience in Enforcement of Child Pornography Laws

The second legitimate interest the government asserted to uphold the child pornography statute in *Hollins* was convenience in enforcement. The

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175. See generally *Lawrence v. Texas*, 539 U.S. 558 (2003); Pavia, *supra* note 164.

176. See *People v. Hollins*, 2012 IL 112754, ¶ 17, 971 N.E.2d 504, 509.

*Hollins* court noted that Congress changed the definition of a minor in child pornography laws to apply to anyone under eighteen because the previous ceiling of sixteen hampered enforcement of child pornography laws.<sup>177</sup> This was due to confusion about whether a subject was a minor because children enter puberty at different ages.<sup>178</sup>

The statute is not narrowly tailored to achieve a compelling government interest because the statute encompasses individuals who are legally able to consent to sexual relations and the convenient enforcement of child pornography statutes is not a compelling government interest. *Ferber* held the compelling reasons for child pornography laws are to prevent exploitation and abuse of minors.<sup>179</sup> Although the government may have a legitimate interest in making enforcement of child pornography laws more convenient, this interest does not directly prevent abuse or exploitation.

Comparatively, the Supreme Court has held that administrative convenience is not a compelling government interest.<sup>180</sup> Administrative convenience lessens the financial expense and burden on government programs, which is not without some importance, but in the realm of strict scrutiny, administrative convenience does not reflect the Constitution's higher values.<sup>181</sup>

Convenient enforcement is comparable to administrative convenience because, in essence, it saves law enforcement time and money by reducing the difficulty of identifying minors defined by child pornography statutes. The statute defining a minor as anyone under the age of sixteen made it difficult for law enforcement to identify the age of the victim just by viewing the depiction because of time variations in children entering puberty. A person depicted may very well be sixteen or seventeen, but still look only fifteen. It would be time consuming and costly to identify and track down each victim just to verify the age, and often law enforcement would likely not be able to do so. However, administrative convenience is strictly an efficiency and financial interest. Convenient enforcement of child pornography laws allows law enforcement to focus its efforts on more important issues in the investigation of a child pornography case other than identifying the age of the victim.

Although convenient enforcement may be slightly more compelling than administrative convenience, changing the age to eighteen expands the sphere of restricted expression to cases where exploitation and abuse may not

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177. *Id.* ¶ 25, 971 N.E.2d at 511.

178. *Id.*

179. *New York v. Ferber*, 458 U.S. 747, 756 (1982). "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id.*

180. *See Frontiero v. Richardson*, 411 U.S. 677 (1973) (noting that administrative convenience was not a compelling government interest when dealing with discriminatory practices by government programs).

181. *Id.* at 690.

exist. Exploitation and sexual abuse are the main concerns *Ferber* was trying to thwart. Merely aiding enforcement of the law is not a compelling interest that justifies restricting a form of sexual expression, especially when the underlying act is legal and sexual exploitation and abuse are not involved. Therefore, the *Hollins* rationale of convenient enforcement of child pornography laws is not a compelling government interest and the statute is not narrowly tailored for the prevention of sexual exploitation and abuse of children.

### 3. Other Legal Arguments For Consideration

The Illinois child pornography statute upheld in *Hollins* could also be argued to be overly broad when the *Stevens* rule is applied. The First Amendment doctrine of substantial over-breadth is applicable when a statute constitutionally applied to one person may be unconstitutionally applied to others.<sup>182</sup> “The doctrine [of over-breadth] is predicated on the danger that an overly broad statute, if left in place, may cause persons whose expression is constitutionally protected to refrain from exercising their rights for fear of criminal sanctions.”<sup>183</sup> As previously stated, the Illinois child pornography statute encompasses persons who memorialize sexual acts that are legal as well as persons who are unable to legally consent. Persons who are legally able to have consensual sexual relations are protected by the First Amendment when depicting those acts. The Illinois child pornography statute encompasses those constitutionally protected acts as well as those not protected. Thus, the Illinois child pornography statute was unconstitutionally applied to the defendant in *Hollins* because the First Amendment protects the form of expression portrayed in *Hollins*.

To correct this issue, there is a possible less restrictive means for furthering the government interest addressed by *Hollins*.<sup>184</sup> The government has a legitimate interest in aiding enforcement of child pornography laws when protecting minors defined by age of consent laws. It also has a legitimate interest in protecting those minors from reputational harm they might not comprehend when taking sexually explicit pictures. However, setting the age in the child pornography laws to eighteen encompasses persons who are legally able to have consensual sexual relations. If the government wants to further the interest in preventing reputational harm to minors, it could restrict its interest to legally defined minors under the age of consent laws. Traditionally, “free speech jurisprudence has held that liberties in the realm of expression must remain broader than the liberties in the realm

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182. *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989) (citing *Bd. of Airport Comm’rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987)).

183. *Id.* at 581 (citing *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980)).

184. *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813 (2000).

of action.”<sup>185</sup> Therefore, “tying child-pornography statutes to age-of-consent statutes would . . . make the realm of allowable expression at least as broad as the realm of allowable action.”<sup>186</sup> This would eliminate the “illogical inconsistency” found in the *Hollins* decision.

However, there are two distinct problems with linking child pornography laws to age of consent laws: (1) the state is constitutionally able to change the age of consent law to eighteen, thus validating Illinois’ definition of child pornography and eliminating the First Amendment protection; and (2) age of consent varies from state to state; therefore, what constitutes a constitutional form of expression in one state may not in another. Furthermore, acknowledging the *Stevens* rule as applicable in *Hollins* could have significant implications regarding federal statutes criminalizing child pornography. If the federal government were to file charges against the defendant in *Hollins*, *Stevens* would imply the federal definition of a child under the federal child pornography statute would also be unconstitutional. It should be recognized that these issues reflect substantial conflicts with the application of the First Amendment protection nationally, but discussion of the scope of these issues is outside the bounds of this Note.

## V. CONCLUSION

In conclusion, the *Hollins* court incorrectly accepted the defendant’s concession that there was not a fundamental right at issue in the case and mistakenly applied the rational basis test. The court should have addressed *Stevens* instead of relying completely on the prior holdings of *Bach* and *Senters*, which did not have an opportunity to discuss *Stevens*. *Stevens* related directly to the pertinent issue of the level of scrutiny to apply in *Hollins*. *Stevens* changed the broad categorical approach originally interpreted from *Ferber* to a more narrow approach that requires the initial question of whether there is specific illegal conduct to which the speech is integral before the content of expression can be restricted.

Given this premise, the expression found in *Hollins* should be subjected to strict scrutiny because the sexual conduct depicted is lawful. To survive strict scrutiny, the statute must be narrowly tailored to achieve a compelling government interest by using the least restrictive means possible. The two government interests provided in *Hollins*, although legitimate, were not compelling, nor was the law narrowly tailored to promote a compelling interest because it did not directly relate to the *Ferber* interests in preventing sexual exploitation and abuse of children. The protection of a minor’s

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185. Tehranian, *supra* note 163, at 4.

186. Haynes, *supra* note 3, at 398.

reputation from harm and convenient enforcement can be more easily obtained by aligning child pornography laws with age of consent laws. This also would allow the realm of expression to be as broad as the realm of allowable action, which is closer to the traditional view of the First Amendment protection.