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Send Me a Picture Baby, You Know I'd Never Leak It: The Role of Miller v. Mitchell in the Ongoing Debate concerning the Prosecution of Sexting

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Casenotes

"SEND ME A PICTURE BABY, YOU KNOW I'D NEVER LEAK IT"[1]: THE ROLE OF *MILLER V. MITCHELL* IN THE ONGOING DEBATE CONCERNING THE PROSECUTION OF SEXTING

I. "PHONOGRAPHY"[2]: AN INTRODUCTION

New technology brings new entertainment.[3] In the past, the invention of the printing press led to the printing of the Bible and Playboy, both causing significant debate.[4] Society has pushed past the limitations of the printed word and now works in the digital world.[5] As the printed word increased interactions, cell phones and computers have further expanded our ability to communicate.[6] This new technology provides a forum for a range of communication, whether allowing the confirmation of a business deal via e-mail between Hong Kong and New York City or providing a venue to quickly incite lust by sending sexually explicit pictures, or "sexts."[7]

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1. TREY SONGZ, *Unusual, on* PASSION, PAIN & PLEASURE (Atlantic Records 2010).

2. BRITNEY SPEARS, *Phonography, on* CIRCUS, DELUXE EDITION (Jive Records 2008).

3. *See generally*, GIZMAG.COM, http://www.gizmag.com/ (cataloguing new technology and innovation for use by consumers). *See also* Hayley Strong, *"Sexting" to Minors in a Rapidly Evolving Digital Age: Frix v. State Establishes the Applicability of Georgia's Obscenity Statutes to Text Messages*, 61 MERCER L. REV. 1283, 1295 (2010) ("[T]oday's youth are growing up in a world in which the interaction between cell phones and websites such as Twitter and Facebook continues to gain popularity as a means to communicate. . . . Moreover, most modern cell phones can send messages in a variety of forms—texts, instant messages, e-mails, and even Facebook posts.").

4. *See, e.g.*, Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1038-39 (2011) ("[I]nvention of the printing press . . . ensured that those other than the 'rich and powerful' also had the tools to communicate effectively.").

5. *See, e.g.*, Catherine Arcabascio, *Sexting and Teenagers: OMG R U Going 2 Jail???*, 16 RICH. J.L. & TECH. 10, 8-9 (2010) (discussing boom of technology infiltrating society).

6. *See, e.g.*, Robert Richards & Clay Calvert, *When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case*, 32 HASTINGS COMM. & ENT. L. J. 1, 12 (2009) (discussing children's lives revolving around technology).

7. *See id.* at 12 (explaining how technology has lead to increasing globalization). Richards and Calvert state:

> Kids in our current culture allow technology to infiltrate everything they do. They express themselves, whether it's anger, love, hate, or intimacy,

Young adults have grown up with cell phones and computers as their generation's entertainment media, taking full advantage of these electronics' vast capabilities, including using them to sext.[8] Sexting, also referred to as self-produced child pornography, is a type of high-tech flirting that entails sending pictures either through cell phones or e-mail.[9] Sexting allows sex, or at least the proposition of it, to be easy and instant.[10] At the prospect of such instant gratification, teenagers often forget, or are unaware of, the possibility that these pictures can be sent to individuals other than the intended recipient or result in legal consequences.[11] Results of a survey conducted by the National Campaign to Prevent Teen and

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through technology. Face-to-face communication, for better or worse, is dropping off in favor of more electronic communication. When teens want to express themselves erotically, they often do so through technology—unaware of the consequences.

Id.

8. *See id.* at 16 (describing how teenagers have been using this type of technology since they were born); *see also* Sarah Wastler, Note, *The Harm in "Sexting"?: Analyzing the Constitutionality of Child Pornography Statutes that Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers*, 33 HARV. J.L. & GENDER 687, 691 (2010) (explaining that nude photographs have always posed issues, but digitalization of technology has created "new problems of over-exposure and permanency"). "[A]ll children are born digital." *Id. But see* John Palfrey, *The Challenge of Developing Effective Public Policy on the Use of Social Media by Youth*, 63 FED. COMM. L.J. 5, 14 (2010). "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." Miller v. Mitchell, 598 F.3d 139, 143 (3d Cir. 2010) (internal quotations omitted).

9. *See* Richards & Calvert, *supra* note 6, at 16 (explaining prevalence and popularity of sexting); *see also* Mary Graw Leary, *Sexting or Self-Produced Child Pornography? The Dialog Continues – Structured Prosecutorial Discretion Within a Multidisciplinary Response*, 17 VA. J. SOC. POL'Y & L. 486, 495 (2010) (arguing use of term "sexting" to describe activity is sensational and inappropriate). The terms "sexting . . . and self-produced child pornography may be overlapping, but they are not synonymous. . . . The term self-produced child pornography is preferable to 'sexting' because, like the term 'child abuse images,' it accurately conveys the content. Secondly, as discussed, it distinguishes between the kinds of images produced." *Id.*

10. *See* Richards & Calvert, *supra* note 6, at 16 (responding to questions about why children sext). Phillip Alpert, a convicted "sext" offender, thought kids did it because they were used to getting everything instantly, and sexual gratification came instantly through sexting. *See id.* (referring to teenage sext offender case); *see also* Arcabascio, *supra* note 5 (suggesting teenagers have grown up in technological world and do not know anything different).

11. *See* The National Campaign to Prevent Teen and Unplanned Pregnancy, *Sex and Tech: Results From a Survey of Teens and Young Adults* (2008), *available at* http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf (reporting 40% of teenagers have had sext shown to them which was supposed to be private); *see also* Jan Hoffman, *A Girl's Nude Photo, and Altered Lives*, N.Y. TIMES, Mar. 26, 2011, at A1, *available at* http://www.nytimes.com/2011/03/27/us/27sexting.html?_r=1&ref=us (noting pressure of media and society in creating sexting culture in which teenagers want to participate but are unaware of consequences).

Unplanned Pregnancy found twenty percent of teenagers sext, often giving little thought to the consequences.[12]

The practice of teen sexting is not surprising, considering the behavior is modeled and promoted by celebrities, athletes, and politicians.[13] Vanessa Hudgens, of High School Musical fame, had nude pictures she had "sexted" leaked over the internet.[14] Brett Favre, while quarterback for the New York Jets, also sent graphic pictures of his genitals using his cell phone.[15] Musical artists, with teenagers as a large part of their target audience, encourage sexting through song lyrics.[16] In his song, "Sexting," Ludacris sings to a woman who just text messaged him a picture of her tongue, "[c]an you send a nasty pic, so I can see right where it is, and I promise I won't show my friends (yeah right)."[17] With the behavior modeled by the figures teenagers look up to, it is not surprising they are emulating the practice.[18]

12. The National Campaign to Prevent Teen and Unplanned Pregnancy, *Sex and Tech: Results From a Survey of Teens and Young Adults* (2008), *available at* http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf (findings of study of sexting among13-26 year olds).

13. *See* Brooke Barnes, *Revealing Photo Threatens a Major Disney Franchise*, N.Y. TIMES, Apr. 28, 2008, at C1, *available at* http://www.nytimes.com/2008/04/28/business/media/28hannah.html (explaining how teen actors like Miley Cyrus are looked up to by teenagers who then copy celebrities' behaviors). "You can't expect teenagers to not do something they see happening all around them." Hoffman, *supra* note 11(internal quotations omitted).

14. *See* John Anderson, *Away, Gabriella! Now She's the Emo Girl*, N.Y. TIMES, Aug. 7, 2009, at AR 14, *available at* http://www.nytimes.com/2009/08/09/movies/09ande.html (referencing scandal involving actress Vanessa Hudgens sending nude photographs to her then boyfriend which ended up on the internet); *see also* Stephen M. Silverman, *Vanessa Hudgens Talks About Dealing with Her Nude Photo Scandal*, PEOPLE (Jan. 3, 2008), http://www.people.com/people/article/0,,20169046,00.html (responding to scandal, Hudgens stated "[i]t was something that was meant to be private").

15. *See Brett Favre*, N.Y. TIMES (Dec. 29, 2010), http://topics.nytimes.com/top/reference/timestopics/people/f/brett_favre/index.html (noting allegations against Favre that he sent graphic sexual photographs through his cell phone to woman).

