

FREEDOM OF SPEECH: ARE CHILD-LIKE SEX ROBOTS PROTECTED?

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Abstract

The introduction of child-like sex robots to the market creates a new legal question: Can they be prohibited? The First Amendment could extend a form of protection for these robots, under the precedents established in *Ashcroft v. Free Speech Coalition* and *Williams v. United States*. The Supreme Court of the United States has protected material that depicted children but did not include minors and were not solicited under the belief that they did. This article evaluates these precedents and, specifically, the components of this new technology, as well as the requirements and limits that sexual speech is given under the First Amendment. It will also examine the obscenity standard established in *Miller v. California* to determine whether the robots are obscene material and, therefore, not protected. It will also examine the concept of low-value sexual speech. Lastly, it will examine the arguments against and in favor the use of the robots. Considering *Ashcroft* and *Williams*, and the other factors analyzed in this article, child-like sex robots could be protected under the First Amendment. However, this protection should be limited to medical and research uses under prescription.

Resumen

La reciente introducción de robots sexuales que asemejan niños en el mercado ha creado una nueva pregunta legal: ¿Pueden ser prohibidos? La Primera Enmienda

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podría extenderse para proteger estos robots, al amparo de los precedentes de *Ashcroft v. Free Speech Coalition* y *Williams v. United States*. El Tribunal Supremo de Estados Unidos determinó que no se clasifica como pornografía infantil lo que tenga imágenes que asemejen menores, si no incluye menores de edad o sea solicitado con la intención de que lo fuesen. Este artículo analiza esos precedentes, el estándar de obscenidad establecido por *Miller v. California* y la doctrina de *low-value sexual speech*. Por último, el artículo discute los puntos a favor y en contra de usar estos robots. Al considerar las decisiones del Tribunal Supremo de los Estados Unidos, y otros factores discutidos en el artículo, los robots sexuales que asemejan niños podrían ser protegidos bajo la Primera Enmienda. Sin embargo, esta protección debería ser limitada a investigaciones y objetivos médicos bajo receta.

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I. Introduction

In 2017, the House of Representatives introduced the *Curbing Realistic Exploitative Electronic Pedophilic Robots Act of 2017* [hereinafter *CREEPER Act*]¹ to ban the importation of child-like sex robots into the United States² in response to an increase in the market for these.³ The Bill was sent to the Senate and referred to the Committee on the Judiciary on June 14, 2018, but it did not go any further.⁴ Even so, it has sparked the debate over child-like sex robots. The main issue is whether their use and/or possession would be considered protected speech under the First Amendment of the United States or considered obscene material.

Because it is protected by First Amendment Free Speech, sexually-oriented can be regulated by the government only to a certain extent.⁵ For instance, pornography is generally protected speech, as long as it complies with the “obscenity standards” set forth in *Miller v. California*.⁶ On the other hand, obscenity, which includes child pornography, is not protected speech.⁷ However, in the case of *Ashcroft v. Free Speech Coalition*,⁸ the Supreme Court determined that child-like images that were altered or created without the use of actual minors were not considered obscenity and were therefore protected speech, as long as the images met the *Miller* test standard.

After *Ashcroft*, Congress passed the *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act* [hereafter *PROTECT Act*], which expanded the definition of child pornography to include some virtual depictions of child pornography.⁹ Title V of the *PROTECT Act* explains how virtual child pornography can be manipulated to disguise real children as virtual reality. This Act was challenged in *United States v. Williams*; however, the Supreme Court held

¹ *CREEPER Act of 2017*, H.R. 4655, 115th Cong. (2017). <https://www.congress.gov/bill/115th-congress/house-bill/4655>.

² *Id.* (In the bill, child-like sex doll is defined as “an anatomically-correct doll, mannequin, or robot, with the features of, or with features that resemble those of, a minor, intended for use in sexual acts.”).

³ Martin Evans, *Child-like sex dolls are being sold on websites such as eBay and Amazon, crime agency warns as churchwarden is convicted*, THE TELEGRAPH (July 31, 2017, 6:24 PM) <https://www.telegraph.co.uk/news/2017/07/31/child-like-sex-dolls-sold-websites-ebay-amazon-crime-agency/> (last visited May 28, 2019).

⁴ H.R. 4655.

⁵ ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 1365 (Vicki Been, et al., eds., 4th ed. 2013).

⁶ 413 U.S. 15, 24 (1973).

⁷ See *Roth v United States*, 354 U.S. 476 (1957). See also, *New York v. Ferber*, 458 U.S. 747 (1982).

⁸ 535 U.S. 234 (2002). In this case the Court decided whether the *federal Child Pornography Protection Act of 1996* (CPPA) which extended federal prohibition on against child pornography to sexually explicit images that appeared to be minors although their production did not involve minors.

⁹ *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003*, 108 P.L. 21, 2003 Enacted S.151.

that it was constitutional.¹⁰ However, the Supreme Court reiterated that for the material to be considered child pornography, real children must have been used in its production, not just a digital alteration of consenting adults to appear like children. In addition, *Williams* expanded the requirements by establishing that if the person who solicited the material reasonably believed that the material involved real children, it will be punished as if it had, regardless of whether the material actually consisted of virtual reality or image alteration.¹¹

Part II of this article will discuss how the Supreme Court has historically treated sexually-related topics regarding pornography under the Freedom of Speech doctrine. Part II will also discuss the standard for determining obscene material established in *Miller*, *Ashcroft*, and *Williams*. This standard considers that altered images of what appear to be minors, but do not involve the harming of minors, are protected speech. Part III will discuss what child-like sex robots are. This part will be divided into two sections. Section A will discuss the current research on the possibility that child-like sex robots can be harmful to children. Section B will examine the use of child-like sex robots for therapeutic purposes. Lastly, Part IV will analyze the obscenity doctrine with regards to the ban on child-like sex robots.

II. Freedom of Speech and treatment of Sexual and Obscene Speech

A. Historical Background

The First Amendment of the United States Constitution states that: “Congress shall make no law . . . abridging the freedom of speech . . .”¹² Though at first read the Amendment is very broad. However, through many cases,¹³ the Supreme Court has carefully limited the understanding of this amendment. However, to understand the limits and the importance of First Amendment Freedom of Speech, we must first understand why speech is protected. According to Chemerinsky, there are four major reasons as to why speech is a fundamental right and why it is protected: “freedom of speech is protected to further self-governance, to aid the discovery of truth via the marketplace of ideas, to promote autonomy, and to foster tolerance.”¹⁴

The self-governance theory entrenches in our independence as a nation. Free speech is crucial in exercising our democratic rights and necessary for voters to

¹⁰ 553 U.S. 285 (2008).

¹¹ *Id.* at 307.

¹² U.S. CONST. amend. I.

¹³ See *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50 (1976).

