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I. INTRODUCTION

Sexting is "the practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular telephones or over the Internet."[1] It is a new phenomenon made possible by the intersection of technology and teenage desire to "push the envelope" in finding new ways of expression.

Although sexting is becoming more popular, it is difficult to determine accurately the number of teens involved. It is known, however, that in 2004, 18% of twelve-year-olds and 64% of seventeen-year-olds owned a cellular telephone. By 2009, that number increased to 58% for twelve-year-olds and 83% for seventeen-year-olds.[2] Also, the National Campaign to Prevent Teen and Unplanned Pregnancy reported that 20% of teens (ages thirteen to nineteen) overall admitted to electronically disseminating nude or semi-nude photos of themselves, and 39% of surveyed teens admitted to having sent or posted sexually suggestive messages.[3]

In schools, authorities have found it extremely difficult to create policies that address sexting and to determine the most appropriate

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1. Miller v. Mitchell, 598 F.3d 139 (3d Cir. 2010).

2. AMANDA LENHART, PEW INTERNET, TEENS AND SEXTING: HOW AND WHY MINOR TEENS ARE SENDING SEXUALLY SUGGESTIVE NUDE OR NEARLY NUDE IMAGES VIA TEXT MESSAGING (2009), http://pewinternet.org/~/media//Files/Reports/2009/PIP_Teens_and_Sexting.pdf.

3. NAT'L CAMPAIGN TO PREVENT TEEN & UNWANTED PREGNANCY, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS (2009), http://www.TheNationalCampaign.org/sextech/PDF/SexTech_Summary.pdf [hereinafter SEX AND TECH].

response to sexting. The most relevant court opinions and statutes[4] provide little guidance, likely because they were not written with teenage activities like sexting in mind. School officials must therefore navigate through a labyrinth of legal minefields, both civil and criminal, in order to respond to sexting. Potential legal issues include First Amendment free speech issues,[5] Fourth Amendment search and seizure issues,[6] and possible criminal charges[7] under pornography statutes.

The purpose of this Article is to generate a discussion that will help schools formulate effective policies regarding sexting in schools, as well as help schools plan and implement appropriate responses to sexting incidents on campus. The Article will first examine one public high school's response to sexting on-campus. This school's experience highlights the various legal issues schools may encounter when sexting disrupts activities on campus. School officials were confronted with two immediate legal issues. First, whether the taking or sharing of nude photos, particularly at school, is protected speech. Case law has yet to discuss this issue.

Second, if sexting does not constitute protected speech, whether school officials should search cellular telephones to identify offenders. Furthermore, if they should search, the question remained how far officials should go. A third legal issue soon emerged: whether sexting is synonymous with pornography. The principal contacted the district's central administration. The administrators concluded that there was a possibility of criminal activity and instructed the principal

4. Catherine Arcabascio, *Sexting and Teenagers: OMG R U Going to Jail???*, 16 RICH. J.L. & TECH. 10 (2010), http://jolt.richmond.edu/v16i3/article10.pdf.

5. *Miller*, 598 F.3d at 139. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 403 (2007) (holding that a "principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."); Bethel v. Fraser, 478 U.S. 675, 685 (1986) (affirming that the First Amendment does not stop a school district from "imposing sanctions upon [a student who gives an] offensively lewd and indecent speech" at an assembly); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1968) (holding that student speech is protected unless it would "materially and substantially disrupt the work and discipline of the school.").

6. Klump v. Nazareth Area Sch. Dist., 425 F. Supp. 2d 622 (E.D. Pa. 2006). *See, e.g.*, Safford v. Redding, 557 U.S. 364 (2009) (affirming that the strip search of a seventh-grade girl by school officials was unreasonable, violating her Fourth Amendment rights); New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (holding that, despite "the privacy interests of schoolchildren," the search of a high school girl's purse for cigarettes based on a teacher's report of the girl's unauthorized smoking on campus was reasonable and therefore constitutional).

7. *Miller*, 598 F.3d at 139.

to contact local police. The police decided there was no action they could take in the situation. To date, no legal action has occurred relative to this incident.

