I. INTRODUCTION

Students should only be permitted to use cell phones in schools in emergency situations or to call their parent or guardian. However, in school districts that allow students to use cell phones more liberally it is necessary to allow teachers, school administrators and principals to confiscate cell phones that are used inappropriately.

An example of why a cell phone should be taken away from a student is the new and growing trend of sexting amongst high school students. Sexting is defined as “nude photos taken by teens and posted or sent to others over the Internet or cell phone.” The term combines “sex” and “texting,” as in text messages. It takes mere seconds to snap a nude photograph of oneself and send it in a cell phone text, but in these mere seconds reputations can be ruined and criminal charges may be brought. Many students send nude photographs to someone he or she is dating, not realizing that the photographs could end up on the internet or sent to other students. One example of this situation is the following statement from a high school student,

I was just thinking, you know, I am in love with this dude. And you know I’m sending him…I’m being, I’m trying to be sweet. And I had no idea that, you

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1 Shannon Shafron-Perez, Average Teenager or Sex Offender? Solutions to the Legal Dilemma Caused by Sexting, 26 J. MARSHALL J. COMPUTER & INFO. L. 431, 435 (2009); See also THE NATIONAL CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS (2008), http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf. The survey found that 39% of all teens are sending or posting sexually suggestive messages, as well as 37% of all teen girls and 40% of teen boys. Id. ; See also Miller et al. v. Skumanick, 605 F. Supp.2d 634 (2009) (discussing the idea of sexting, which is when a person takes a picture of him or herself with a digital camera or cell phone camera, which become stored as a digital image and then sent via text message or a photo-send function on a cell phone or posted to a website like Facebook).

2 Id. note 1, at 435.

3 Id.

know, he was going to send it to everyone, betray me. I mean so many people found out about it, and it hurt my reputation.¹

Moreover, often a boyfriend or girlfriend might seek revenge by sending the photographs to their entire high school.² This youthful revenge can unfortunately result in criminal charges, such as child pornography. For example, Philip Alpert received nude photographs from his sixteen-year-old girlfriend when he was seventeen.³ A month after he turned eighteen, he got into an argument with his girlfriend and sent the nude photographs to everyone on his phone, which was 70 people and included friends, teachers, parents, and grandparents.⁴ Philip was subsequently arrested for distribution of child pornography and required to register on the public sex offender list, kicked out of college, unable to find a job, and unable to live with his father, whose home was near a school.⁵

Sexting not only has real consequences, but also can significantly harm a child’s reputation and cause humiliation. In school districts that allow students to use their cell phones while in school, administrators, principals, and other school officials must punish students that sext. However, these students should not be labeled as felons and charged with child pornography. Instead, school officials should suspend the students depending on the number of times the student was previously caught sexting. If the student does not follow school policies, then the school should enlist the help of the juvenile system.

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¹ Id.
² Id.
⁴ Id.
⁵ Id.
Part II of this paper will recognize that school officials are permitted to search students' cell phones under the Fourth Amendment and that sexting is not protected under the First Amendment. Part III will discuss the recent case *Miller, et al. v. Mitchell* where after students were found sexting the District Attorney of Wyoming County, Pennsylvania sent letters to parents requiring those students to attend an educational program or else face criminal charges. While students must face consequences for sexting, the punishment must not be criminal charges and must be left to school officials. Part IV will propose what consequences students should face who are found sexting at school.

**II. BACKGROUND**

School officials are permitted to search student’s phones under the Fourth Amendment for inappropriate messages if they have reasonable suspicion that the student is sexting. In addition, the words and images found in a sext message are not protected under the First Amendment.

**a. The Fourth Amendment’s Role in Schools**

The application of the Fourth Amendment to schools has been addressed by recent U.S. Supreme Court cases discussing whether or not the Amendment should be applied to school officials the same way that it is applied to police officers. Supreme Court decisions have held

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10 See infra Part II (discussing the role of the Fourth Amendment in schools and that sexting is not protected under the First Amendment).
11 See infra Part III (discussing the recent case of *Miller et al. v. Mitchell*).
12 See infra Part IV (analyzing the consequences for students that are found sexting at school).
13 See infra Part II.A (discussing search and seizure standards in schools).
14 See infra Part II.B (discussing the First Amendment and sexting).
15 U.S. CONST. amend. IV states the following:
   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
that when school officials conduct searches of students in school they are held to a different standard than when the search is done by police officers.