¹⁴ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 926 (Vicki Been, et al., eds., 3th ed. 2006).

make informed selections and influence government choices through speech.¹⁵ The discovery of truth theory regards how freedom of speech is important for the discovery of truth through the market place of ideas. This theory has been criticized by scholars because it is wrong to assume every idea will enter the market place of ideas.¹⁶ Despite this criticism, it is widely accepted that free speech protects the people from a government that determines what is true and what is false.¹⁷ This prevents the government from censoring the ideas it does not favor. The third theory for the protection of free speech is for the advancement of autonomy. This theory sees free speech as intrinsically important and is tied to a person's way to express themselves in accordance with their views.¹⁸ Lastly, the fourth theory as to why Freedom of Speech should be protected is for the promotion of tolerance. This means that the promotion of "unpopular or distasteful speech is itself an act of tolerance."¹⁹ As Professor Lee Bollinger stated in respect to this theory, "[it] involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters."²⁰ This theory has also faced criticism, mainly that society need not be tolerant of intolerance.²¹

The aforementioned theories are not mutually exclusive, and their purposes can intertwine amongst each other.²² Thus, "[they] are all important in understanding why freedom of speech is protected, in considering what expression should be safeguarded and what can be regulated."²³

B. Protected Speech Versus Obscenity

The regulation of sexually oriented speech has been a major topic in free speech doctrine. Sexually oriented speech is divided into two categories. One category of sexually oriented speech is protected by the First Amendment. The second category is obscene speech, which is not protected by the First Amendment. To understand Freedom of Speech and the extent to which it applies to sexually oriented speech, first we need to analyze the Supreme Court decisions regarding obscene material as unprotected speech.

¹⁵ *Id.*

¹⁶ *Id.* at 928.

¹⁷ *Id.*

¹⁸ *Id.* at 929.

¹⁹ *Id.* at 930.

²⁰ LEE BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 9-10 (1986).

²¹ CHEMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES*, *supra* note 14, at 930.

²² *Id.*

²³ *Id.*

In *Roth v. United States*, the Supreme Court held that obscenity is a category of speech that is not protected by the First Amendment.²⁴ In this case, the Court defined obscene material as “material which deals with sex in a manner appealing to prurient interest.”²⁵ But it was not until *Miller* that the Court formulated the definition for obscene material that is still used today.²⁶ The standard established in *Miller* has three prongs. First, the material must appeal to the prurient interest under the community standard.²⁷ Second, whether it depicts or describes in an offensive way sexual conduct specifically defined by the applicable law.²⁸ Lastly, whether the work “taken as a whole lacks serious literary, artistic, political, or scientific value.”²⁹ By this standard, the Supreme Court has determined that child pornography is not protected speech, because the production of such content produces physical and psychological harm to minors.³⁰

i. Child Pornography

The use of child-like sex robots is related to virtual child pornography and the depiction of minors. However, they do not use real children in their production. Therefore, an in-depth analysis on whether child-like sex robots would be protected under the First Amendment must examine the applicable legal precedents of the Supreme Court on matters related to child pornography.

In 2006, the United States ratified the Convention on Cybercrime, Article 9 of the Convention specifically treats the offenses related to child pornography. This treaty establishes that:

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law when committed intentionally and without right, the following conduct:

- a. producing child pornography for the purpose of its distribution through a computer system;
- b. offering or making available child pornography through a computer system;

²⁴ 354 U.S. 476, 485 (1957).

²⁵ *Id.* at 499. (“A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or exertion and if it goes substantially beyond customary limits of candor in description or representation of such matters.” (footnotes omitted)).

²⁶ CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 5, at 1368.

²⁷ *Miller v. California*, 413 U.S. 15, 24 (1973).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *New York v. Ferber*, 458 U.S. 747 (1982).

- c. distributing or transmitting child pornography through a computer system;
- d. procuring child pornography through a computer system for oneself or for another person;
- e. possessing child pornography in a computer system or on a computer-data storage medium.³¹

Moreover, section 2 of this article defines child pornography as one of the following: “[1] a minor engaged in sexually explicit conduct; [2] a person appearing to be a minor engaged in sexually explicit conduct; [3] realistic images representing a minor engaged in sexually explicit conduct.” Upon ratifying this treaty, the United States had some reservations with regards to this definition. Specifically, the United States reserved the right to apply subsections (b) and (c) “to the extent consistent with the Constitution of the United States as interpreted by the United States and as provided for under its federal law, which includes, for example, crimes of distribution of material considered to be obscene under applicable United States standards.”³² Those two subsections regard a person who appears to be a minor and depiction of minors.

With this background, we examine the Supreme Court precedents. The first Supreme Court case that discussed the representation of what *appears* to be a minor engaging in sexually explicit conduct is *Ashcroft v. Free Speech Coalition*. Here, the Supreme Court determined that virtual child pornography was protected speech if it did not involve real children in its production.³³ The statute that was being questioned in this case expressed that virtual child pornography “whets the appetites of pedophiles and encourages them to engage in illegal conduct.”³⁴ In response, the Court determined that this proposition could not be sustained and further commented that “[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.”³⁵ Expanding on this, the Court stated that the government cannot “constitutionally premise legislation on the desirability of controlling a person’s private thoughts.”³⁶ In *Ashcroft*, the Court did not find this type of pornography harmful to the children, nor did it find that it encouraged sex offenders to abuse children.³⁷ The court found that the government did not show more than a remote connection between “speech that might encourage thoughts or

³¹ Convention on Cybercrime, art. 9, Nov. 23, 2001, ETS No. 185.

³² *Id.*

³³ 535 U.S. 234 (2002).

³⁴ *Id.* at 253.

³⁵ *Id.*

³⁶ *Id.* (quoting *Stanley v. Georgia*, 394 U.S. 557 (1969)).

³⁷ *Id.* at 256.

impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.”³⁸

In response to the decision in *Ashcroft*, Congress passed the PROTECT Act.³⁹ The PROTECT Act, as previously mentioned, expanded the definition of child pornography. Title V specifically refers to how virtual child pornography can be manipulated to disguise real children.⁴⁰ Although this Act was upheld in *United States v. Williams*,⁴¹ the Supreme Court emphasized that to classify the material as child pornography the requirement was for real children to actually be involved in its production.⁴² Nonetheless, the Court concluded that the law could punish those who solicit or offer material under a reasonable belief that the material was child pornography, as previously defined.⁴³ Therefore, this statute did not change the requirements set forth in *Ashcroft*. It only added that reasonable belief that the material contained actual children, was enough to punish a person under the statute for offering or soliciting material that would be classified as child pornography.

C. Low-Level Protection for “Low-Value” Sexual Speech

i. Doctrine of “Low-Value” Sexual Speech

According to Chemerinsky, the standard used for sexually related speech is far more than just a rational basis standard.⁴⁴ He says, “cases like *Erie*, *Barnes*, *Renton*, and *Young* raise the question of whether there should be a category of minimally protected sexually oriented speech.”⁴⁵ This type of sexual speech has been identified as “low-value” sexual speech. The cases mentioned by Chemerinsky are about

³⁸ *Id.* at 253-54.