16. *See, e.g.*, LUDACRIS, *Sexting*, *on* BATTLE OF THE SEXES (DTP/Def Jam South 2010) (asking girl to send him nude picture of herself in lyrics).

17. *Id. See also* TREY SONGZ, LOL:), on READY (Songbook/Atlantic Records 2009) ("Shorty just text me, says she want to sex me. . . . Shorty sent a twitpic, saying come get this."); *see also* TAIO CRUZ FT. KE$HA, *Dirty Picture*, *on* ROCKSTAR (Island 2009) ("Take a dirty picture/Just send the dirty picture to me.").

18. *See* Hoffman, *supra* note 11 ("[T]he primary reason teenagers sext is to look cool and sexy to someone they find attractive."); *see also* Terri Day, *The New Digital Dating Behavior – Sexting: Teens' Explicit Love Letters: Criminal Justice or Civil Liability*, 33 HASTINGS COMM. & ENT. L.J. 69, 73-74 (2010) (admitting that while sexting is new, "[s]ince the beginning of time, teens have flirted with each other and pushed the envelope. But 10 to 15 years ago, it didn't go global in 30 seconds").

Sexting is not just modeled or endorsed from celebrity avenues; it is generally accepted as a way of spicing up a relationship.[19] Various news sources and relationship advisors promote the behavior.[20] Fox News has published articles about how to sext, explaining a "[d]ay long tease can lead to a night-long in-person session."[21] Further, an article in AARP suggests sexting "is a fun, easy and usually harmless way to spice up . . . sex."[22]

Although sexting spans generations as a new way to explore sexuality, the law is primarily concerned with underage sexting.[23] Teenagers are viewed differently than consenting adults and thus, there is concern regarding protection and prevention.[24] Therefore, prosecutors across the country have been put in the difficult situation of trying to understand how, and to what extent, to prosecute sexting.[25] With little guidance from legislators, and confusion about the role of parents and schools, prosecutors' differing decisions have created a varied and coagulated area of law.[26]

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19. *See, e.g., The Sex Toy Hiding in Your Purse,* COSMOPOLITAN, http://www.cosmopolitan.com/sex-love/tips-moves/The-Sex-Toy-Hiding-in-Your-Purse (last visited Oct. 28, 2011) (explaining game of sending pictures of part of your breasts, butt, etc. to your boyfriend to entice him).

20. *See* Jenny Block, *The Do's and Don'ts of Sexting,* FOX NEWS, http://mapserv.amz.tpa.foxnews.com/health/2011/02/16/dos-donts-sexting/ (last visited Oct. 28, 2011) (encouraging sexting for consenting adults); Jessica Leshnoff, *Sexting Not Just for Kids,* AARP (June 2011), http://www.aarp.org/relationships/love-sex/info-11-2009/sexting_not_just_for_kids.html (advising baby boomers how to engage in sexting to add excitement to their relationship);

21. *See* Block, *supra* note 20 (explaining ways sexting can be beneficial).

22. *See* Leshnoff, *supra* note 20 (discussing different sexting practices of baby boomer generation).

23. *See* Joanna Barry, Note, *The Child as Victim and Perpetrator: Laws Punishing Juvenile "Sexting",* 13 VAND. J. ENT. & TECH. L. 129, 132-33 (2010) (explaining how adults and juveniles are treated differently under law as it pertains to sexting); *see also* Richards & Calvert, *supra* note 6, at 18 (questioning why, in sexting cases, minors are held to "higher standard than adults" when usually it is reverse).

24. *See* Nunez v. City of San Diego, 114 F. 3d 935, 946 (9th Cir. 1997) (explaining interest in protecting minors is more important than adults in some areas). *But see* Ramos v. Town of Vernon, 331 F.3d 315, 322 (2d Cir. 2003) (applying intermediate scrutiny to minors as a balance between protecting their rights and protecting their potential vulnerable status).

25. *See* Arcabascio, *supra* note 5, at 40 (recounting various ways prosecutors have chosen to handle sexting cases); *see also* Leary, *supra* note 9, at 492-94 (explaining how U.S. media has further convoluted sexting issue by including many types of behavior into term "sexting").

26. *See* Lawrence J. Walters, *How to Fix the Sexting Problem: An Analysis of the Legal and Policy Considerations for Sexting Legislation,* 9 FIRST AMEND. L. REV. 98, 110 (noting "hodgepodge" of both laws and court decisions that have added confusion). Not only is sexting an issue with regard to new technology, but many areas of child pornography laws are also being stretched to fit into situations where the legislators never envisioned the laws would go. *See, e.g.,* State v. Canal, 773 N.W.2d 528, 529 (Iowa 2009) (holding eighteen-year-old guilty of "knowingly disseminat-

Although many state courts have dealt with the issue of sexting, the case of *Miller v. Mitchell*[27] is the first federal sexting case.[28] In *Miller*, school officials found nude and semi-nude pictures on students' cell phones.[29] They turned the pictures over to the District Attorney ("D.A.") who gave the students involved, both with production and dissemination, an ultimatum of attending an educational program or facing child pornography charges.[30] Those who refused to attend the educational program filed suit against the D.A. claiming a violation of multiple constitutional rights.[31] The court held the D.A. could not require the educational program and could not bring charges against the plaintiffs.[32]

This Note explores the *Miller* decision and what it adds to the national debate concerning sexting.[33] Section II catalogues the factual and legal background that led to the case.[34] It explores the federal law regarding child pornography, Pennsylvania law as applied to this case, and examples of other sexting cases.[35] Section III explains the specific constitutional issues argued by the plaintiffs and the holding of the court.[36] Specifically, the issues addressed are the parental right to raise a child and the right against com-

ing obscene material" to a minor when sexting fourteen year old girl); A.H. v. State, 949 So.2d 234, 234 (Fla. Dist. Ct. App. 2007) (holding minor liable for "producing and promoting pornographic photograph of a child" when she and her boyfriend shared nude photographs of themselves with each other); *see also* Erica Goode, *Michigan Town Split on Child Pornography Charges*, N.Y. TIMES, Mar. 7, 2011, at A12, *available at* http://www.nytimes.com/2011/03/08/us/08muskegon.html?_r=1&scp=2&sq=child%20pornography&st=cse (describing case where twenty-one year old was charged under child pornography laws because of digitally altered video).

27. 598 F.3d 139 (3d Cir. 2010)

28. *See* Tamar Lewin, *Court Says Parents Can Block 'Sexting' Cases*, N.Y. TIMES, Mar. 17, 2010, at A18, *available at* http://www.nytimes.com/2010/03/18/education/18sext.html (noting first federal case on sexting.)

29. *See Miller*, 598 F.3d at 143 (describing sexts at issue in case).

30. *See id.* at 144 (threatening students that "[i]f you[r] son/daughter successfully completes this program[,] no charges will be filed and no record of his/her involvement will be maintained").

31. *See id.* at 147-48 (recounting actions and claims of students and their parents).

32. *See* Miller v. Mitchell, No. 3:o9cv54o, 2010 WL 1779925, at *1, *5-*6 (M.D. Pa. Apr. 30, 2010) (mem.) (granting preliminary injunction to stop D.A. from pressing charges).

33. For further discussion of *Miller v. Mitchell*, *see infra* notes 42-288 and accompanying text.

34. For further discussion of the factual and legal background of the case, see *infra* notes 42-111 and accompanying text.

35. For further discussion of the factual and legal background of the case, see *infra* notes 42-111 and accompanying text.