In *New Jersey v. T.L.O.*, the Supreme Court asked whether a teacher had a right or probable cause to search through a student’s purse.\(^\text{16}\) The Supreme Court held that the Fourth Amendment did apply to schools, but that no warrant was needed if the search was done by a school official whom had reasonable suspicion that there was contraband in the student’s purse.\(^\text{17}\) Reasonable suspicion was defined as, “sufficient probability, not certainty,” which “is the touchstone of reasonableness under the Fourth Amendment . . . ”\(^\text{18}\)

The Court held that to determine the reasonableness of a search a two-fold test must be used: (1) whether the act was “justified at its inception;” and (2) whether the search conducted was reasonably related in scope to the circumstances that justified the search in the first place.\(^\text{19}\) School officials who conduct searches must be careful to balance governmental and private interests.\(^\text{20}\) However, the Court suggested that public interests are best served by a Fourth Amendment standard of reasonableness stopping short of probable cause.\(^\text{21}\)

In *Safford Unified Sch. Dist. #1 v. Redding*, the Supreme Court limited what they classified as a reasonable search “in light of the age and sex of the student and the nature of the infraction.”\(^\text{22}\) In *Safford*, school officials believed the student had non-dangerous contraband on her body.\(^\text{23}\) The Court reasoned that because it was non-dangerous contraband, it did not permit

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\(^\text{16}\) New Jersey v. T.L.O., 469 U.S. 325 (1985) (holding that the Fourth Amendment’s prohibition on unreasonable searches and seizures applies to searches conducted by public school officials, and that the search of the student’s purse was reasonable).

\(^\text{17}\) *Id.* at 346.

\(^\text{18}\) *Id.*

\(^\text{19}\) *Id.* at 342.

\(^\text{20}\) *Id.*

\(^\text{21}\) New Jersey v. T.L.O., 469 U.S. at 341.

\(^\text{22}\) Safford Unified Sch. Dist. #1 v. Redding, 129 S.Ct. 2633, 2642 (2009) (holding that despite the principal’s reasonable suspicion, the school official went too far when searching the children’s clothing for drugs).

\(^\text{23}\) *Id.*
a school official to look in intimate places in the child’s clothing to find the drugs.\textsuperscript{24} The Court stated that “reasonable scope” requires the support of “reasonable suspicion” of a danger or wrongdoing before searching the intimate parts of a student, which thereby degrades the student.\textsuperscript{25}

From the standard ascertained in both \textit{T.L.O.} and \textit{Safford}, school officials are permitted to search through a student’s belongings for a cell phone under the Fourth Amendment, as well as search through a student’s phone for inappropriate text messages should they have reasonable suspicion that the student is sexting. While the school official is permitted to go through the phone, they must adhere to the holding in \textit{Safford}, so the search is reasonably related in scope to the school official’s knowledge, as well as the circumstances.

\textit{b. Why Sexting is Not Covered by the First Amendment}

School officials are permitted to look through a student’s cell phone if they have a reasonable suspicion that the student is sexting on his or her cell phone or using his or her cell phone inappropriately. By taking such actions school officials do not violate the principles of the First Amendment.\textsuperscript{26}

In \textit{Miller v. California}, the Supreme Court defined obscenity and its relation to the First Amendment.\textsuperscript{27} The Court developed three prongs to determine whether the material fell outside the protection of the First Amendment: (1) whether it “appeal[s] to the prurient interest;” (2) whether it is “patently offensive in light of community standards;” and (3) whether it lacks

\begin{itemize}
  \item \textsuperscript{24} \textit{Id.}
  \item \textsuperscript{25} \textit{Id.} at 2643
  \item \textsuperscript{26} U.S. \textsc{const.} amend. I states the following:
    Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
  \item \textsuperscript{27} John A. Humbach, ‘\textit{Sexting} and the First Amendment,’ \textit{37 Hastings Const. L.Q.} 433, 444 (2010) (determining whether teenagers have a constitutional right to record and document their own sexual conduct and nudity).
\end{itemize}
“serious literary, artistic, political, or scientific value.” Sexting meets all of the Miller prongs because the purpose of it is to: (1) inspire classmates and friends; (2) to offend the notion of “community standards,” sometimes intentionally; and (3) does not create or possess any “serious” value.