³⁹ Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, 108 P.L. 21, 2003 Enacted S.151.

⁴⁰ *Id.*

⁴¹ 553 U.S. 285 (2008).

⁴² CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 5, at 1386-87.

⁴³ *Williams*, 553 U.S. at 306.

⁴⁴ CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 5, at 1395-96.

⁴⁵ *Id.* Referring to the cases of: *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000) (discussing an ordinance that banned fully nude dance performance and holding that the ordinance did not violate any cognizable first amendment protections of expressive conduct); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (plurality opinion expressing that the statute prohibiting nude dancing that required that the dancers wear pasties and a G-string at a minimum); *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) (determined that a zoning ordinance by the City of Renton which limited where adult theaters could be established was constitutional); *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976) (determined that a Detroit ordinance regulating where adult theaters could be placed was constitutional and that the State could regulate this sort of establishment).

sexually related speech such as nude dancing and adult theatres. Through these cases, the Court has held that the government could limit the manner in which some sexual speech is conducted. However, as Genevieve Laker states in her article, the doctrine of “low-value” sexual speech allows the government to:

[R]emove ideas it dislikes from public circulation in the marketplace and potentially (though less easily) repress the speech of those who criticize it. It also, of course, allows the government to absolutely prohibit its citizens from expressing themselves in certain ways—by, for example, speaking of sex in a prurient manner, or using threatening speech.⁴⁶

In this article, she also criticizes the way that the New Deal Court allowed the government to punish certain kinds of speech “not only when it threatened serious violence or disorder, but also when it violated dominant norms of civility, decency, and piety.”⁴⁷ This permission paves the way for discrimination against forms of speech on the basis of content, when that content is considered the general moral precept at the moment it is being made. The standard used in this type of cases has not been specified by the Court. However, as Chemerinsky posits, it is less than a strict scrutiny standard and more than a rational basis standard.⁴⁸

The Court has not defined what speech is included in this category of “low-value” sexual speech. Nonetheless, the cases indicate that sexually explicit material is clearly included.⁴⁹ The most important issue emerging from the creation of this category is the standard. What justification would be sufficient for “low-value” sexual speech to be regulated?⁵⁰ The decisions in some of these cases, like the plurality opinion in *City of Erie v. Pap's A.M.*,⁵¹ “focus on the need to regulate speech to stop secondary effects. But almost all speech has some secondary effects . . . These cases also raise the question of whether a state’s interest in advancing a certain moral vision is sufficient to warrant restrictions of speech.”⁵² This issue

⁴⁶ Genevieve Laker, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2172 (2015).

⁴⁷ *Id.* at 2168. The New Deal period was when the courts “began to link constitutional protection to a judgment of the value of different kinds of speech.” *Id.* at 2168. It was only in the New Deal period that courts began to link constitutional protection to a judgment of the value of different kinds of speech.

⁴⁸ CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 5, at 1396. As stated in the book by Chemerinsky, the cases such as *Erie*, *Barnes*, *Renton*, and *Young* do not specify the level of scrutiny that was used. It was “obviously far less than strict scrutiny and appears to be little more than a rational basis review” this is brought to show the tension that cases involving sexual speech. “Freedom of Speech is seen usually under strict scrutiny, but there appears to be an unspoken differentiation for sexual speech.”

⁴⁹ *Id.* at 1387.

⁵⁰ *Id.* at 1396.

⁵¹ 529 U.S. 277 (2000).

⁵² CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 5, at 1396.

brings us back to Genevieve Lakier's argument. The "low-value" sexual speech category permits discrimination and the imposition of moral values to punish certain kinds of speech.⁵³

With this "low-value" sexual speech doctrine, the Court is determining which speech warrants protection and which speech does not, based on which ones it finds more or less valuable. The Supreme Court would be making a value judgment to decide what speech is worthy of First Amendment protection. This sentiment was expressed by Justice Powell in his concurring opinion in *FCC v. Pacifica*,⁵⁴ where he objected to the low-value speech theory by stating:

I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most "valuable" and hence deserving of the most protection, and which is less "valuable" and hence deserving of less protection.⁵⁵

ii. What is "low-value" sexual speech?

There is no clear-cut definition of what is considered "low-value" sexual speech. Thus far, the Supreme Court cases have dealt mostly with adult entertainment establishments, such as Adult Theaters and whether zoning ordinances on their locations could be constitutionally valid.⁵⁶ However, the restrictions for "low-value" sexual are not just limited to establishments which sell adult content material. A sexual expression such as nude dancing has also been found to be of "low-value" sexual speech.⁵⁷ In the case of *Barnes v. Glen Theatre Inc.*, the Court discussed a ban on nude dancing but justified its decision by saying that the ban was not directed at the message conveyed by the nude dancing but at the secondary effect of it.⁵⁸

The plurality opinion in *Barnes* noted that the kind of dancing in question was "expressive conduct within the outer perimeters of the First Amendment, though we view it as marginally so."⁵⁹ The Court viewed nude dancing as symbolic speech and implemented the test used for this kind of speech.⁶⁰ The ordinance prohibiting

⁵³ Lakier, *supra* note 46.

⁵⁴ *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

⁵⁵ *Id.* at 761 (Powell, J. concurring).

⁵⁶ *See City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976).

⁵⁷ *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

⁵⁸ *Id.* at 582-86 (Scouter J., concurring).

⁵⁹ *Id.* at 566.

⁶⁰ CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 5, at 1391. The test used for regulating symbolic speech was determined in the case of *United States v. O'Brien*, 391 U.S. 367, 378 (1968) ("government

nude dancing was upheld because it served the goal of “protecting societal order and morality.”⁶¹ The dissenting opinion of Justice White, in this case, he stated that the ban was suppressing a message.⁶²

As shown, the biggest problem with the “low-value” sexual speech categorization is that the Court has not established what type of speech would specifically fall under this, or what standard should be followed to determine whether a form of speech should be considered “low-value”. However, sexually explicit speech has been determined to fall under this category. This is problematic. Upon studying the cases decided by the Court on this subject, it becomes clear that such a categorization would necessarily lead to more judgments based solely on moral precepts, which exclude speech from First Amendment protection without balancing other sources of value the speech that is seeking protection may have. This would lead to censorship by the government in matters related to sexual speech or conduct based on a correlation of facts and moral judgments, instead of abundant research or empirical studies on the matter.⁶³

III. Child-like sex robots

There is a recent concern brewing in response to the introduction of child-like sex robots into the market. Anatomically, child-like sex robots are made to assimilate a real child. They can be acquired through online retailers, such as Amazon and eBay.⁶⁴ These child-like sex robots have sparked a series of legal, ethical and scientific debates worldwide.⁶⁵ Across the globe, the ease with which

regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”)

⁶¹ *Id.* See also, *Barnes v. Glen Theater*, 501 U.S. 560, 568 (1991).