36. *See infra* notes 112-142 and accompanying text for further discussion of the issues raised by the plaintiffs and the court's analysis.

pelled speech.[37] Section VI analyzes the reasoning of the court and its application to the issue of sexting.[38] The section will also analyze what role schools, parents, and prosecutors should play in punishing minors for sexting and how *Miller* adds guidance and confusion to sexting jurisprudence.[39] Section V concludes by explaining the impact of the case and future sexting issues.[40] There has been some political and legal movement on the issue; however, more attention is necessary.[41]

II. BACKGROUND

A. Factual Background

The dispute in this case arose when school officials in Tunkhannock, Pennsylvania found sexts being passed around on male students' cell phones.[42] The sexts were nude and semi-nude photographs of girls, some of whom attended school in the district.[43] The plaintiffs in this case were involved with the production of two of these pictures.[44] One picture showed two of the middle school girls in solid white bras from the waist up.[45] The other picture showed a girl's breasts with a white towel wrapped underneath them.[46] The school officials turned over the phones to the D.A., who then investigated the issue.[47]

The D.A., George Skumanick, told the students who produced the pictures and the students who disseminated the pictures they could be charged with child pornography or criminal use of a communication facility under Pennsylvania law.[48] Before filing any

37. For further discussion of the issues raised by the plaintiffs and the court's analysis, see *infra* notes 112-142 and accompanying text.

38. For further discussion of the application of this case to issue of sexting, see *infra* notes 143-255 and accompanying text.

39. For further discussion of the application of this case to issue of sexting, see *infra* notes 143-255 and accompanying text.

40. *See infra* notes 256-288 and accompanying text for further discussion of the application of this case to issue of sexting.

41. For further discussion of the application of this case to issue of sexting, see *infra* notes 256-288 and accompanying text.

42. *See* Miller v. Mitchell, 598 F.3d 139,143 (3d Cir. 2010) (explaining how dispute arose).

43. *See id.* (describing contents of sexts).

44. *See id.* at 144 (giving background on plaintiffs and their actions).

45. *See id.* (relating details of photographs).

46. *See id.* (specifying content of pictures).

47. *See id.* at 143-44 (describing D.A.'s involvement in prosecuting texts and negotiations presented to plaintiffs to avoid felony charges).

48. *See id.* (informing parents and press about possible repercussions of students' actions).

charges against the students, however, Skumanick sent a letter to the parents of the students explaining an education program their children could participate in to avoid having charges filed against them.[49] The program focused on issues such as sexual harassment, gender identity, and why the students' actions were wrong.[50]

After sending the letter, Mr. Skumanick held a group meeting for parents on February 12, 2009.[51] He further explained that to avoid felony charges, the children would have to attend the education program, pay a $100 program fee, and submit to probation.[52] During the meeting, some parents questioned the use of child pornography laws because the pictures did not seem provocative enough to invoke such charges; Mr. Skumanick, however, refused to answer questions about the definition of provocative.[53] Mr. Skumanick told the parents they had a week to sign the agreement.[54] Then, on February 23, 2009, the parents were sent a letter from the Juvenile Court Services informing them that there was an appointment on February 28 to sign the agreement.[55] Everyone signed the agreement except for the plaintiffs, who then filed this suit.[56]

On March 25, the plaintiffs filed suit for a temporary restraining order to prevent the D.A. from filing charges against the students.[57] Their claims were based on an argument of retaliation; they were being punished by the D.A. for exercising their constitutional rights.[58] On March 30, the District Court found for the

49. *See id.* (explaining letter from plaintiffs to D.A.).

50. *See id.* at 144 (listing various issues different sessions were centered around). Students also had to write a report on why they were wrong and how their actions affected others, among other topics. *See id.* (describing further requirements of education program).

51. *See id.* (discussing next step D.A. took).

52. *See id.* (reiterating option D.A. Skumanick gave to plaintiffs to avoid felony charges).

53. *See id.* (noting reactions and questions of parents). One of the pictures was a girl in a bathing suit and her parent could not understand why that would be chargeable under child pornography laws. *See id.* (explaining questions of parents in regard to specific pictures).

54. *See id.* (requiring parents to sign agreement at February 12 meeting). When only one parent signed agreement, he gave other parents one week in which to sign agreement instead of students facing felony charges. *See id.* (noting some parents' refusal to sign agreement).

55. *See id.* at 144-45 (scheduling time for parents to sign agreements).

56. *See id.* at 145 (explaining actions of most parents and explaining how lawsuit came about).

57. *See id.* (demonstrating actions of plaintiffs and goals in litigation).

58. *See id.* at 147-48 (listing plaintiffs' claims). The plaintiffs' claims included the following:

plaintiffs.[59] The D.A. appealed.[60] The Court of Appeals upheld the temporary restraining order.[61] On March 30, the Court of Appeals held that the restraining order was permanent, and consequently, the D.A. could not file child pornography charges against the students.[62]

B. Legal Background

1. *Federal Law*

Underage sexting has become a legal issue because of the unique position the Supreme Court has given to minors in regards to obscenity.[63] The Supreme Court created guidelines regulating obscenity in the case of *Miller v. California*.[64] In *Miller*, the Court created a three-prong test for determining obscenity.[65] If the requirements of the test are not met, then the material at issue is not obscene and cannot be regulated.[66]

> (1) retaliation in violation of the minors' First Amendment right to free expression, the expression being their appearing in two photographs; (2) retaliation in violation of the minors' First Amendment right to be free from compelled speech, the speech being the education programs required essay explaining how their actions were wrong; and (3) retaliation in violation of the parent's Fourteenth Amendment substantive due process right to direct their children's upbringing . . . .

Id.

59. *See id.* at 145 (granting temporary restraining order for plaintiffs to block charges District Attorney filed against them).

60. *See id.* at 145, 147 (explaining actions of D.A.).

61. *See id.* at 155 (holding that court upheld temporary restraining order barring charges against plaintiffs because plaintiffs had valid claim for constitutional right not to attend D.A. enforced education program to avoid felony charges).

62. *See* Miller v. Mitchell, No. 3:09cv54O, 2010 WL 1779925, at *1, *6 (M.D. Pa. Apr. 30, 2010) (mem.) (making temporary restraining order permanent).

63. *See* New York v. Ferber, 458 U.S. 747, 764 (1982) (holding obscenity in regard to child pornography is not protected speech). Only underage sexting is at issue under the law; adult sexting is not considered obscene and fits clearly within adults' First Amendment rights. *See* Shannon Shafron-Perez, *Average Teenager or Sex Offender? Solutions to the Legal Dilemma Caused by Sexting*, 26 J. MARSHALL J. COMPUTER & INFO. L. 431, 432 (2009) ("The First Amendment protects this type of private conduct among adults.").

64. *See Miller v. California*, 413 U.S. 15, 24-25 (1973) (explaining significance of case).

65. *See id.* at 24. The elements of the three-prong test are:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. (internal citations omitted).

66. *See id.* (explaining use of test in determining obscenity).

Child pornography has been carved out as an exception to the regular obscenity standards.[67] In *New York v. Ferber*,[68] the Supreme Court decided that child pornography is outside the protection of the First Amendment.[69] The Court found there to be a compelling interest in "safeguarding the physical and psychological well-being of a minor."[70] Additionally, the Court stated that the distribution, selling, and advertising of child pornography is inconsistent with this compelling interest and is therefore allowed to be banned.[71] Furthermore, the Court recognized this decision was in line with the legislative intent of the various state statutes concerning child pornography.[72]

Based on the Supreme Court's decision in *Ferber*, child pornography became a federally regulated crime.[73] Congress enacted legislation based on the findings that "the use of children in the production of sexually explicit material, including photographs, films, videos, computer images, and other visual depictions, is a form of sexual abuse which can result in physical or psychological harm, or both, to the children involved."[74] The regulation, under Title 18 of the United States Code defines child pornography as:

> [A]ny visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where –

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67. *See* Ferber, 458 U.S. at 764 (making child pornography illegal and discussing balancing of concerns for child welfare within decision).

68. 458 U.S. 747 (1982).

69. *See id.* at 764 (reiterating Supreme Court decision not to give child pornography First Amendment protection).

70. *Id.* at 757 (citing Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)).

71. *See id.* at 759-63 (chronicling second and third points regarding distribution and advertising of child pornography as "a permanent record of the children's participation," where the "distribution network . . . must be closed . . . to be effectively controlled" and providing "an economic motive for . . . the production of such materials, an activity illegal throughout the Nation."). The effect on any literary or artistic value was small enough for the Court to find it "*de minimis*." *Id.* at 762-63.

72. *See id.* at 757 (explaining another determinative factor used in analysis).

73. *See* Sexual Exploitation and Other Abuse of Children, 18 U.S.C. §§ 2251, 2252 2256, 2260A (2006) (describing child pornography crimes and types of criminal forfeiture related to child pornography).