On the other hand, some classify sexting as child pornography, not obscenity, when discussing that the First Amendment does not protect sexting. Child pornography does not compel an examination of the third prong in Miller. As a result, even if sexting were classified as child pornography, the First Amendment would not protect the material. However, labeling sexting as child pornography is inappropriate because it would lead to criminal charges against students. Classifying sexting as child pornography circumvents the First Amendment, as discussed in Part IV, and can cause irreparable harm to the students involved in their future endeavors.

III. DISCUSSION


Recently, the Appellate Court of Pennsylvania was faced with the issue of resolving students’ constitutional rights in light of sexting charges against high school students. In October of 2008, school officials confiscated several students cell phones and discovered semi-nude and nude photographs of teenage girls enrolled at the school, also known as sexting
messages.\textsuperscript{34} The District Attorney of Wyoming County, Pennsylvania sent letters to parents threatening to file criminal charges if the students did not agree to attend an educational program.\textsuperscript{35} The educational program required students to write reports about what they had done wrong and how their actions affected themselves, the community, and the school.\textsuperscript{36} Some students refused to sign up for the program and filed a temporary restraining order when the District Attorney initiated criminal charges.\textsuperscript{37}

Focusing solely on the students’ First Amendment rights in this case, the court stated that the “government action that requires stating a particular message favored by the government violates the First Amendment right to refrain from speaking.”\textsuperscript{38} Requiring the students to write certain essays, they argued, “invade[d] the sphere of intellect and spirit which...is the purpose of the First Amendment....”\textsuperscript{39} The court showed concern with a government program that purported to teach a student about her sexual identity and why her actions were morally wrong, not legally wrong, as well as permitting an elected figure to venture outside the realm of his “authority.”\textsuperscript{40}

School officials in this case were permitted to search through students phones for sexting messages; however, the ultimate consequences the students faced were criticized and held to violate their First Amendment rights. As previously stated, students must face consequences for inappropriate messages on his or her phone. However, such consequences should be imposed by school officials in the form of a suspension or an educational program promoted by the juvenile


\textsuperscript{35} Id.; Miller, et al. v. Miller, No. 09-2144, 2010 WL 935776, at *2 (F.3d Mar. 17, 2010) (discussing the educational program that the court eventually held violated the students First Amendment right).

\textsuperscript{36} Miller, 2010 WL 935776, at *2.

\textsuperscript{37} Id. (noting that that the Plaintiff brought suit in March of 2009).

\textsuperscript{38} Id. at 9.

\textsuperscript{39} Id.

\textsuperscript{40} Id.
justice system. In the next section, the consequences students should face when they sext will be discussed, as well as proposals schools should adopt in light of the growing trend.

IV. ANALYSIS

a. Should a sexter also be called a felon?

School officials should be permitted to confiscate a student’s cell phone upon having reasonable suspicion that the student is sexting or has nude photographs on his or her cell phone. Upon finding the inappropriate material, school officials should suspend the student for his conduct, which could not only lead to humiliation for the people in the pictures, but also harm to their reputation. However, labeling a student a sex offender or charging a student with a felony, like in the case discussed in the introduction, is going too far.

The Supreme Court criminalizes child pornography, labeling it a separate category aside from material protected under the First Amendment. Although each state has its own set of laws dealing with child pornography, the Federal government enacted laws prohibiting the sale, possession, production and distribution of child pornography. The Supreme Court held in New York v. Ferber, that states have a compelling interest in protecting children, which is why the government is permitted to ban child pornography in every respect.

Recently, some states have begun to classify underage sexting as child pornography, thus making it a felony. However, sexting differs in many respects from child pornography. First,

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41 Shafron-Perez, supra note 1, at 438.
42 Id. at 438-439.
44 Id.
(1) The general assembly hereby finds and declares: That the sexual exploitation of children constitutes a wrongful invasion of the child's right of privacy and results in social, developmental, and emotional injury to the child; that a child below the age of eighteen years is incapable of giving informed consent to the use of his or her body for a sexual purpose; and that to protect children from sexual exploitation it is necessary to prohibit the production of material which
the victims of child pornography are often manipulated, while the victim of a sexting message that is later sent out into the community is at one point or another a “willing participant in the initial transmission of the message, making the intent and context behind the images that are produced in both circumstances vastly dissimilar.”\textsuperscript{46} Second, the judicial system must look at the child’s age and immaturity level. A child under the age of 18 is more immature than an adult. The child may be incapable of making the same decisions as a fully capable adult. Adults charged with child pornography are aware of their actions and consequences, unlike the minors involved in sexting.