⁶² CHEMERINSKY, *CONSTITUTIONAL LAW*, *supra* note 5, at 1391.

⁶³ See Lakier, *supra* note 46.

⁶⁴ Ciaran Varley, *Is Japan turning a blind eye to paedophilia?*, BBC UK (March 07, 2018), <https://www.bbc.co.uk/bbcthree/article/57eaaf23-0cef-48c8-961f-41f2563b38aa> (last visited May 28, 2019). Martin Evans, *Child-like sex dolls are being sold on websites such as eBay and Amazon, crime agency warns as churchwarden is convicted*, THE TELEGRAPH (July 31, 2017, 6:24 PM), <https://www.telegraph.co.uk/news/2017/07/31/child-like-sex-dolls-sold-websites-ebay-amazon-crime-agency/> (last visited May 28, 2019). A spokesman for Amazon stated that “[a]ll Marketplace sellers must follow our selling guidelines and those who don’t will be subject to action, including potential removal of their account.” *Id.* However, law enforcement officials in the United Kingdom said that stopping the trade and sale of these robots will be like “turning around a tanker.” *Id.*

⁶⁵ Mandy Stadtmiller, *Child Sex Robots are Coming to America. Can We Stop Them Before Its Too Late?*, THE DAILY BEAST (Feb. 12, 2018), <https://www.thedailybeast.com/child-sex-robots-are-coming-to-america-can-we-stop-them-before-its-too-late> (last visited May 28, 2019).

these types of robots can be obtained has caused countries and law enforcement agencies great worry. Recently, Canada and the United Kingdom courts have begun to see cases regarding child-like sex robots.⁶⁶ In the United Kingdom, the first case of its kind was *R. v. Dobson*, which deals with the importation of a child-like sex doll the person had bought on eBay.⁶⁷ One of the aspects the case considered was the possession of a child-like sex doll. Regarding this possession the court stated:

It is common ground before us that there is no offense of either manufacture or simple possession of such a doll, only an offense of importing it is indecent. There may possibly be an offense of sending an indecent or obscene item through the post, but otherwise, production, possession, or even a purely internal sale in the United Kingdom does not appear to have been the subject of legislation prohibiting it.⁶⁸

This decision makes it clear that the importing of such dolls is obscene and thus illegal. However, owning and producing one in the United Kingdom is not illegal. It must be distinguished from the United States, the United Kingdom laws against child pornography and obscenity that are different and, in a way, stricter than the United States. These do not make a differentiation between virtual pornography and child pornography made in the United States.⁶⁹ On the other hand, the case presented in Canada had a different verdict. The case is the first case of child pornography in Canada involving a child sex doll. The child pornography laws in Canada define child pornography as “a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means.”⁷⁰ The crown lawyers argued that the robot was a three-dimensional form of child pornography.⁷¹ In the final verdict “Judge Mark Pike said he accepted expert testimony that the doll

⁶⁶ See *R. v. Dobson*, 2017 WL 07736724 (case in the United Kingdom where a man was charged for importing an obscene object which was a child sex doll into the United Kingdom); Dorian Geiger, *Canada's Child Sex Doll Trial Raises Uncomfortable Questions About Pedophilia and the Law*, VICE (Feb. 25, 2016), https://www.vice.com/en_us/article/kwxj7w/newfoundlands-child-sex-doll-trial-raises-uncomfortable-questions-about-pedophilia-and-the-law (last visited May 28, 2019), (discussing the moral and legal challenges faced by the unprecedented case of the importation of a child sex doll into Canada.).

⁶⁷ *Dobson*, 2017 WL 07736724.

⁶⁸ *Id.*

⁶⁹ YAMAN AKDENIZ, INTERNET CHILD PORNOGRAPHY AND THE LAW 19 (2008).

⁷⁰ Holly McKenzie-Sutter, *Prosecutors in Kenneth Harrison Trial Argue Child-Sized Sex Doll is 32 Child Porn*, HUFFPOST (May 8, 2019, 08:34am), https://www.huffingtonpost.ca/2019/05/07/prosecutors-kenneth-harrison-child-porn_a_23722967/?ncid=other_huffpostre_pqylmel2bk8&utm_campaign=related_articles (last visited May 25, 2019).

⁷¹ *Id.*

was child pornography,⁷² however, the crown did not meet the burden of proof necessary for a criminal conviction and the person was found not guilty.

The main issue with these robots is whether they are considered child pornography, and therefore obscene material. In the United Kingdom, a man was found guilty for the possession of such dolls, while in Canada the person was found not guilty although the judge accepted the testimony that the robots are a form of child pornography. The distinction we need to keep in mind in these cases is that both countries consider any type of material, whether digitally produced or not, that depicts a child is child pornography;⁷³ Whereas, in the United States, digitally produced material that is not requested under the belief that it involves real children is constitutional unless found to be obscene.⁷⁴ This portion of the article will discuss whether child-like sex robots are considered obscene material or not and whether they are a form of speech.

A. Child-like Sex Robots as Speech

Although it might be new and unconventional to associate this type of object with speech, when it comes to the extension of the right of Free Speech to other objects there has always been a debate. Initially, it was pondered whether it extended to art and other expressions such as sculptures. Later on, it was whether expressions or non-speech were also covered. Now, we face the new frontier of technology; one of the first cases we saw was *Ashcroft* which extended the right animated images.⁷⁵ The difference between animated image described in the case of *Ashcroft* and child sex robots is that these brings that which was initially in digital form out of the screen. In the case presented in Canada regarding a child sex robot, the crown (prosecution) argued that these were a form of three-dimensional pornography, and the court agreed to this argument.⁷⁶ Comparing this concept presented by the crown in Canada, we can see that it is a way to adapt those animations into the modern concepts, since modern technology consists on bringing images that were previously two dimensional into three-dimensional form, an example of this is materials created with 3D printers.

Provocative and controversial art and topics put freedom of speech to the test, especially when it consists of sexually related topics.⁷⁷ Earlier the main theories

⁷² The Canadian Press, *Newfoundland Man Found Not Guilty In Trial Over Child-Sized Sex Doll*, HUFFPOST (May 23, 2019, 10:54am) https://www.huffingtonpost.ca/entry/newfoundland-man-child-sized-sex-doll_ca_5ce6a2ade4b09b23e65ee764 (last visited May 25, 2019).

⁷³ See AKDENIZ, *supra* note 69.

⁷⁴ See *United States v. Williams*, 553 U.S. 285 (2008); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

⁷⁵ See *Ashcroft*, 535 U.S. at 234.

⁷⁶ McKenzie-Sutter, *supra* note 70.