Next, the Article will also look at various related court cases, including one appellate court decision in the area of sexting,[8] two court cases concerning search and seizure of cellular telephones in schools,[9] and relevant pornography statutes

II. A Lack of Legal Guidance Concerning Sexting

Sexting has caused many headaches for school district administrators, particularly where there is no clear school policy regarding sexting on campus. One superintendent in Texas explained the problems he encountered when a junior high school student sent her boyfriend a photo of herself, nude.[10] The boyfriend received the photo in class and began sharing it with his friends. Various administrators, including the teacher, assistant principal, and building principal, also observed the photo during their investigation, and the legality of their behavior was raised at the student's eventual expulsion hearing. At the hearing, the school district argued that the student should be turned over to the police for possible criminal prosecution. The student's lawyer responded by pointing out that the teacher, assistant principal, building principal, and any other person from the district who saw the photo on the phone could also be turned over to the police on a criminal charge of distributing child pornography. It was decided at the hearing that the situation would be handled as an incident for in-school discipline.[11]

Many school districts in Texas lack an effective policy for on-campus sexting because school officials are waiting on the legislature and appropriate state agencies for guidance on how to handle such problems. In 2011, the Texas Legislature passed Senate Bill 407 into law, which allows individuals younger than eighteen years old who are involved in sexting to be charged with a misdemeanor, rather than a felony, and does not require them to register as sex

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8. *Id.*

9. *Klump*, 425 F. Supp. 2d at 622; J.W. v. DeSoto Cnty. Sch. Dist., 2010 U.S. Dist. LEXIS 116328 (N.D. Miss. Nov. 1, 2010).

10. The school and school officials described in this incident requested anonymity from the authors.

11. Communication from Superintendent to authors (May 24, 2011) (on file with authors).

offenders.[12] The bill further requires the Texas School Safety Center (TSSC) to develop a curriculum on sexting and make it available for school districts dealing with sexting incidents, although there are no statewide figures indicating the number of school districts.[13]

Although Senate Bill 407 is part of a bipartisan attempt to deal with the problem of sexting in schools, Shannon Edmonds of the Texas District and County Attorney Association (TDCAA) advised prosecutors to ignore the law.[14] Edmonds indicated that a "catch-22" exists for adults who come across sexually explicit material held by minors.[15] She explained that school personnel "could either destroy the evidence and be prosecuted for destruction of evidence or . . . could not destroy it and arguably be prosecuted for child pornography."[16] TSSC officials have noted that Edmond's concern has been addressed with the enrolled version of the new bill.[17] Senate Bill 407 amends the Texas Penal Code and now provides a defense against pornography charges when:

> (1) A school administrator or police officer possessed prohibited images while investigating a relevant criminal allegation;
>
> (2) A school administrator or police officer allowed appropriate access to other school administrators or police officers during the investigation of a relevant allegation; and
>
> (3) A school administrator or police officer "took reasonable steps" to destroy prohibited images within a "reasonable period of time" following the allegation.[18]

Even so, however, thirty-two states, including Texas, currently do not have statutes that specifically address sexting.[19] Coupled with the paucity of applicable case law, schools are too often ill prepared

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12. Breck Porter, *Sexting Prevention Legislation Signed Into Law*, HOUSTON EXAMINER (Aug. 1, 2011), http://www.examiner.com/crime-in-houston/sexting-prevention-legislation-signed-into-texas-law.

13. Interview with Curtis Clay, Assoc. Dir., Educ. & Training Servs., Tex. Sch. Safety Ctr. (Aug. 12, 2011).

14. Aman Batheja, *Prosecutors Find Glitches in Human Trafficking, Sexting, and Domestic Abuse Laws*, STAR-TELEGRAM (Aug. 6, 2011), http://www.star-telegram.com/2011/08/06/3273840/prosecutors-find-glitches-in-human.html.

15. *Id.*

16. *Id.*

17. Interview with Texas School Safety Center Officials (Sept. 16, 2011).

18. TEX. PENAL CODE § 43.26(h) (2012).

19. *See* Ronald J. Palenski, *State Laws on Obscenity, Child Pornography and Harassment*, http://www.lorenayedon.com/laws.htm.

to deal with sexting on their campuses.

III. A SEXTING INCIDENT IN TEXAS[20]

A few minutes before class, a fifteen-year-old, tenth-grade girl transmitted a nude picture of herself to her eighteen-year-old senior boyfriend using her cellular phone. The boyfriend electronically shared the photo with a few of his friends, and in a short period of time, the nude photograph had been distributed to an unknown number of students throughout the school. Giggling students in the back of classrooms crowded around cellular telephones and disrupted both teaching and learning.

Teachers reported the classroom disruptions, and building administrators responded by speaking with the girl depicted in the picture and her boyfriend who received the picture. Administrators soon discovered the boyfriend had sent the nude photo to a short list of his friends. The administrators called each friend into a conference room and began checking their cellular phones for inappropriate pictures. After administrators discovered the picture had spread to a number of other students, they became concerned about how far they could or should go in searching student cellular phones to determine the extent to which the picture had been disseminated.