74. *See* Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, §121, 110 Stat. 3009, 3009-26 (1996) (codified as note to 18 U.S.C. § 2251).

> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is a digital image, computer image, or computer generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or
>
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct[75]

The punishment for engaging in any of these activities is a minimum of a fifteen year prison sentence, along with a fine and possible registry as a sex offender.[76] If the act committed requires registry, the offender will be sentenced to another ten years in prison.[77] Further, the definition of a sex offender was expanded in 2006 to include juvenilesover fourteen convicted of certain crimes, thereby increasing the number of convictions requiring registry.[78]

2. *Pennsylvania Law*

States vary in the language of their child pornography laws, the rigidity of enforcement, and the harshness of punishment.[79] Thus, the varying approaches to child pornography laws have led to differences in how those laws are applied to "sext" offenders.[80]

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75. 18 U.S.C. § 2256.

76. *See id.* §§ 2251, 2252, 2256, 2260A (detailing punishment, activities, and criminal forfeiture related to child pornography).

77. *See id.* § 2260A (describing punishment of registered sex offenders).

78. *See* 42 U.S.C. § 16911(8) ("The term convicted or a variant thereof, used with respect to a sex offense includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse.") (internal quotations omitted).

79. *See* Megan Sherman, *Sixteen, Sexting, and a Sex Offender: How Advances in Cell Phone Technology Have Led to Teenage Sex Offenders*, 17 B.U. J. SCI. & TECH. L. 138, 147-49 (2011) (explaining varying state laws addressing child pornography); *see also* National Conference of State Legislatures, *2011 Legislation Related to "Sexting"* (Sept. 2, 2011), http://www.ncsl.org/default.aspx?tabid=22127 ("In 2011, at least 21 states and Guam introduced bills or resolutions aimed at "sexting". . . . Bills have been enacted in five states (Florida, North Dakota, Nevada, Rhode Island and Texas) and Guam so far this year.").

80. *See* Jan Hoffman, *States Struggle With Minors' Sexting*, N.Y. TIMES (Mar. 26, 2011), http://www.nytimes.com/2011/03/27/us/27sextinglaw.html?_r=1&ref=us (discussing how states have taken different approaches in dealing with child pornography, such as classifying sexting as a misdemeanor, creating education programs, enforcing sanctions, or granting immunity under certain circumstances).

Pennsylvania's approach is moderate in comparison to the approach of other states.[81] Pennsylvania defines child pornography as:

> Any person who intentionally views or knowingly possesses or controls any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.[82]

Using this statute, the D.A. argued that the sexted pictures fit into the definition of "prohibited sexual act" because they showed a "lewd exhibition of . . . nudity . . . for the purpose of sexual stimulation or gratification of any person who might view such depiction."[83]

The other statute at issue in this case was the Criminal Use of a Communication Facility.[84] The offense defined by this statute is a third degree felony if a "person uses a communication facility to commit, cause or facilitate the commission or the attempt thereof of any crime . . . ."[85] Punishment may include a fine, possible seven year jail sentence, or both.[86] This statute was used by the D.A. because the students had sent the pictures using cell phones, a "communication facility" as defined by the statute.[87]

Another aspect of child pornography prosecution is a conviction resulting in registry as a sex offender.[88] The policy of the Pennsylvania Legislature on sex offenders is "to protect the safety and general welfare of the people of this Commonwealth by providing for registration and community notification regarding sexually

81. *See id.* (explaining Pennsylvania's proposed mild sanctions to general sexting); *see also Greensburg Kids Get Phones Back After 'Sexting' Sentence: Juvenile Judge Gives Boys, Girls Community Service*, WTAE PITTSBURGH (Mar. 26, 2009), http://www.wtae.com/news/19022180/detail.html (relating facts of Pennsylvania state sexting case where students were given curfews and had their phones taken away as punishment for sexting).

82. 18 PA. CONS. STAT. § 6312(d)(1) (2010).

83. *Id.* § 6312(g) (2010).

84. *See id.* § 7512 (describing crime of using a communication facility for disseminating child pornography).

85. *Id.* § 7512(a)

86. *See id.* § 7512(b) (describing penalty for committing crime).

87. *See id* § 7512(c) ("As used in this section, the term communication facility means a public or private instrumentality used or useful in the transmission of . . . images . . . transmitted in whole or in part, including, but not limited to, telephone.") (internal quotations omitted).

88. *See* 42 PA. CONS. STAT. ANN. § 9791 (West 2007) (giving legislative findings and policy on issue).

violent predators who are about to be released from custody and will live in or near their neighborhood."[89] As of now, no sextor has been required to register as a sex offender in Pennsylvania.[90]

In light of recent Pennsylvania sexting cases, and the nationwide problem, Pennsylvania has legislation pending in regard to sexting.[91] The legislation specifically defines the offense as:

> No person under 18 years of age shall use a computer or a telecommunications device to knowingly transmit or distribute a photograph or other depiction of himself or herself or of another minor who is at least 13 years of age, in a state of nudity, to another person who is not more than four years younger or more than four years older than the person transmitting or distributing the photograph or other depiction.[92]

The judge also has the discretion to refer a person charged with this offense to a diversionary program.[93]

Further, once convicted, the judge again has discretion to require participation in an educational program as part of the sentence.[94] The education program would be developed with the specific goals of teaching:

> (1) The legal consequences of and penalties for using a computer or a telecommunications device to share sexually suggestive or explicit materials, including applicable Federal and State laws.
>
> (2) The nonlegal consequences of using a computer or a telecommunications device to share sexually suggestive or explicit materials, including the effect on relationships, loss of educational and employment opportunities and the potential for being barred or removed from school programs and extracurricular activities.

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89. *Id.* § 9791(b).

90. For discussion of how Pennsylvania has not required any teenagers charged under child pornography laws to register as sex offenders, *see infra* notes 97-142 and accompanying text.

91. *See* S. 1121, Gen. Assemb., 2009 Sess. (Pa. 2009) (attempting to create new sexting legislation).

92. *Id.*

93. *Id.* (explaining discretion of judge in proceedings).

94. *See id.* (proposing new legislation to deal with sexting in more appropriate way).

> (3) How the unique characteristics of the Internet, including the ability to search for and to replicate materials and the limitless audience, can produce long-term and unforeseen consequences from sharing sexually suggestive or explicit materials.
>
> (4) The connection between bullying, including bullying on the Internet, and juveniles sharing sexually suggestive or explicit materials.[95]

The education program proposal aligns with the D.A.'s intent in *Miller*, but notably excludes topics of women's role in society and what the correct boundaries of sexual expression should be.[96]

3. *Other Sexting Cases*

Recently, the number of cases addressing sexting has exploded in the state court system.[97] In 2009, a juvenile court case in Pennsylvania involved charges brought against students in a situation similar to that in *Miller*.[98] In that case, three girls sent nude pictures to three boys and were charged with child pornography.[99] They were not convicted under these charges; they were, however, required to do community service and abide by a curfew.[100] This case was the first Pennsylvania sexting case and the first to "demonstrate a new trend toward pushing prosecutorial boundaries to include subjects of child pornography whose victimization is a result of their own doing."[101]

Another example is a case in Washington, where an eighth-grade girl, Margarite, sent a nude picture to her then boyfriend through her cell phone.[102] After breaking up, the boy forwarded

95. *Id.*

96. *See generally id.* (excluding morality from educational program).

97. *See* Shafron-Perez, *supra* note 63, at 431 (listing various state cases concerning sexting).

98. *See Greensburg Kids Get Phones Back After 'Sexting' Sentence: Juvenile Judge Gives Boys, Girls Community Service*, WTAE PITTSBURGH (Mar. 26, 2009), http://www.wtae.com/news/19022180/detail.html (explaining facts of case); *see also* Ed Bushnell, *Sweet "Sext" teen: When Child Pornography Victims Become Defendants*, LEGALITY (Mar. 16, 2011), http://www.thelegality.com/2009/02/19/sweet-sextteen-when-child-pornography-victims-become-defendants/ (discussing how case arose).

99. *See* Ed Pilkington, *Sexting Craze Leads to Child Pornography Charges*, GUARDIAN, Jan. 14, 2009, http://www.guardian.co.uk/world/2009/jan/14/child-pornography-sexting (explaining facts of case).