⁷⁷ Freedom of Expression in the Arts and Entertainment, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/other/freedom-expression-arts-and-entertainment> (last visited May 28, 2019).

as to why freedom of speech is important where discussed. The importance of safeguarding the expressions, as unconventional as they may seem, lies in the fact that:

[A] free society is based on the principle that each and every individual has the right to decide what art or entertainment he or she wants -- or does not want -- to receive or create. Once you allow the government to censor someone else, you cede to it the power to censor you, or something you like. Censorship is like poison gas: a powerful weapon that can harm you when the wind shifts. Freedom of expression for ourselves requires freedom of expression for others. It is at the very heart of our democracy.⁷⁸

Morally these robots would face strong rejection, but for it to be prohibited it would require more than just a moral rejection on the part of society.⁷⁹ As expressed by Tiehen in his article “[y]ou might have the initial gut reaction that something is morally wrong but decide after further reflection that your initial intuition is mistaken.”⁸⁰ To determine whether they should be protected or not we must analyze whether they are considered obscene material or not. That requires analysis of the Miller standard, and the possible benefits to medicine and rehabilitation these products could bring. To determine this, we will be discussing what the possibilities of these robots to cause harm to children are and whether they can be used for therapeutic purposes. This will help develop the discussion on the purposes of these robots and how they can be protected, even if it is done with some limitations, such as providing them only with a prescription.

B. Research Regarding Possible Harm to Children

Last summer, the House of Representatives passed the CREEPER Act, which sought to ban the importation of child-like sex robots.⁸¹ The Bill defines a child-like sex robot as “an anatomically-correct doll, mannequin, or robot, with the features of, or with features that resemble those of, a minor, intended for use in sexual acts.”⁸² Furthermore, the Bill is premised on the belief that the use of these robots will serve as a gateway for pedophiles to attack minors. The Bill did not pass; nonetheless, it is crucial in the analysis of this issue, as it is the first attempt to regulate the use

⁷⁸ *Id.*

⁷⁹ See *Miller v. California*, 413 U.S. 15 (1973).

⁸⁰ Justin Tiehen, *Virtue Ethics and the CREEPER Act*, 41 SEATTLE U. L. REV. 1153, 1160 (2018).

⁸¹ CREEPER Act of 2017, H.R. 4655, 115th Cong. (2017)). <https://www.congress.gov/bill/115th-congress/house-bill/4655>.

⁸² *Id.*

of these robots and it brought the issue to public knowledge. The Act was based on a premise that these robots could be used as a gateway for pedophiles to attack children. However, this premise was highly criticized by professionals in the field of psychology. These professionals claim that there is room for broad study for the possible rehabilitative use of these robots.⁸³ In a similar manner, there is not enough research to demonstrate a link between their use and encouragement to act against a child.⁸⁴

Due to the fact that the recent introduction of these robots in the market is unprecedented, no research is available regarding whether they conduce to harmful conduct towards children. However, some researchers have been studying the possible correlations between the use of child pornography and virtual child pornography and the attacking of a child. For instance, Marie-Helen Maras and Lauren R. Saphiro have discussed research studies that examined convicted child sex offenders and found that the use of child pornography is a strong indicator of pedophilia.⁸⁵ They concluded that:

The consumption of child and virtual child pornography does not prevent pedophiles from future offending. Instead, viewing child pornography (actual and virtual) is considered to be a progressive addiction that serves as a gateway to child sexual abuse. Specifically, passive viewing of child pornography often becomes insufficient for the perpetrator as he or she becomes desensitized to it.⁸⁶

This is one of the main worries presented by those who oppose the use of child-like sex robots. The United Kingdom's National Society for the Prevention of Cruelty to Children [hereafter *NSPCC*] has spoken regarding the possible harm that the use of these robots might cause to children has been. The NSPCC expressed that "there is a risk that those using these child[-like] sex [robots] or realistic props could become desensitized and their behavior becomes normalized to them so that they go on to harm children themselves, as is often the case with those who view indecent images."⁸⁷ The co-director of the Foundation for Responsible Robotics, who helped

⁸³ Samantha Cole, *The House Unanimously Passed a Bill to Make Child Sex Robots Illegal*, MOTHERBOARD (Jun. 15, 2018, 9:00 AM), https://motherboard.vice.com/en_us/article/vbqjx4/a-new-bill-is-trying-to-make-child-sex-robots-illegal (last visited May 28, 2019).

⁸⁴ *Id.*

⁸⁵ Michael C. Seto, et al., *Child pornography offenses are a valid diagnostic indicator of pedo-philia*, 115 ABNORMAL PSYCH. J. 610 (2006).

⁸⁶ Marie-Helen Maras & Lauren R. Saphiro, *Child Sex Dolls and Robots: More Than Just an Uncanny Valley*, J. INTERNET L., Dec. 2017, at 7.

⁸⁷ Richard Wheatstone, *Outrage over push to give pedophiles 'child sex dolls'*, NEW YORK POST (Aug. 3, 2017, 1:15pm), <https://nypost.com/2017/08/03/outrage-over-push-to-give-pedophiles-child-sex-dolls/1839320122967772/> (last visited May 25, 2019).

Congressman Donovan draft the CREEPER Act, stated that she believed in the need of a ban on child-like sex robots “because of the dangers that they may create. They could have a pernicious impact on society and potentially normalize sexual assault on minors. It would be relatively easy to make these as replicas of actual children from photographs. The way forward is to have international laws against them.”⁸⁸

This topic has created disagreement between researchers. As we have seen, some researchers stress that the use of child-like sex robots can desensitize a person and can cause them to molest children. On the other hand, others emphasize that there is a lack of research in the area. They also argue that studies have found that there is no causation link between pornography consumption and child molestation. Moreover, there is no research on whether the use of child-like sex robots directly results in harm to children.⁸⁹ A specialized researcher, Michael Seto denies the existence of definitive evidence on the possible therapeutic uses or the effect of those uses.⁹⁰ Seto, who conducts research on pedophilia and sexual offenders who target children, commented on the research used in the CREEPER Act in order to justify the ban. On the premise that the use of child-like sex robots is harmful to children, he stated: “The study that is cited in the article discusses factors that are important in the treatment of identified sex offenders to reduce offending. I know this research, and it does not address the impact of child-like sex dolls or robots, which are relatively new inventions.”⁹¹

Due to ethical and legal prohibitions, scientific studies examining the effects of virtual child pornography on pedophiles is not likely.⁹² However, studies on the effect of virtual child pornography could be helpful for the determination on the effect of the use of child-like sex robots on potential sex offenders and pedophiles. A study by Seto and Eke on the Criminal Histories and Later Offending of Child Pornography Offenders, analyzed and compared several types of focus groups and their reactions to pornographic material.⁹³ These studies showed “little demonstrable

⁸⁸ Stadtmiller, *supra* note 65.

⁸⁹ *Id.* In an email to the Daily Beast Seto explained that he does not understand why despite the lack of research the authors of the act can be so confident in their opinions.

⁹⁰ *Id.* In the previously mentioned email Seto also explained that he conducts “research on pedophilia and sexual offending against children and [he] is not aware of any research on the impacts of access to child sex robots.” *Id.*

⁹¹ Stadtmiller, *supra* note 65.