The building principal contacted the central office for advice and discovered numerous potential legal issues. Were students' Fourth Amendment rights violated when students' cellular phones were searched? Could the distribution of a nude photograph, even by a high school student, be considered a crime under state pornography laws? Could the photograph be considered speech deserving First Amendment protection? If dissemination of the photo could be considered speech and if it was speech protected by the First Amendment, was the disruption caused by the photo sufficient to allow sanctions under *Tinker v. Des Moines Independent Community School District*[21] or *Bethel v. Fraser*?[22]

Unfortunately, the answers to these legal issues were unclear, as the case law relevant to administrators' actions in a sexting incident was sparse, and what was available provided very little clarity. The state pornography laws were only marginally more helpful.

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20. The school and school officials described in this incident requested anonymity from the authors.

21. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

22. Bethel v. Fraser, 478 U.S. 675 (1986).

IV. GENERAL CASE LAW ON SEXTING

To date, *Miller v. Mitchell* is the only appellate court decision in the area of sexting.[23] In *Miller*, between sixteen and twenty students at Tunkhannock (Pennsylvania) High School were found to have semi-nude pictures of fellow students on their cellular telephones.[24] The district attorney sent letters to these students that gave them the option of either attending a six- to nine-month educational program about the dangers of sexting or being charged with a felony under Pennsylvania pornography laws.[25] All agreed to participate in the educational program except for the three named parent plaintiffs, Miller, Day, and Doe, who filed suit and sought a temporary restraining order (TRO) to prevent the district attorney from filing charges against the three female students.[26]

The plaintiffs brought three causes of action before the court.[27] First, they claimed governmental retaliation against the students for exercising their First Amendment right to free expression by appearing in the pictures.[28] The second claim was that of governmental retaliation due to the students' refusal to participate in the alternative educational program.[29] The students and their parents believed the threat of prosecution on felony charges constituted a violation of the students' right to be free from governmentally compelled speech under the First Amendment.[30] Finally, the plaintiffs claimed a violation of their substantive due process rights under the Fourteenth Amendment to be free from governmental interference in directing the upbringing of their children.[31]

The trial court held that the second and third claims were likely to succeed at trial.[32] Finding grounds for irreparable harm to the plaintiffs, that no harm was eminent to the non-moving party and that granting a TRO would be in the public interest, the trial court

23. Miller v. Mitchell, 598 F.3d 139 (3d Cir. 2010).
24. *Id.* at 143.
25. *Id.*
26. *Id.* at 145.
27. *Id.* at 147-48.
28. *Id.*
29. *Miller*, 598 F.3d at 147-48.
30. *Id.*
31. *Id.*
32. *Id.* at 147-48.

granted the TRO.[33] On appeal, a panel from the Third Circuit Court of Appeals agreed with the trial court that the one remaining plaintiff's claims were likely to succeed and therefore affirmed the trial court's order.[34] Further, the appellate panel pointed out that the plaintiffs brought "no direct constitutional claim, only claims of retaliation."[35] Some important questions were left unanswered, however, by the *Miller* court, the first concerning the search of student cellular telephones.[36] Did these searches violate students' rights under the Fourth Amendment?

V. Fourth Amendment Issues

While investigating the Texas classroom disturbance caused by the sexting incident described above, school authorities were confronted with a legal issue: whether school authorities could search students' cellular telephones. If the answer is yes, under what circumstances would such a search be consistent with students' rights under the Fourth Amendment? In 1985, the Supreme Court established the "reasonableness" standard for searches in schools in *New Jersey v. T.L.O.*[37] However, it is still unclear how school authorities should interpret the Court's reasonableness standard in the context of students' cellular telephones.

Three court cases concerning search and seizure of cellular telephones in schools may provide some guidance. In *Klump v. Nazareth Area School District*,[38] high school student Christopher Klump's cellular telephone fell out of his pocket, placing him in violation of school policy that forbade students from displaying or using their telephones. Klump's teacher confiscated his telephone.[39] Later the same day, the teacher and the school's assistant principal called nine other students using Klump's telephone and numbers

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33. *Id.* at 148.

34. *Id.* at 142-43. The appeal dealt with only one of the plaintiff's claims because the district attorney decided not to file charges against the other two students, making the case moot for them.

35. *Miller*, 598 F.3d at 148 n.9.

36. *Id.* at 143.