100. *See Greensburg Kids Get Phones Back After 'Sexting' Sentence: Juvenile Judge Gives Boys, Girls Community Service*, *supra* note 98 (listing what students were required to do under settlement).

101. Bushnell, *supra* note 98.

102. *See* Hoffman, *supra* note 11 (explaining facts of sexting at issue).

the text to one person who then further forwarded it around the local middle schools.[103] Although the students who forwarded the sext were initially charged with child pornography, the charge was lowered to a gross misdemeanor of telephone harassment, which allowed them eligibility for a community service program, and the charges could be dropped.[104] The students were required to "create public service material about the hazards of sexting, attend a session with Margarite to talk about what happened and otherwise have no contact with her."[105]

Not all prosecutors, however, have allowed sextors to escape harsh criminal liability.[106] In a Florida case, Philip Alpert, an eighteen-year-old boy, e-mailed naked pictures of his sixteen-year-old girlfriend to approximately seventy people.[107] Alpert was charged and convicted under Florida's child pornography laws.[108] Additionally, Alpert was required to register as a sex offender.[109] Registering as a sex offender caused him to be kicked out of college and restricted his ability to get a job.[110] The disparity in these cases and the harshness of the penalty Alpert faced has caught the attention of the legal world.[111]

III. ISSUES ADDRESSED BY THE COURT

The plaintiffs' goal in *Miller* was to bar the D.A. from pressing charges under Pennsylvania's child pornography laws.[112] Both of

103. *See id.* (giving factual background of situation).

104. *See id.* (detailing punishment of students who participated in dissemination of sext).

105. *Id.*

106. *See* Vicki Mabry & David Perozzi, *'Sexting': Should Child Pornography Laws Apply? Legal Debate Springs Up After Man Put on Sex Offender List for Forwarding Risque Images*, ABC NEWS (Apr. 1, 2010), http://abcnews.go.com/Nightline/phillip-alpert-sexting-teen-child-porn/story?id=10252790 (explaining case of Philip Alpert).

107. *See* Richards & Calvert, *supra* note 6, at 18 (describing actions of Alpert).

108. *See* Mabry & Perozzi, *supra* note 106 (noting Alpert faced seventy-two charges under Florida law).

109. *See id.* (requiring punishment of conviction under Florida child pornography laws).

110. *See* Richards & Calvert, *supra* note 6, at 2 (describing consequences of registering as sex offender).

111. *See generally* Leary, *supra* note 9, at 487 (noting dealing with sexting is pertinent, nationwide issue requiring action).

112. *See* Miller v. Mitchell, 598 F.3d 139, 147 (3d Cir. 2010) (trying to get court to grant preliminary injunction). The court stated that the four elements are "(1) a likelihood of success on the merits; (2) he or she will suffer irreparable harm if the injunction is denied; (3) granting relief will not result in even greater harm to the nonmoving party; and (4) the public interest favors such relief." *Id.* (citing Child Evangelism Fellowship of N.J. Inc. v. Stafford Twp. Sch. Dist., 386 F. 3d 514, 524 (3d Cir. 2004)). The Court of Appeals affirmed the analysis of the

the plaintiffs' claims were based on retaliation of the D.A., the retaliation being an attempt to punish the plaintiffs for exercising their constitutional rights.[113] First, the plaintiffs argued there was "retaliation in violation of the minors' First Amendment right to be free from compelled speech."[114] Second, the plaintiffs argued the D.A.'s actions were "retaliation in violation of the parents' Fourteenth Amendment substantive due process right to direct their children's upbringing."[115]

The Court of Appeals addressed the retaliation claim from the perspective that "any future prosecution would be an unconstitutional act of retaliation."[116] The court accepted this theory because it was an attempt to prevent any charges from being filed.[117] Thus, on the theory that "plaintiffs seek injunctive relief to prevent a future retaliatory act-an actual prosecution that has not yet been brought-from occurring," the Court of Appeals upheld the preliminary injunction granted by the District Court.[118]

In analyzing the case, the court first addressed the issue of parents' Fourteenth Amendment right "to raise their children without undue state interference."[119] The mother of one of the girls in-

District Court on three of the elements required for an injunction, but reviewed whether the plaintiffs had a likelihood of success on the merits. *See id.* at 147 (agreeing with District Court's analysis of last three factors).

113. *See id.* at 149 (explaining question of retaliation claim). Retaliation claims are distinct from Constitutional claims in that they focus on "whether the Government is *punishing* the plaintiffs for exercising their rights." *Id.* at 148 n.9. "Under the doctrine of retaliation, 'an otherwise legitimate and constitutional government act can become unconstitutional when an individual demonstrates that it was undertaken in retaliation for his exercise of First Amendment speech.'" *Id.* (citing Anderson v. Davila, 125 F.3d 148, 161 (3d Cir. 1997)).

114. *Id.*

115. *Id.* at 148 (addressing two claims court dealt with in its opinion).

116. *See id.* (explaining Court of Appeals approach in dealing with idea of retaliation in regards to case). The District Court analyzed the retaliation claim by looking at the threatened prosecution as the retaliation. *See id.* (explaining why this theory was not used by Court of Appeals). The Court of Appeals rejected this theory based on the timing not being appropriate. *See id.* (timing at issue). The threat of prosecution came before the plaintiff would not sign the agreement; thus the plaintiff had not asserted any right that was then retaliated against. *See id.* (refusing to attend program before threat caused first retaliation theory to not work because timing was wrong for retaliation claim).

117. *See id.* at 149 (explaining how timing issue affects first theory but not second theory).

118. *Id.*

119. *Id.* at 150 (citing Gruenke v. Seip, 225 F.3d 290, 303 (3d Cir. 2000)). The court also cited other cases which further solidified the significant and overarching role parents have in the upbringing of their own children, out of the control of the government. *See id.* (highlighting different opinions where parents rights were continually given high importance). The claims were based around meeting the three elements of a retaliation claim, but in this case the analysis fo-

volved in the case argued that the education program lessons interfered with her job as a parent.[120] Specifically, she objected to "[t]he program's teachings that the minors' actions were morally 'wrong' and created a victim, which contradict the beliefs she wished to instill in her daughter."[121]

In its analysis, the court found that parents have the main responsibility to raise their children, but school officials also have some responsibility.[122] Once the D.A. became involved, the chain of responsibility was broken; thus, the D.A. did not fall into the class of a school official and did not have the authority to impose this education program on the students.[123] By making this program involuntary, the D.A. violated the mother's right to raise her child.[124] The program itself could be offered, but not coerced.[125]

The second constitutional issue raised was the students' First Amendment right to be free from compelled speech.[126] The court acknowledged any "[g]overnment action that requires stating a particular message favored by the government violates the First Amendment right to refrain from speaking."[127] The plaintiffs argued that the education program compelled their speech.[128] One part of the curriculum required the students to write an essay explaining why sending sexts was wrong.[129] The plaintiffs argued this was speech compelled by the D.A.'s threat of prosecution.[130]

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cuses on just the major issues that are pertinent to the broad spectrum of sexting cases. *See id.* (outlining major issues surrounding retaliation claim). One of the issues not addressed in this Note, but addressed by the court, was whether the government "responded with a retaliatory act" as the second element of the retaliation claim requirements. *See id.* at 152 (defining second element of retaliation claim). The court, without explanation, found that the test, "sufficient to deter a person of ordinary firmness from exercising his constitutional rights" was clearly met. *Id.*

120. *See id.* at 130 (detailing different parts of program with which plaintiff disagreed). The mother's main issues with the program were the lessons that would be taught about women and society. *See id.* (explaining opposition to education program).

121. *Id.*

122. *See id.* (describing how school officials take part in raising children).

123. *See id.* (explaining how court views D.A.'s program for students).

124. *See id.* (noting violation of mother's right).

125. *See id.* at 151 (coercing student to attend program was outside scope of D.A. 's authority).

126. *See id.* (describing second constitutional issue).

127. *Id.* While the compulsion must be actual, it does not have to be direct. *See id.* at 152 (defining case law).

128. *See id.* (arguing education program violated their rights).