⁹² Neil Malamuth & Mark Huppin, *Drawing the Line on Virtual Child Pornography: Bringing the Law in Line with the Research Evidence*, 31 N.Y.U. REV. L. & SOC. CHANGE 773, 790 (2006-2007).

⁹³ Michael C. Seto & Angela W. Eke, *The Criminal Histories and Later Offending of Child Pornography Offenders*, 17 SEXUAL ABUSE: J. RES. & TREATMENT 201 (2005). The study made a differentiation between child molesters, which are the individuals who have committed sexual molestation against children, and the pedophiles, which are the individuals who are sexually aroused by children. The study found that the data suggests (on the self-reports) that many pedophiles use pornography of various types as masturbatory aid and “[s]ome individuals believe that such materials may have

risk for other individuals (including child pornography offenders without a history of contact sexual offending) to commit future molestation pursuant to pornography consumption, and the data, therefore, do not at present support a blanket prohibition against the use of virtual child pornography.”⁹⁴

Evidently, there two main opposing arguments by experts in the field in the topic of whether child-like sex robots could be a gateway to harming real children. Despite the difference in opinions, both sides point out the lack of research data on the matter. The closest thing to studies on this matter is those on the effects of virtual reality child pornography consumption and their correlation with violent behavior.⁹⁵ This study showed that individuals, particularly those who did not have a prior history of sexual offenses, posed “little demonstrable risk” to commit future offenses.⁹⁶

C. The use of the robots as therapeutic

The goal of treatment for pedophilia is to keep the person from offending or acting out against children. This is done either by decreasing sexual arousal or by increasing the ability to manage the arousal. However, the most effective method is preventing access to children or providing close supervision to the individual.⁹⁷ No form of intervention is likely to work on its own. Therefore, a treatment that involves psychotherapy and medication is likely more efficient.⁹⁸ Currently, the research on pedophilia is limited, because most studies conducted have involved men convicted for sexually abusing minors.⁹⁹ This research may not be applicable to a non-offending pedophile.¹⁰⁰ In efforts to understand pedophilia and prevent

actually reduced their tendencies to engage in molesting behaviors, although a minority reported that the materials caused increased tendencies.” *Id.*

⁹⁴ Malamuth & Huppin, *supra* note 92, at 827.

⁹⁵ See Seto & Eke, *supra* note 93; Leonard Berkowitz, *The Contagion of Violence: An S-R Medialional Analysis of Some Effects of Observed Aggression*, 18 CURRENT THEORY & RES. MOTIVATION 95, 101-33 (1970); Martin Barron & Michael Kimmel, *Sexual Violence in Three Pornographic Media: Toward a Sociological Explanation*, 37 J. SEX. RES. 161, 164 (2000).

⁹⁶ *Id.*

⁹⁷ Harv. Health Publ'n, *Pessimism about pedophilia*, (July 2010), https://www.health.harvard.edu/newsletter_article/pessimism-about-pedophilia (last visited May 25, 2019), (Treatment is effective if the patient is committed to controlling the behavior. Psychotherapy treatment focuses on enabling the patient to recognize and overcome rationalizations about his behavior and empathy training and techniques in sexual impulse control. Drug treatment consists on a drug which suppresses production of testosterone to reduce the frequency or intensity of sexual desire. Physical castration is also another option).

⁹⁸ *Id.*

⁹⁹ *Id.* See also, TEDx Talks, *Let's be mature about pedophilia | Madeleine van der Bruggen | TEDxSittardGeleen*, YOUTUBE (Apr. 13, 2018), <https://www.youtube.com/watch?v=egiBgmvv8wA> (last visited May 28, 2019).

¹⁰⁰ *Id.*

pedophiles from acting on their urges, researchers are trying to broaden the studies to people who voluntarily seek treatment instead of just focusing on those who have already acted and been convicted.¹⁰¹

The use of child-like sex robots is a potential treatment for pedophilia. This has generated some debate. Similar to the previous debates, experts have differing opinions in this area. Some experts claim that the use of child-like sex robots would serve as a gateway and incite them to offend. Others believe it would serve as a release and stop them from acting against a child.¹⁰² As part of this debate, the Chairwoman of the Specialist Treatment Organization for the Prevention of Sexual Offending [hereafter *StopSO*], Juliet Grayson commented that:

If someone comes forward and says, “I am attracted to young children, and I want help to ensure that I never act on that attraction, so that I never harm a child,” then maybe society should consider the use of dolls in a carefully regulated way. Perhaps a “prescription” for the use of a child sex doll could be given, alongside therapy, mentoring and supervision could help the individual remain law-abiding and fully accountable for their behavior. This carefully regulated use of child sex dolls might be one way to keep children safe. It feels like dangerous territory but is certainly worthy of consideration.¹⁰³

This statement was met with a lot of criticism, including from the development head for the National Society for the prevention of Cruelty to Children [hereafter *NSPCC*]. John Brown commented that there was no evidence to support Grayson’s comment and that there is “a risk that those using these child-like sex [robots] or realistic props could become desensitized and their behavior becomes normalised to them, so that they go on to harm children themselves, as is often the case with those who view indecent images.”¹⁰⁴ Brown has further commented on the idea of child-like sex robots being used as therapeutic stating that: “There is no evidence to support the idea that the use of so-called child[-like] sex dolls helps prevent potential abusers from committing contact offenses against real children.”¹⁰⁵

Because research is so scarce, analysts use related research areas. One study led by Milton Dalton focused on pornography consumption and rates of sexual

¹⁰¹ *Id.*

¹⁰² James McCarthy, *Welsh Charity Criticized after Suggesting Child Sex Dolls Should be made Available on Prescription*, WALESONLINE (Aug. 11, 2017, 5:15 PM), <https://www.walesonline.co.uk/news/wales-news/welsh-charity-criticised-after-calling-13422072> (last visited May 28, 2019).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Craig Harper, *Let ‘s Talk About Sex (dolls)*, MEDIUM (Feb. 10, 2018), <https://medium.com/@CraigHarper19/lets-talk-about-sex-dolls-50f9be2e6198> (last visited May 25, 2019).

abuse.¹⁰⁶ This study found support for the cathartic effect of pornography. Specifically, it studied a period of Czech law where the ownership of pornography was legal.¹⁰⁷ The investigating team “reported a significant reduction in rates of sexual abuse during this time, which echoed similar trends in Denmark and Japan in relation to the sexual abuse of children.”¹⁰⁸ Dalton and his team:

[A]rgued that artificially produced material might serve as a useful preventative substitute for some people with sexual interests in children who are actively trying to not offend against real children. Child-like sex dolls clearly fulfill this brief of artificially produced material, and therefore the suggestion that these dolls might be a suitable ‘prescription’ option for some paedophiles does appear to have some empirical backing.¹⁰⁹

Craig Harper remarks that it is not clear how to design a research study to determine whether the use of child-like sex robots has a cathartic effect or not. Nevertheless, Harper emphasizes the need to use studies on previously established models of sexual violence to understand people for whom the use of these child-like sex robots might be cathartic from those that it would be an instigator.¹¹⁰ This argument has also been made by Michael Seto, who suggests that: “[f]or some paedophiles, access to artificial child pornography or to child[-like] sex dolls could be a safer outlet for their sexual urges, reducing the likelihood that they would seek out child pornography or sex with real children. For others, having these substitutes might only aggravate their sense of frustration.”¹¹¹ Clearly, there is a need for models to identify individuals who could benefit from this type of treatment.