37. New Jersey v. T.L.O., 469 U.S. 325 (1984). The Court held that the search of a high school girl's purse was reasonable at its inception because the information on which the search was based on a teacher's observations. Further, the Court held the search was reasonable in scope.

38. Klump v. Nazareth Area Sch. Dist., 425 F. Supp. 2d 622 (E.D. Pa. 2006).

39. *Id.* at 630.

found stored in his telephone.[40] In addition to the calls, the two school authorities searched Klump's text messages and voicemail.[41] Finally, they carried on a text message conversation with Klump's younger brother using Klump's telephone.[42] According to the officials, these actions were undertaken to determine if other Nazareth students were in violation of the school's cellular telephone policy.[43]

Klump and his parents filed suit against the school district, the superintendent, assistant principal, and teacher, stating ten separate claims based on Pennsylvania, as well as federal law.[44] Count Four accused the defendants of violating Klump's rights under the Fourth Amendment.[45] The court opined that the teacher was justified in seizing Klump's telephone because of the violation of policy.[46] However, the court reasoned that school officials could not reasonably expect to find evidence that Klump had violated any other school policy as a result of the search of his voicemails and text messages. Therefore, the search of the telephone was not reasonable and violated Klump's Fourth Amendment rights.[47] Further, the court rejected the school authorities' claim for qualified immunity.[48]

J. W. v. DeSoto County School District[49] presents an interesting contrast to *Klump*. In this case, a school employee observed R.W., an eighth-grade student, using his cellular telephone to access a text message sent by his father.[50] The employee who observed R.W. using his phone confiscated the phone, opened the phone, and began viewing personal pictures stored on the device.[51] R.W. and his phone were turned over to the principal and school resource officer, who

40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 627.
44. *Klump*, 425 F. Supp. 2d at 627.
45. *Id.* at 628.
46. *Id.* at 640.
47. *Id.*
48. *Id.* at 640-41. Citing the Supreme Court's opinion in *New Jersey v. T.L.O.*, the *Klump* court believed that constitutional law was sufficiently settled to deny qualified immunity. *Id.*
49. J.W. v. DeSoto Cnty. Sch. Dist., 2010 U.S. Dist. LEXIS 116328 (N.D. Miss. Nov. 1, 2010).
50. *Id.* at *1-2.
51. *Id.*

also examined the photos.[52] Although one of the photos depicted R.W. holding a BB gun, there was no sign of nudity or sexual content.[53] Nevertheless, R.W. was suspended.[54]

At R.W.'s suspension hearing, the school resource officer testified that he recognized gang symbols in several of the photographs on R.W.'s phone.[55] The principal testified that he believed R.W. to be a threat to the safety of his school.[56] The hearing officer issued an order suspending R.W. from school and recommending his expulsion.[57] R.W. appealed the hearing officer's ruling to the DeSoto County Board of Education, but to no avail.[58] The board not only upheld the hearing officer's decision, but ordered R.W.'s expulsion for the rest of the 2008-2009 school year.[59] R.W.'s mother J.W. then filed suit on his behalf.

The *J.W.* court held that the search of R.W.'s phone did not violate his Fourth Amendment rights.[60] The court reasoned that because "R.W. was caught *using* his cell phone at school," he "greatly increased his chances of being caught with . . . contraband (and of being suspected of further misconduct)."[61] In the view of the court, this compounding of one violation of school policy on top of another provided reasonable suspicion for school authorities to believe R.W. could be participating in other misconduct such as cheating and, therefore, provided sufficient grounds for the search of R.W.'s phone.[62] The court also held that the defendants could also enjoy qualified immunity since no established rule of law had been violated.[63]

R.W. and J.W. relied on *Klump v. Nazareth Area School District* to support their claims.[64] However, the court distinguished *J.W.* from *Klump*: Klump's telephone was not contraband since school

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52. *Id.*
53. *Id.* at *2.
54. *Id.*
55. *J.W.*, 2010 U.S. Dist. LEXIS 116328 at *3-4.
56. *Id.* at *4.
57. *Id.*
58. *Id.*
59. *Id.* at *3.
60. *Id.* at *5.
61. *J.W.*, 2010 U.S. Dist. LEXIS 116328 at *5-6.
62. *Id.* at *9.
63. *Id.*
64. *Id.* at *8–9.

policy did not forbid students to possess a telephone on school property; and because Klump's telephone accidently fell from his pocket, he did not intentionally violate school policy.[65] The court further reasoned that because R.W. made the conscious decision to bring his telephone to school in violation of school policy and intentionally committed a second violation by retrieving his father's text message in full view of school personnel, his expectation of privacy was necessarily diminished.[66]