129. *See id.* (explaining view of parents in filing suit).

130. *See id.* (compelling someone to speak by forcing them to attend program and write essays).

The court affirmed the plaintiff's argument because the required essay dealt with "a *moral*, not a *legal* matter."[131] The court distinguished that "[w]hat it means to be a girl in today's society, while an important sociological concern, in this case is a disconnect with the criminal and juvenile justice systems."[132] The court also highlighted the vulnerability of minors to the influence of others which makes the program that much more problematic in regards to moral compulsion.[133]

Lastly, the plaintiffs had to show that the D.A.'s retaliation was what caused the infringement of constitutional rights.[134] The court found this burden to be met; three threats of filing charges were made in response to the plaintiffs refusing to submit to the education program.[135] Since the decision not to attend the program is constitutionally protected, there cannot be enforcement of the program or charges.[136]

Another reason the court did not allow the filing of charges was the lack of evidence against the plaintiffs.[137] The court found that two pictures on students' cell phones would not meet probable cause.[138] Thus, the plaintiff met the element of likelihood of success.[139]

In conclusion, the court found that to "have to choose either a prosecution . . . based not on probable cause but as punishment for exercising their constitutional rights, or forgo those rights and avoid prosecution . . . [was a] Hobson's Choice [which is] unconstitutional."[140] The court thus affirmed the ruling of the District Court and the preliminary injunction remained.[141] The court then

131. *Id.* (emphasis in original).

132. *Id.* (internal quotations omitted).

133. *See id.* at 152 (finding this educational program outside scope of D.A.'s power to compel).

134. *See id.* (laying out third element of causation).

135. *See id.* (listing reasons why causation was found). First, the D.A. said he would prosecute the students if they did not attend the program. *See id.* ("The compulsion here takes the form of the District Attorney's promise to prosecute Doe is she does not satisfactorily complete the education program."). Also, the letter sent to the parents stated that the D.A. would prosecute if the program was not completed, the same threat was reiterated at the meeting held for the parents. *See id.* (recounting different ways D.A. threatened filing charges against students).

136. *See id.* at 153 (discussing why there can be no enforcement of charges or requirement to attend program).

137. *See id.* (finding picture of girl on cell phone was not enough evidence).

138. *See id.* at 154-55 (holding of court).

139. *See id.* (asserting that plaintiff's were likely to be successful on the merits).

140. *Id.* at 155.

141. *See id.* (affirming lower court's decision).

made the temporary restraining order permanent, prohibiting charges to be filed against the plaintiffs.[142]

IV. CRITICAL ANALYSIS

The analysis by the court in *Miller* provides a federal perspective on what has previously been strictly a state issue: the prosecution of sexting.[143] Prohibiting charges to be pressed against these students sets a precedent for rejecting the broad application of child pornography laws to minors who engage in sexting.[144] *Miller* does not end the discussion, however, but raises more questions of how the federal court's decision will affect the state courts in this area of law.[145]

The main issues the case addresses are: the issue of a parents' Fourteenth Amendment right to raise a child; freedom of choice and expression of minors; the definition of sexually explicit; and compelling speech.[146] These issues span both how sexting should generally be viewed and how sexting should be handled by the legal system once it occurs.[147] *Miller* adds both clarity and confusion to this area of law going forward.[148]

A. The Right to Raise a Child

1. *Rights of Parents*

Miller demonstrates the continued struggle between the parental right to raise a child and the accountability the legal system requires of parents.[149] Initially, the D.A. was forceful in requiring the parents to support the punishment of the education program.[150]

142. *See* Miller v. Mitchell, 2010 WL 1779925, at *5-6 (M.D. Pa. Apr. 30, 2010) (making temporary restraining order permanent).

143. *See* Shannon P. Duffy, *Third Circuit Tackles Teen 'Sexting' As Child Pornography*, 8 No. 2 INTERNET L. & STRATEGY 3 (2010) (noting *Miller* is first federal sexting case).

144. *See* Richards & Calvert, *supra* note 6, at 26 (arguing that *Miller* is precedent set by "brave federal judge" taking stand against unjust prosecutions of sexting).

145. For further discussion of *Miller* and its role in the sexting issue, see *infra* notes 146-255 and accompanying text.

146. *See* Miller v. Mitchell, 598 F.3d 139, 148-49 (3d Cir. 2010) (examining Constitutional issues raised).

147. For further discussion of the application of the holding of *Miller* to the issue of sexting, see *infra* notes 149-255 and accompanying text.

148. For further discussion of the application of the holding of *Miller* to the issue of sexting, see *infra* notes 149-255 and accompanying text.

149. *See* Miller, 598 F.3d at 149 (discussing issue of parental right to raise children).

150. *See id.* (noting D.A.'s view of situation).

Based on the Fourteenth Amendment claim of the parents, however, the court decided that the sexting in this instance was a parental rights issue.[151]

The aspect of the D.A.'s actions found to be invalid was the message of the program—an attempt to regulate morality.[152] The program was designed to educate the students on how women should be portrayed in society and how they should view themselves.[153] The program also required the girls to write a statement explaining why their actions were wrong.[154] These views were not necessarily in accordance with the views the parents wished to instill in their children about what it means to be a woman or whether engaging in sexting is immoral.[155] By adding morality to the educational program, the D.A. overstepped the bounds of where the law stops and parenting begins.[156]

Not all sexting instances have been left to parents' discretion.[157] In a prior case in Pennsylvania, a group of students was caught with sexts on their cell phones at school.[158] The Juvenile Court took a different approach than the District Court and took over the role of parents.[159] Charges were filed and the case was settled with the requirements that the teenagers do community service and abide by a curfew.[160] The court took up the role of policing teenagers, chipping away at the parents' traditional role.[161] The parents were outraged at this decision, not believing the issue should have gone to court at all, much less having the settlement infringe on their role of raising their children.[162]

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151. *See id.* (allowing parents freedom to raise their children).

152. *See id.* (explaining how program violated parents rights).

153. *See id.* (concluding forcing daughter to explain why sexting was wrong was regulating morality).

154. *See id.* (describing requirements of program).

155. *See id.* (requiring students to be taught these views and write that they agreed with them was not what parents wanted instilled in their children).

156. *See id.* (explaining reasons why education program was not allowed).

157. *See, e.g.*, State v. Canal, 773 N.W. 2d 528 (Iowa 2009); A.H. v. State, 949 So. 2d 234 (Fla. Dist. Ct. App. 2007); State v. Phillip Michael Alpert, No. 07-CF-0016350-O (Fla. Cir. Ct. 2008).

158. *See Greensburg Kids Get Phones Back After 'Sexting' Sentence: Juvenile Judge Gives Boys, Girls Community Service*, WTAE PITTSBURGH (Mar. 26, 2009), http://www.wtae.com/news/19022180/detail.html (explaining facts of case); *see also* Bushnell, *supra* note 98 (discussing how case arose).

159. *See* Pilkington, *supra* note 99 (citing prior cases where minors were criminally charged as a result of sexting).

160. *See id.* (describing prior Pennsylvania state case).

161. *See id.* (explaining settlement of case).

162. *See id.* (providing parents' perspective on how juvenile court handled case).

One of the key differences between these two cases, however, is a punishment of actions versus beliefs.[163] The D.A. in *Miller* pushed beyond legal boundaries and created a moral issue.[164] He designed a program based on what is right and wrong from an individual moral perspective rather than a punishment system based on non-compliance with law.[165] Due to this distinction, *Miller* may not be a case where the court was championing the rights of parents, but instead, simply drawing a line between acceptable forms of punishment.[166]

Punishment for sexting utilizing the standard legal procedure, however, has also been questioned.[167] Phillip Alpert was prosecuted under child pornography laws and is labeled as a sex offender.[168] His parents cannot make a constitutional claim that the court was forcing morality on their child, but they are outraged at the harshness of the punishment he received.[169] In Alpert's case, his parents were not given the opportunity to deal with the issue or punish him as they felt necessary; the issue was taken out of their control.[170]

These cases reveal a common theme—prosecutors are willing to take on the role of parent.[171] This raises the dilemma of determining when a prosecutor appropriately takes on the parents' role and to what extent.[172] *Miller* creates a guideline that legislating the

163. *See* Miller v. Mitchell, 598 F.3d 139, 149 (noting court's explanation of morality aspect D.A. was trying to enforce).