Seto’s Motivation-Facilitation Model is an example of one that could help distinguish who these individuals might be.¹¹² With this model, one could classify people with a particular interest –such as pedophilia– and identify possible motivators and facilitators such as “antisocial tendencies, or substance misuse problems.”¹¹³ Another model is Griffith’s Problematic Pornography Consumption

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Michael C. Seto, *The Motivation-Facilitation Model of Sexual Offending*, RESEARCH GATE (Jul. 2017), https://www.researchgate.net/publication/318560689_The_Motivation-Facilitation_Model_of_Sexual_Offending (last visited May 25, 2019). This model “identifies the traits of paraphilia, high sex drive, and intense mating effort as primary motivations for sexual offenses, as well as trait (e.g., antisocial personality) and state (e.g., intoxication) factors that can facilitate acting on these motivations when opportunities exist.”

¹¹³ *Id.*

Scale.¹¹⁴ This scale uses Griffith's six-component addiction model,¹¹⁵ which can be used to distinguish between problematic and non-problematic pornography use.¹¹⁶ Using one of these tests could determine whether child-like sex robots could serve a therapeutic purpose for the person or if it would encourage them into acting on the urges instead. This could answer the fears many people have. It would also allow for some control and study on those this would benefit without the risk of an unrestricted use that might cause harm.

IV. Child-like sex robots and the law

So far, this article's covered what child-like sex robots are; their possible use; the arguments for and against them; and some forms of protected speech. This section will examine how the law applies to child-like sex robots. Dr. Marty Klein, a certified sex therapist and a licensed psychotherapist, stated that the CREEPER Act is "part of a long series of attempts to corral our sexual imagination."¹¹⁷ Further stating that: "Congress and other legislators may talk about the practical consequences of using various objects or perceiving various images (rape, child abuse, promiscuity, divorce, etc.), but they're really expressing their disapproval of our sexual imagination."¹¹⁸

As previously stated, child-like sex robots, are new in the market. This technology brings a new form of expression on sexual imagery to the market. However, the CREEPER Act seeks to eliminate them. Now, in order to determine whether that is unconstitutional under the First Amendment, the question is whether child-like sex robots are obscene. To determine that the *Miller* standard must be applied. The first prong of the standard is whether an average person would find that the child-like sex robot appeals to the prurient interest, applying contemporary community standards. This is the first challenge in the application of the *Miller* standard, precisely, because

¹¹⁴ Harper, *supra* note 105.

¹¹⁵ Mark Griffiths, *A 'components' model of addiction within a biopsychosocial framework*, 10 *SUBSTANCE USE J.* 191 (2005). This model creates six characteristics that could indicate whether someone who is engaging in a particular behavior is addicted. The characteristics in this model are: salience, this happens when the activity becomes the most important thing in the persons life, mood modification, this is subjective experiences that are reported by the person engaged in the activity that could be sort of a coping strategy, tolerance, a gradual build of the amount spent on the activity, withdrawal symptoms, unpleasant feeling that occurs when the activity is reduced or stopped, conflict, conflict affecting the persons interpersonal relations, with oneself or in a work/school setting, and relapse, which is repeated reversions of the conduct.

¹¹⁶ Mark D. Griffiths et al., *The development of the Problematic Pornography Consumption Scale (PPCS)*, 55 *SEX RES. J.* 395 (2018).

¹¹⁷ Marty Klein, *Congress Criminalizes Sex Robots*, *Sex & Politics*, Sexual Intelligence Blog (Jun. 19, 2018), <https://www.martyklein.com/congress-criminalizes-sex-robots/> (last visited May 25, 2019).

¹¹⁸ *Id.*

there is not enough data on the broader public opinion on sex robots.¹¹⁹ However, there is recent research attempting to measure public opinion regarding sex robots. The Scheutz study is the first systematic study valuing the use and opinions of the general public on sex robots.¹²⁰ This study found that a majority of those surveyed found the use of child-like sex robots to be inappropriate.¹²¹ Based on the results of this study, child-like sex robots could meet the first prong of the *Miller* test which requires a community standard.

The second prong of the test requires the work to “depict or describe, in a patently offensive way, sexual conduct specifically defined by the applicable state law.”¹²² This means that the conduct tolerable in one state would not necessarily be tolerable in another one. This part of the test creates a category for what is acceptable where the conduct is being prohibited. However, this slightly changed when it comes to internet conduct as we saw in the case of *Ashcroft*. In this case, the Supreme Court determined that child pornography necessarily implies that a child or minor was used in the production of the material.¹²³ Subsequently, in *Williams* the Court determined that, in regards to virtual pornography, what was determinative was if the person had solicited or sent the material with a reasonable belief it was child pornography, meaning that real children were used in production, despite the material actually being virtual child pornography.¹²⁴

Child-like sex robots are anatomically similar to children, but they are not real children, nor are real children in any way involved in their production.¹²⁵ There is, also, no likelihood that a person purchasing a child-like sex robot would reasonably believe they are purchasing a real child. Therefore, according to applicable law, these robots cannot be considered child pornography. Taking this into account, the use of child-like sex robots does not depict or describe the sexual conduct applicable in the law.

The third part of the test requires that the material lack serious literary, artistic, political or scientific value.¹²⁶ As previously discussed, there is an ongoing debate

¹¹⁹ Matthias Scheutz & Thomas Arnold, *Are We Ready for Sex Robots?*, TUFTS, <https://hrilab.tufts.edu/publications/scheutzarnold16hri.pdf> (last visited May 28, 2019). This study reports the outcome of the first systematic study asking about the appropriateness and value of sex robots, and whether their use can count as sex. To conduct this study an online questionnaire was created. Among the results listed it was also found that overall those interviewed view sex robots more like masturbation or using sex toys rather than having sex with a human.

¹²⁰ *Id.*

¹²¹ *Id.* at 5.

¹²² *See Miller*, 413 U.S. at 40.

¹²³ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

¹²⁴ *See* CHEMERINSKY, *CONSTITUTIONAL LAW*, *supra* note 5, at 1391.

¹²⁵ *See* Varley, *supra* note 64.