Moreover, to list those that are culpable of sexting as sex offenders does not meet the standard of the original intent of the registry.\textsuperscript{47} The sex offender registry’s purpose is to inform the public of sex offenders living in their community so they are aware that the offenders may re-offend.\textsuperscript{48} Teens that are sexting “are not offenders in the way that the registry defines sex offenders.”\textsuperscript{49} These minor children are not likely to re-offend, but the result for students is being labeled a sex offender, unable to pursue the education and career they worked towards in high school.\textsuperscript{50} Furthermore, while students engaged in such activities should be punished through suspension by the school, they “should be regarded as either victims in need of help to turn their lives around or, at the very least, not wrongdoers deserving of the severe vengeance and blame society justifiably imposes on adults and others who sexually abuse children.”\textsuperscript{51}

\textit{b. What New Sexting and Cell Phone Laws in Schools Should Look Like}

\begin{itemize}
\item \textsuperscript{46} Dan Corbett, \textit{Let’s talk about Sext: The Challenge of Finding the Right Legal Response to the Teenage Practice of “Sexting”}, 13 NO. 6 J. INTERNET L. 3, 6 (2009).
\item \textsuperscript{47} Shafron-Perez, \textit{supra} note 1, at 450.
\item \textsuperscript{48} \textit{Id.}
\item \textsuperscript{49} \textit{Id.}
\item \textsuperscript{50} \textit{Id.}
\item \textsuperscript{51} Weins & Hiestand, \textit{supra} note 30, at 29 (discussing the schools of thought on whether the justice system should criminalize sexting as child pornography).
\end{itemize}
As discussed above, schools should outlaw cell phone usage in schools, except to call parents and guardians or for emergency situations. However, in schools that do allow cell phones, school officials must punish the students for sexting. While some states have decided to classify sexting in the same category as child pornography, labeling the students as sex offenders is not the right path to rehabilitating the students. First, students should be suspended from school depending on the number of times the student was previously caught sexting. Second, if the school officials find that the students, after repeated suspensions, are not following the school’s policies, then the school should follow one of the recommendations below.

Recently, in Valparaiso, twelve-year-old and thirteen-year-old students were found sexting at school. The students were referred to juvenile probation on charges of possession of child pornography and child exploitation. The Prosecutor Brian Gensel decided not to handle the case in the adult system, which would have carried prison time and registering as a sex offender, and instead decided to handle the case in the juvenile system. He decided that the behavior should not have long-term ramifications on the students’ lives, but favored a program that explained to the students how serious sexting is and the potential consequences to their image, reputation, and safety. Moreover, police Sgt. Michael Grennes discussed the need for parental involvement with cell phones, as well as monitoring the cell phone.

In addition, if the school finds that the student not only received the pictures, but also distributed them, the school might apply the recently proposed Illinois bill. Students found

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53 *Id.*
54 *Id.*
55 *Id.*
56 *Id.*
guilty of posting nude photographs of classmates will get juvenile court supervision that might ultimately result in mandatory counseling or community service.\textsuperscript{58} The new law would not apply to those that send and receive pictures, but rather those that distribute them widely.\textsuperscript{59}

As a result, if students do not follow school policies after repeated suspensions, schools could follow one of the suggestions above. Schools could enlist the help of the juvenile justice system, which could: (1) teach the students about the long-term effects of sexting; or (2) mandate juvenile court supervision.

\textbf{V. CONCLUSION}

Schools must take action against students found sexting by suspending the students or if the students repeatedly disobey the policy, then by enlisting the services of the juvenile system. Students must not be charged as sex offenders on child pornography charges. These youth have made foolish mistakes while in high school, but should be able to learn lessons from it, not allowing their lessons to hinder their future.

Furthermore, it is important that schools provide classes educating parents about the ramifications of sexting. With the parents help, they can continue to educate their children about the dangers of cell phone use, as well as monitor their children’s cell phone. Parents must continue to communicate with their children about the repercussions of sending nude photographs. In addition, parents should set limits on cell phone use, telling their children that there are certain times of day when they are allowed, but to take the phone away altogether at other times.\textsuperscript{60} Finally, parents might also consider purchasing phones that do not have a camera.

\textsuperscript{58} Id.
\textsuperscript{59} Id.
and do not allow texts to be sent.\textsuperscript{61} With the help of parents and school officials, students can begin to see the dangers of sexting and the consequences that may arise.

\textsuperscript{61} Id.