164. *See id.* (forcing students to write why what they did was wrong was enforcing morality instead of legality).

165. *See id.* (describing court's view that education program cannot encompass morality).

166. *See id.* (refraining from addressing whether other education programs or punishments were acceptable).

167. *See* Bushnell, *supra* note 98 ("Are we attempting to legislate morality, or are we trying to protect underage victims?").

168. *See* Richards & Calvert, *supra* note 6, at 7-20 (explaining conviction and punishment).

169. *See id.* (showing results of case and how parents had no rights to punish their son on their own).

170. *See id.* (taking over role of parents in child's life).

171. *See, e.g.*, Duffy, *supra* note 143 (explaining D.A.'s argument that his actions were "a proper response to a rash of incidents in which girls had transmitted nude photos of themselves for no other purpose than sexual gratification.").

172. *See* Leary, *supra* note 9, at 497 (proposing structured prosecutorial discretion as best remedy for sexting); *see also* Richards & Calvert, *supra* note 6, at 13 (indicating we need to take different approach to teen sexting cases than applying traditional criminal laws). Leary states that:

> [Child pornography] laws are so draconian and the punishment goes on for so long, however, that these kids end up being punished for decades as a result of a mistake they made that, in any other rational circum-

moral issues of how to view women and their role in society is not an appropriate response.[173] The question remains of when punishment becomes too harsh, even if it is legally correct.[174] Further, there is continued debate on how much of a role parents should have.[175] There is strain between where the law needs to intercede and where parents and other social avenues should be allowed to have control.[176] Many parents, social scientists, and even some lawyers argue this type of issue should be handled from the family context, not a legal one.[177]

Parents are not necessarily involved with the issue, however, leaving a gap between parent's rights and the government's interest in protecting children.[178] From the perspective of the government, prosecutors have the responsibility to uphold the intent of child pornography laws to prevent harm to children.[179] Prosecutors are in a position of witnessing the harm caused by sexting, and upon determining that it can be redressed by a statute, view it as their responsibility to prosecute.[180]

2. *Role of the School*

Although *Miller* has given parents a strong role in dealing with the issue of sexting, the court also highlighted that schools have a role to play in the upbringing of children.[181] Moreover, the Su-

> stance, would have resulted in a more justified punishment—they would get grounded, get suspended, and then they would live their life.

Id. (quoting Lawrence Walters).

173. *See* Miller v. Mitchell, 598 F.3d 139, 149 (3d Cir. 2010) (holding that education program required by D.A. could not force morality on students); *see also* Duffy, *supra* note 143 (quoting Judge Ambro during oral arguments).

174. *See generally* Susan Hanley Duncan, *A Legal Response Is Necessary For Self-Produced Child Pornography: A Legislator's Checklist For Drafting the Bill*, 89 OR. L. REV. 645, 689-99 (2010) (arguing there needs to be new legislation addressing sexting because sexting should not be prosecuted under child pornography laws).

175. *See* Arcabascio, *supra* note 5, at 45-48 (explaining debate about parents, schools, and media having larger role in issue).

176. *See id.* (arguing crucial role of players outside law).

177. *See id.* (explaining appropriate role of parents).

178. *See* Ginsberg v. New York, 390 U.S. 629, 640 (1968) (recognizing that society still has responsibility to protect children) (citation omitted); *see also* Duncan, *supra* note 174, at 653 (describing problem that parents are unaware of issue or do not think their children would engage in such behavior).

179. For further discussion the government's role in protecting children, see *supra* notes 67-72 and accompanying text.

180. *See* Duncan, *supra* note 174, at 670-81 (arguing sexting is not encompassed by child pornography laws); *see also* Day, *supra* note 18, at 77-78 (noting common view among prosecutors is that sexting does satisfy elements of child pornography).

181. *See* Miller v. Mitchell, 598 F.3d 139, 151 (recognizing "secondary responsibility" of school in upbringing of children).

preme Court has held in multiple instances that school officials have a responsibility in raising children.[182] Therefore, the school may have the authority to enforce the type of education program supported by the D.A. in *Miller*.[183] One avenue that has been suggested is to pre-empt the behavior by having blanket education programs for schools.[184] In multiple states, including Pennsylvania, there is legislation pending that would require schools to create such education programs.[185] The problem with such programs, however, is determining where the line is between educating legality and morality.[186] Sexting is a unique issue because of the inherent morality involved with deciding what constitutes appropriate sexual expression for teenagers.[187] Further, schools are faced with other difficult facets of the problem, such as privacy rights and liability; schools' responsibility is important but often hard to define and determine limits.[188]

182. *See* Bethel School District v. Fraser, 478 U.S. 675, 684 (1986) (explaining schools do have partial responsibility in raising children).

183. *See* Barry, *supra* note 23, at 144 ("[S]chool's must be wary about their response because parents will scrutinize any action taken, which could expose the school to liability."). *See generally* Duffy, *supra* note 143 (questioning during oral arguments show that judges are not willing to turn over education of teenagers to state).

184. *See* Sherman, *supra* note 79, at 158-59 (arguing sexting education must happen at schools); *see also* Elizabeth Ryan, *Sexting: How the State can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults*, 96 IOWA L. REV. 357, 380 (2010) (noting that other states, like Ohio and New Jersey, have created alternative programs to deal with sexting instead of prosecuting).

185. *See* S. 2923, 213th Leg. (N.J. 2009) (requiring annual information materials to be distributed to parents and students); *see also* S. 1121, Gen. Assemb., 2009 Sess. (Pa. 2009) (defining goals of educational program in proposed legislation).

186. *See* Day, *supra* note 18, at 71-72 ("Although teen sexting, in general, may be abhorrent to public sentiment, dealing with the morality of such activity is not the role of the government.").

187. *See id.* (expressing general viewpoint that sexting is normal expression of teenagers sexuality and morality should not be regulated by government).

188. *See* Barry, *supra* note 23, at 143 (arguing for treating sexting as right to privacy issue similar to how sex between minors is handled); *see also* Richards & Calvert, *supra* note 6, at 10-11 (noting argument that privacy rights need to be protected). Grabbing cell phones in school is never questioned in regards to rights of privacy. *See id.* (explaining argument of Phillip Alpert's attorney that student's Constitutional rights are being infringed). The question of students' rights is lost amidst what teachers find on their cell phones, however, which leads to the issue of charging children with sexting offenses. *See id.* (taking of cell phones in school goes unquestioned which is privacy right issue).

B. Students' Freedom of Expression

The second constitutional issue raised in this case is whether the speech of the students is protected.[189] The clear distinction in these cases, as opposed to normal child pornography, is that the victim's images were created and distributed by choice of the victim.[190] The girls voluntarily took pictures as a way to express themselves and their sexuality.[191] They were not accosted at the hands of a pedophile, but were victims of their own choices.[192] Although societal pressures to be attractive or to get attention from the opposite sex may have contributed to the girls' actions, the sexting at issue was not coerced in the traditional sense.[193]

Taking these pictures without traditional coercion creates a scenario where the victim and the defendant are the same.[194] Under traditional perceptions of child pornography laws, this creates an oxymoron for the purposes of prosecution as to who is being protected.[195] Further, allowing victim and defendant to be the same could frustrate the intent of the law, broadening the reach of the law beyond what is necessary or required.[196]

The distinction in Alpert's case and Margarite's case from the teenagers in *Miller* is that Alpert and Margarite's boyfriend distributed the photographs of someone else without consent, a common occurrence in the world of sexting.[197] This behavior aligns more closely with the goals of child pornography statutes than the situa-

189. *See* Wastler, *supra* note 8, at 701 ("[T]he Court later made clear that the judgment in *Ferber* was based on how it was made, not on what it communicated.") (internal quotations omitted).

190. *See* Walters, *supra* note 26, at 101 (distinguishing choice from being victimized).

191. *See id.* (describing how practice is part of youth expression of sexuality).

192. *See* Wastler, *supra* note 8, at 701 (discussing ideas of voluntariness and choice with sexting in contrast to child pornography).