¹²⁶ *Miller v. California*, 413 U.S. 15, 40 (1973).

on the value of child-like sex robots. However, there is a need for research on pedophilia, its triggers and possible treatments. Researchers believe that these child-like sex robots could have important therapeutic purposes in this field.¹²⁷ Therefore, and due to the lack of research on the topic of pedophilia and treatments for preventing pedophiles from offending, the importance of studying child-like sex robots increases. This is especially true because most of the research done on pedophilia has used only people that have already offended and been convicted as test subjects. This means that little research has been done testing non-offenders and developing methods aimed at prevention.¹²⁸ There are currently efforts to reach people who suffer from pedophilia but have not offended so they may volunteer for these studies, and aid in the creation of real research on the topic.¹²⁹ Child-like sex robot, in this context, hold intrinsic scientific value. They could be central both in the research stage and the treatment of offenders and non-offenders alike. They have the potential to serve a therapeutic purpose and, furthermore, that research on them would also aid in the expansion of research on pedophilia. Therefore, the last prong of the *Miller* test does not exclude them from First Amendment protection.

Lastly, the category of low-value speech must be discussed in relation to child-like sex robots. As previously mentioned, the Supreme Court has not been very precise in defining what falls under the category of low-value speech. However, it has clearly determined that sexual speech falls under that heading.¹³⁰ Nonetheless, being “low-value” does not deprive the speech of protection. The standard of review used for sexually related speech is more than just a rational basis standard but less than a strict scrutiny standard.¹³¹ In cases related to sexual speech, the Court has held that the government can *limit* the manner in which some sexual speech is conducted.¹³² This allows for discrimination of certain kinds of sexual speech by the government, based on the content and the general moral precept.¹³³ Decisions like *Erie*¹³⁴ and *Barnes*¹³⁵ show that the Court has even permitted the government to regulate this kind of speech based on secondary effects. Although potentially problematic, this also does not dispose of First Amendment protection for child-like sex robots.

¹²⁷ McCarthy, *supra* note 102.

¹²⁸ TEDx Talks, *supra* note 99.

¹²⁹ *Id.*

¹³⁰ CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 5.

¹³¹ *Id.*

¹³² *Id.* See also, *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976).

¹³³ Tiehen, *supra* note 80.

¹³⁴ 529 U.S. 277 (2000).

¹³⁵ 501 U.S. 560 (1991).

When applying this precept to child-like sex robots, the government may be able to *regulate* the speech. This based on its classification as a low-value speech and on the possible secondary effects of their use. However, the CREEPER Act is asking for a *complete ban* on these child-like sex robots.¹³⁶ Although with the low-value speech doctrine, the Court may determine which type of speech is less valuable requiring a less strict standard in judicial review, the State would still need to prove a compelling reason for banning any form of speech in its entirety. Child-like sex robots do not meet the obscenity standard; therefore, they are afforded some First Amendment protection. Though that protection may be less strict, due to its classification as low-value sexual speech, it is not left open to censorship on a whim.

V. Conclusion

An issue presented in regulating or researching child-like sex robots, as with sex robots in general, is that they have only been recently introduced in the market. Due to this, there is little information available regarding many of the factors necessary for proper classification. In the first place, there is little data in respects to how the general population perceives the use of sex robots.¹³⁷ That lack of data on public opinion is burdensome when applying the standard of obscenity because an understanding of the community perception of the material in question is a component of the test.¹³⁸ However, the little data available suggests that there may be enough to meet the first prong.¹³⁹

The second prong of the obscenity standard requires the material to depict or describe conduct that is defined by the applicable state law.¹⁴⁰ As the law prohibits child pornography, which is defined as having to involve real children in its production, child-like sex robots do not fall under this category.¹⁴¹ As it has been reiterated, child-like sex robots are anatomically similar to a real child. However, they do not constitute child pornography, because there is no use of children in their production and no reasonable person could believe that they were purchasing a real child as opposed to a robot. The last prong of the *Miller* test for obscenity requires that the work as a whole is lacking in serious literary, artistic, political or scientific

¹³⁶ CREEPER Act of 2017, H.R. 4655, 115th Cong. (2017)). <https://www.congress.gov/bill/115th-congress/house-bill/4655>.

¹³⁷ Scheutz & Arnold, *supra* note 119.

¹³⁸ *Miller v. California*, 413 U.S. 15, 24 (1973).

¹³⁹ *Id.* (There is only one study that measures the public opinion on child sex robots done by Scheutz & Arnold, *supra* note 119).

¹⁴⁰ *Id.*

¹⁴¹ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

value.¹⁴² As stated, there is a lack of research on pedophilia, especially regarding nonoffenders. Researchers believe that these child-like sex robots could serve a therapeutic purpose to some individuals to deter them from ever offending a child.¹⁴³ Because of that value, and the other reasons argued above, child-like sex robots do not fall into the category of obscene speech and are therefore protected. Although child-like sex robots might fall under the category of less protected speech, the case law points to there being a category of low-value sexual speech.¹⁴⁴ As discussed in this article low-value sexual speech has a lesser degree of protection than the other types of speech protected under the First Amendment, but protection nonetheless.

The Supreme Court has previously found that animation and computer-generated images of virtual child pornography are indeed forms of speech. The difference between this speech and the ones the Court has previously discussed is that the animations are no longer projected on a screen. Technology has advanced in a way that, now, that which was projected in the screen now can be marketed and replicated in 3D form. These robots are merely a different form of the same material that has already been protected in pronouncements of the Supreme Court of sexual speech.¹⁴⁵

It is for this reason that the author recommends that, even if the child-like sex robots are protected speech under the First Amendment, their use could only be limited and be made unavailable in the open market. Instead, these robots could be restricted, so they can be obtained only by prescription. This would entail that a psychologist determined that such person soliciting the product has undergone some psychological testing to determine their risk of offending and whether the use of the child-like sex robots would lead to sexual aggression in their case. Since there is little research on the topic of pedophilia the limitation could provide some aid to the scientist to have new tools for developing research and expanding the possibilities that the now have and are limited.¹⁴⁶ Although this could be a possibility to help both fields, we must take into account that the topic of pedophilia is still considered taboo and people that suffer from this and don't act may still hold back from seeking help due to the stereotypes. One of the reasons that safeguarding Freedom of Speech is important is to encourage tolerance.¹⁴⁷ By speaking of the topic and fomenting research and medical development on it, it may encourage

¹⁴² See *Miller*, 413 U.S. at 40.

¹⁴³ See Malamuth & Huppín, *supra* note 92.

¹⁴⁴ CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 5.

¹⁴⁵ See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *United States v. Williams*, 553 U.S. 285 (2008).

¹⁴⁶ Malamuth & Huppín, *supra* note 92.

¹⁴⁷ CHEMERINSKY *supra* note 14, at 930

these people to seek help. The value of this lies in the development of research, safe treatment methods and a way for it to safeguard children. The Supreme Court of the United States had previously determined that the material which did not contain real children is not considered as child pornography, as long as it is not solicited as such.¹⁴⁸ Child sex robots are a new form of technology that is, a modern take, on what used to be animation and have a scientific and medical value, that is why the should be protected under the First Amendment.

¹⁴⁸ 535 U.S. at 234.