In *Mendoza v. Klein Independent School District*,[67] Jennifer Mendoza, on behalf of her daughter A.M., filed suit against the Klein Independent School District, claiming that A.M.'s rights under the Fourth Amendment were violated.[68] The factual background revealed that A.M. had been observed by Associate Principal Stephanie Langer using her cell phone during school hours in violation of school policy. When questioned by Langer, A.M. stated that she had not been using her phone and that her friends would vouch for her claim. Further, A.M. begged not to have her phone confiscated because it had been taken from her twice previously and her mother would make her pay the fee to retrieve it.[69] Langer stated that she turned on A.M.'s phone to determine when it was last used because A.M. had denied using it at school.[70] Langer also believed that, based on other students' reactions to looking at A.M.'s phone, there was "something inappropriate for a school setting."[71] After scrolling through the first few texts, Langer discovered that A.M. had been untruthful.[72] In the sent box, Langer also discovered a nude picture of A.M. that A.M. had taken in front of a mirror and sent to her boyfriend, who had sent a nude picture of himself to A.M.[73] A.M. admitted showing the boyfriend's picture to a friend at school.[74] Langer notified the principal, who, in turn, notified the police.[75] A.M.'s mother was notified that her daughter would be

65. *Id.*
66. *Id.* at *11.
67. Mendoza v. Klein Indep. Sch. Dist., No. 4:09-CV-03895 (S.D. Tex. Mar. 3, 2011).
68. *Id.* at *1-2.
69. *Id.* at *3.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Mendoza*, No. 4:09-CV-03895 at *3-4.
74. *Id.* at *4.
75. *Id.*

assigned three days in-school suspension and further penalties, including the possibility of expulsion, pending the result of both school district and police investigations.[76] A few days later, the police notified Langer that A.M.'s cell phone would be destroyed.[77]

Following the investigations, Langer informed A.M. that she had violated the school's code prohibiting "incorrigible" behavior and that A.M. would be assigned to the district's alternative education program.[78] An appeal to the district administration upheld the principal's determination. A.M.'s mother filed suit on A.M.'s behalf, stating that the principal and Langer violated her and A.M.'s Fourth Amendment rights and that the school district should also be held liable for its failure to properly train the principal and Langer on protecting students' rights and failed to put in place policies that protected students' rights.[79] The suit also accused the defendants of intentional infliction of emotional distress because A.M. was assigned to the district's alternative school.[80] Plaintiffs and defendants both moved for summary judgment, the school officials claiming sovereign immunity.[81]

The court found that Langer's search of A.M.'s cellular telephone was reasonable at its inception under the first prong of the reasonableness standard of *New Jersey v. T.L.O.*[82] However, Langer's subsequent search, which resulted in the discovery of the nude images, was not reasonable in scope under the second prong of *T.L.O.*[83] Further, the court believed that Langer's testimony suggested that she was aware that her subsequent search was not reasonable and would constitute a violation of A.M.'s Fourth Amendment rights.[84] The court also recommended that the principal's and school district's motions for summary judgment should be granted,[85] finding no grounds on which it could hold the school district liable for Langer's actions.[86]

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76. *Id.* at *4-5.
77. *Id.* at *5-6.
78. *Id.* at *6.
79. *Mendoza*, No. 4:09-CV-03895 at *7.
80. *Id.* at *8.
81. *Id.*
82. *Id.* at *22.
83. *Id.* at *27.
84. *Id.*
85. *Mendoza*, No. 4:09-CV-03895 at *32.
86. *Id.* at *41.

In summary, three different federal district courts have addressed the question of whether, consistent with the Fourth Amendment, school authorities may search students' cellular telephones. In *Klump*, school authorities were found to have violated a student's Fourth Amendment rights by searching text and voicemail messages on his telephone, while the *J.W.* court found no violation when school authorities and a school resource officer searched pictures on a student's telephone. The *Mendoza* court held that an associate principal's search of a student's cell phone was initially reasonable, but the search crossed the proverbial constitutional line when the associate principal began looking in areas of the phone that were not directly related to the incident that gave rise to the search. When considering the constitutionality of searching a cellular telephone, the courts appear to be looking for a close nexus between school policy, parameters of the search, and the incident from which the search arose. Accordingly, guidance for schools, such as the unnamed Texas school referenced above, needs to be formulated in the context of board policy and training for its administrators.

VI. First Amendment Issues

In addition to Fourth Amendment issues, school personnel responding to sexting must consider First Amendment issues, as well. The framers of the First Amendment in the eighteenth century could scarcely have anticipated twenty-first century communications technology. Because sexting by definition involves images of either partial or full nudity, the question arises whether the images are speech, and, if they are, whether they merit First Amendment protection. Because no Supreme Court opinions concerning sexting exist, exploration of the constitutional protection of those images must be found in the Court's obscenity holdings.

The Supreme Court's obscenity jurisprudence goes at least as far back as 1878, when it held that postal regulations prohibiting obscene pictures or print being carried by mail carriers did not offend the Constitution.[87] In *Near v. Minnesota*, heard in 1931, the Court struck down a state statute that forbade the "producing, publishing or circulating, having in possession, selling or giving away" of "an obscene, lewd and lascivious newspaper, magazine, or other periodical" as violative of the First Amendment right to freedom of

87. *Ex parte* Jackson, 96 U.S. 727 (1877).

the press.[88] However, the Court did not attempt to define "obscene."[89]

The Supreme Court announced its definition of obscenity in 1957 with its decision in *Roth v. United States*.[90] In *Roth*, the Court upheld the constitutionality of a federal statute criminalizing the "mailing of material that is 'obscene, lewd, lascivious, or filthy . . . or other publication of indecent character.'"[91] The Supreme Court defined obscene material as "material which deals with sex in a manner appealing to prurient interest"; "the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests."[92] The Court's language concerning obscenity and its lack of First Amendment protection was plain: "expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press."[93]

The Supreme Court introduced a significant shift in its obscenity definition in *Memoirs v. Massachusetts*.[94] In *Memoirs*, the Supreme Court overturned a decision of the Supreme Judicial Court of Massachusetts that declared a book, *Memoirs of a Woman of Pleasure* by John Cleland, to be obscene.[95] A plurality of three justices on the *Memoirs* Court, citing the *Roth* Court's definition, added a third prong: material is obscene if it is "*utterly* without redeeming social value."[96] This was based largely on the testimony before the trial court of five college English professors that *Memoirs* was a "minor work of art" with "historical merit."[97]

Seven years later, though, the Court explicitly rejected the *Memoirs* standard of "*utterly* without redeeming social value" as without basis in the Constitution.[98] In *Miller v. California*, the Court

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88. Near v. Minnesota, 283 U.S. 697, 702 (1931).

89. Judith A. Silver, *Movie Day at the Supreme Court or "I Know it When I See It": A History of the Definition of Obscenity*, FINDLAW (Mar. 26, 2008).

90. Roth v. United States, 354 U.S. 476 (1957).

91. *Roth*, 354 U.S. at 491, citing 18 U.S.C. § 1461 (1957).

92. *Id.* at 489.

93. *Id.* at 481.

94. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Mass., 383 U.S. 413 (1966).

95. *Id.*

96. *Id.* at 418.

97. *Id.* at 421-422.

98. Miller v. California, 413 U.S. 15 (1973).

instead opined that obscene material is that which, "taken as a whole, lacks serious literary, artistic, political, or scientific value."[99]

Arguably, the most "on point" Supreme Court decision is *New York v. Ferber*, in which the Court upheld a New York statute that prohibited the production or distribution of material that depicted any sexual performance by any person under the age of sixteen.[100] In *Ferber*, the Court drew a distinction between obscenity and child pornography.[101] Because physically and psychologically healthy children are essential to the continuance and proper functioning of a democratic society, the Court found it abundantly clear that a State would have a compelling interest in proscribing the production and distribution of child pornography.[102]

However, the Supreme Court has yet to directly answer the question of whether nude or semi-nude pictures are protected speech if they are taken by and distributed by teens using their cellular telephones. If these images are not protected speech, do teenagers who sext place themselves in jeopardy of criminal prosecution under pornography statutes? The authors believe that *Ferber* has affirmed that nude pictures taken by and distributed by teens using their cellular telephones are not protected speech. In fact, the *Ferber* Court asserted that states "are entitled to greater leeway in . . . recognizing and classifying child pornography as a category of material outside the First Amendment's protection and is not incompatible with this Court's decisions dealing with what speech is unprotected."[103]

VII. PORNOGRAPHY STATUTES

According to the National Campaign to Prevent Teen and Unplanned Pregnancy, 20% of teenagers overall admit to having sent or posted a nude or semi-nude photo of themselves.[104] More than one-third (36% of girls and 39% of boys) report that it is common to share nude or semi-nude photos with persons other than the intended recipients.[105] Considering the fact that approximately 16

99. *Id.* at 24-25.
100. New York v. Ferber, 458 U.S. 747 (1982).
101. *Id.* at 764-765.
102. *Id.* at 756-757.
103. *Id.* at 747.
104. SEX AND TECH, *supra* note 3.
105. *Id.*

million children now have their own cellular telephones[106]—Pew Internet and American Life Project reports that 71% of teens own a cellular telephone[107]—these numbers are alarming and sobering.

The United States Code explicitly proscribes the production, distribution, reception, and possession of a "depiction of any kind" of "a minor engaging in sexually explicit conduct [that] is obscene."[108] In addition, all fifty states and the District of Columbia have criminalized child pornography.[109] Further, eighteen states currently have laws that criminalize either the distribution of or possession of child pornography using an electronic device such as a cellular telephone. Similar legislation is pending in nine other states. Four states without sexting laws have seen attempts to pass such legislation fail at least once in the last three years.[110]

It would appear that in at least the eighteen states with sexting laws currently in force, teens who sext could be committing a felony. Indeed, three cases suggest this to be true. In *A.H. v. State*, the sixteen-year-old girl A.H. and her seventeen-year-old boyfriend J.G.W. took pictures of themselves engaging in sexual conduct.[111] The photos were never sent to any third party,[112] but both teens were charged with the producing of a photograph depicting sexual conduct under Florida law.[113] J.G.W. was also charged with possession of child pornography.[114] The trial court denied A.H.'s

106. Laura Petrecca, *Cell Phone Marketers Calling All Preteens*, USA TODAY (Sept. 5, 2005), http://www.usatoday.com/tech/products/gear/2005-09-05-preteen-cell-phones_x.htm.

107. Amanda Lenhart, Pew Internet, *Teens and Mobile Phones Over the Past Five Years: Pew Internet Looks Back* (2009), http://www.pewinternet.org/~/media//Files/Reports/2009/PIP%20Teens%20and%20Mobile%20Phones%20Data%20Memo.pdf.

108. 18 U.S.C. § 1466A(a)(1) (2012).

109. *See* Ronald J. Palenski, *supra* note 19.

110. Nat'l Conference of State Legislatures, *2009 "Sexting" Legislation* (Sept. 1, 2010), http://www.ncsl.org/default.aspx?tabid=17756; Nat'l Conference of State Legislatures, *2010 Legislation Related to "Sexting"* (Jan. 4, 2011), http://www.ncsl.org/default.aspx?tabid=19696; Nat'l Conference of State Legislatures, *2011 Legislation Related to "Sexting"* (Jan. 23, 2012), http://www.ncsl.org/default.aspx?tabid=22127.

111. A.H. v. State, 949 So. 2d 234 (Fla. Dist. Ct. App. 2007).

112. *Id.*

113. FLA. STAT. ANN. § 827.071 (West 2012) ("A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a child less than 18 years of age.").

114. *A.H.*, 949 So. 3d at 935 n.1.

motion to dismiss, finding the state's interest in protecting children more compelling than A.H.'s privacy interests.[115] The First District Court of Appeals affirmed the trial court's finding. The appellate court opined that the act of "memorializing" their sexual activity through "the decision to take photographs and to keep a record that may be shown to people in the future weighs against a reasonable expectation of privacy."[116] A.H. entered a plea of nolo contendere to violating child pornography laws, and her conviction was upheld on appeal.[117]

In another situation, a fifteen-year-old girl in Newark, Ohio faced felony charges for sending nude photographs of herself using her cellular telephone.[118] According to one press report, the girl reached an undisclosed agreement with prosecutors that, in part, allowed her to avoid having to register as a sex offender.[119] Another Florida case ended with eighteen-year-old Phillip Alpert convicted of a felony and registered on the state's list of sex offenders for the next twenty-five years. Alpert, after an argument with his then-sixteen-year-old girlfriend, sent nude photographs of her to "dozens" of her friends and relatives.[120] For Alpert, the consequences of being a registered sex offender include expulsion from college, difficulty finding employment, and the requirement to make arrangements with his probation officer in order to travel anywhere outside of his home county.[121]

Because child pornography laws vary from state to state, the question of whether or not child pornography charges could apply to the school in this Article is answered only by an examination of that state's law. For example, prior to the passage of Senate Bill 407, the Texas State Penal Code criminalized, as a third degree felony, the possession or promotion of material that "visually depicts a child younger than 18 years of age at the time the image of the child was

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115. *Id.* at 235.

116. *Id.*

117. *Id.* at 236, 239.

118. Kim Settere, *Teen Girl Faced Child Porn Charges for E-mailing Nude Pictures of Herself to Friends—Update*, WIRED.COM (Oct. 22, 2008), http://www.wired.com/threatlevel/2008/10/teen-girl-faces/.

119. *Id.*

120. Deborah Feyerick & Sheila Steffen, *"Sexting" Lands Teen on Sex Offender List*, CNN.COM (Apr. 8, 2009), http://www.cnn.com/2009/CRIME/04/07/sexting.busts/index.html?iref=storysearch.

121. *Id.*

made . . ." by anyone, including school-aged adolescents.[122] Such an offense under Texas law also required registration in the state as a sex offender.[123] Thus, students in this state who choose to sext could have been in peril of prosecution under pornography laws for their actions.

VIII. RECOMMENDATIONS

When administrators are forced to address sexting in schools, the legal issues can be daunting. Based on available case law, it is clear that nude images sent via cellular telephones are not protected speech. What is less clear is if and when school officials should search students' cellular telephones. In *Klump*, the court held the search of the student's cellular telephone unconstitutional because the school could not show a nexus between a violation of school policy and the search. School policy for the unnamed Texas school states, "Students shall not possess a telecommunications device, including a cellular telephone or other electronic device at school during the school day." Because students in that particular scenario actually used their phones in view of school personnel, *J.W.* and *Mendoza* would be the most applicable of the three court decisions discussed in Part IV, *supra*. Based on the *J.W.* court's holding, this policy would support confiscation of student telephones, but would most likely not support searching them. However, the *Mendoza* court provides support for the searching of student cell phones, but also a stern warning to school administrators. Cell phone searches that go beyond what is necessary based on the infraction and school policy may run afoul of the Fourth Amendment.

At least as pressing as First and Fourth Amendment issues is the use of state child pornography laws to prosecute teens for sexting. In *Miller v. Mitchell*, a Pennsylvania prosecutor was prevented from prosecuting teens under state child pornography laws for sexting.[124] While there is no doubt that legally and morally, child pornography is wholly undeserving of First Amendment protection,[125] there is considerable disagreement over whether or not existing child pornography laws and their consequences are appropriate for dealing with sexting.

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122. TEX. PENAL CODE § 43.26(a) (West 2011).
123. TEX. CODE CRIM. PROC. art. 62.001,§ 5(B) (West 2011).
124. Miller v. Mitchell, 598 F.3d 139, 139 (3d Cir. 2010).
125. *See* New York v. Ferber, 458 U.S. 747 (1942).

Pace University School of Law Professor John Humbach argues that "autopornography" such as sexting does not exploit children and could thus create an exception to the *Ferber* standard:

> Almost certainly the most significant difference between teenage autopornography and "traditional" child pornography, like the material in *Ferber*. . . is the circumstances under which the two genres are produced. It is highly probable, moreover, that these different circumstances of production greatly affect their respective potentials for harm. The harms described in *Ferber* include various deleterious effects both immediate and long-range on the children depicted, but the common theme throughout the case is *exploitation*. Indeed, in the *Ferber* opinion, the Court uses or quotes the word "exploit" and its derivatives more than twenty times.[126]

Catherine Arcabascio, Associate Dean at Nova Southeastern University's Shepard Broad Law Center, points out that the Court in *A.H. v. State*[127] placed itself in a difficult and seemingly contradictory position:

> In essence, the court found that the government has a simultaneous compelling state interest in both protecting and convicting children in child pornography cases despite the fact those same children, by the court's own definition, lack the "foresight and maturity" to "make an intelligent decision about engaging in sexual conduct and memorializing it."[128]

IX. CONCLUSION

Teens who sext place public schools in a difficult position. For schools, the dissemination of nude photographs causes a disruption to the learning environment. Case law provides limited guidance to help schools navigate students' rights. School authorities are caught between the proverbial "rock and a hard place" by school policies that are inadequate to deal with sexting and state child pornography laws that do not seem well suited for teens making poor decisions with cellular telephones. States are developing statutes specifically aimed at sexting, but the process is slow. A texted photograph may

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126. John A. Humbach, "*Sexting*" *and the First Amendment*, 37 HASTINGS CONST. L.Q. 433 (2010).

127. A.H. v. State, 949 So. 2d 234 (Fla. Dist. Ct. App. 2007).

128. Arcabascio, *supra* note 4, at 17-18; *A.H.*, 949 So. 2d at 238.

circle the world in an instant, while sexting legislation can take years to become law. Until all states have laws specifically designed to address the issues surrounding teen sexting, states will continue to find themselves on the prongs of the "protect or convict" dilemma.