193. *See* Hoffman, *supra* note 11 (explaining pressures of sexting in teenage community and status it gives to person).

194. *See* Duncan, *supra* note 174, at 677 (asserting views that "Congress cannot pass a law to protect children against themselves").

195. *See* Bushnell, *supra* note 98 (explaining child pornography convicts are "lowliest offenders, even among criminals" because of the innocence of victims and questioning "[w]hat if the victims are also the defendants?").

196. *See* Barry, *supra* note 23, at 133-34 (questioning what actual intent of law was and who it was supposed to incriminate).

197. *See* Shafron-Perez, *supra* note 63, at 433 ("Graphic messages are passed from teenager to teenager, usually without the permission of the subject in the photograph."). There is some argument that situations such as Alpert's should be dealt with by a mixture of sexting and bullying laws, which are more akin to what actually happened in the case. *See* Conn, *supra* note 188, at 20-21 (exploring idea about cyberbullying laws incorporating sexting).

tion in *Miller*, where the students were being punished for taking and sending their own picture.[198] Another distinction in Alpert's case was that his girlfriend had taken and sent the pictures of herself and was not charged with any crime.[199] Under the guidance of the Pennsylvania state case, however, it may have been possible to charge her, and at the least, require community service and a curfew.[200] Instead of harmonizing the law, *Miller* may have simply added more confusion.[201]

Further, the distinction of choice versus force adds the question of whether child pornography laws can even encompass sexting.[202] Taking a picture of oneself to disseminate may not fit into the actual meaning or intent of the statute.[203] Accordingly, adolescents being charged under these statutes have legitimate claims that the laws are overbroad and overly harsh as applied to their actions.[204] The Supreme Court precedent in *Ferber*, along with each State's laws, has been used to deal with serious child pornography crimes by pedophiles that seriously harm the children involved.[205] Whether this same harm is at issue in sexting is a necessary point

198. For further discussion of the charges threatened against the plaintiffs in *Miller*, see *supra* notes 42-62 and accompanying text.

199. *See generally*, Richards & Calvert, *supra* note 6 (explaining that Alpert was charged with dissemination of pictures, but subject of pictures was not charged for taking them).

200. For further discussion of the Pennsylvania court's ruling concerning the punishment of teenagers who took pictures of themselves, see *supra* notes 97-142 and accompanying text.

201. *See* Miller v. Mitchell, 598 F.3d 139, 144 (3d Cir. 2010) (giving little guidance for future sexting cases).

202. *See* Wastler, *supra* note 8, at 694 (questioning whether statute was intended to apply in cases where person takes picture of self to sext); Bushnell, *supra* note 98 (addressing issue from perspective of defense attorney who believes charges are "clearly overkill.").

203. *See* Wastler, *supra* note 8, at 694 ("Can an individual employ, use, persuade, induce, or entice oneself?").

204. *See* Meghaan McElroy, *Sextual Frustrations*, 48 HOUS. LAW. 10, 10 (2010) (arguing child pornography not right mechanism for dealing with sexting issue). The Supreme Court precedent does not support use of child pornography statutes to prosecute sexting. *See id.* at 11-12 (analyzing Supreme Court cases dealing with child pornography and showing that intent was to deal with much more serious crimes than what sexting involves). "Prosecuting sexting cases would in effect be declaring the subjects of the images simultaneous victims and perpetrators . . . in some rare case[s] . . . the intention rather than the strict language should control." Wastler, *supra* note 8, at 694.

205. *See* McElroy, *supra* note 204, at 10 (arguing that child pornography is not right mechanism for dealing with sexting issue). The Supreme Court precedent does not support use of child pornography statutes to prosecute sexting. *See id.* at 11-12 (analyzing Supreme Court cases dealing with child pornography and showing the intent was to deal with much more serious crimes than what sexting involves).

for consideration.[206] If there is no outside harm to a victim by choice, then the court system has overstepped its bounds by legislating morality.[207]

Moreover, the government may not be serving its own best interests by implementing child pornography laws to encompass such a wide range of situations.[208] Prosecuting adult sex offenders alongside teenagers expressing their sexuality could affect the way the law is applied to real predators, possibly becoming less effective and wasting resources.[209] Further, the public may have a harder time identifying real predators if sextors are added to the registry.[210] Creating different laws, or decriminalizing sexting, however, may also make it more difficult to control and investigate nude pictures.[211] A situation could be created that "provide[s] pedophiles with a defense that any images they possess were voluntarily self-produced and thus are protected speech."[212]

Due to the speculation surrounding these issues, especially concerning law enforcement, one practical step would be to insti-

206. *See* Duncan, *supra* note 174, at 659-60 (arguing both reputational harm and emotional harm result from self-produced child pornography). Two teenagers committed suicide after images they had sexted were spread beyond the intended recipient. *See* Randi Kaye, *How a Cell Phone Picture Led to Girl's Suicide*, CNN (Oct. 7, 2010), http://articles.cnn.com/2010-10-07/living/hope.witsells.story_1_photo-new-school-year-scarves?_s=PM:LIVING (recounting teenager's suicide after sext of her breast was leaked to middle school classmates); *Nude Photo Led to Suicide: Family Wants to Educate Teens About Dangers of Sexting*, CINCINNATI.COM (Mar. 22, 2009), http://news.cincinnati.com/article/20090322/NEWS01/903220312/Nude-photo-led-suicide (detailing teenage girl's struggle with being bullied after nude photo she had sexted leaked and her eventual suicide).

207. *See* Wastler, *supra* note 8, at 699 (arguing harm of sexting is not same as harm to victims of child pornography); Bushnell, *supra* note 98 ("Are we attempting to legislate morality, or are we trying to protect underage victims?").

208. *See* Wastler, *supra* note 8, at 700 (arguing that allowing sexting to be brought under child pornography laws may make situation harder for law enforcement and gives victims less protection).

209. *See* Rachel Rodriguez, *The Sex Offender Under the Bridge: Has Megan's Law Run Amok?* 62 RUTGERS L. REV. 1023, 1024-25 (2010) (arguing child pornography laws are not effective for dealing with actual child pornographers); *see also* Bryn Ostrager, Note, *SMS. OMG! LOL! TTYLE: Translating the Law to Accommodate Today's Teens and the Evolution From Texting to Sexting*, 48 FAM. CT. REV. 712, 717 (2010) (finding that sex offender registries are already overcrowded with petty offenses to where law enforcement does not have the resources to keep up with monitoring).

210. *See* Richards & Calvert, *supra* note 6, at 23-26 (explaining problems with putting sextors on same sex offender registry as child pornographers).

211. *See* Wastler, *supra* note 8, at 700 (addressing possible problems posed to law enforcement in dealing with cases of actual child abuse).

212. *Id.*; *see also* Leary, *supra* note 9, at 565 (noting Indiana Senate is delayed in creating legislation to deal with sexting because of concern that it will allow sexual offenders to fit under statute).

gate research.[213] Research would add to legislatures' knowledge in why sexting happens, how it happens, and how to best address the issue from a societal and legal standpoint.[214] Case law, such as *Miller*, gives some guidance about how current law addresses sexting, but it does little to speak to how sexting should be addressed in the future.[215] Legislators need to react to the case law that is being decided and draft laws accordingly.[216]

C. Definition of Sexually Explicit

The primary laws dealing with sexting are child pornography laws.[217] A concern is whether these laws are being stretched too far to envelop sexting as a crime.[218] One of the reasons the students in *Miller* were not prosecuted is because the court held their actions did not fit the language of the statute.[219] The analysis focused on the definition of sexually explicit and whether the pictures fit the definition.[220] In this case, the court said the pictures were not sexu-

213. *See* S. Res. 116th Gen. Assem., 1st Reg. Sess. (Ind. 2009) (enacting resolution assigning sentencing policy study). The committee is to address:

> (1) the use of cellular telephones to send explicit photographs and video ("sexting"), especially by children; (2) the psychology of sexuality and sexual development; (3) the psychology of sexual deviants and deviancy; and (4) the mental development of children and young adults and how this affects the ability to make certain judgment.

Id.

214. At this point, there is little research on the issue. There have been some studies done by the National Campaign to Prevent Teen and Unplanned Pregnancy, the Associated Press, MTV, ad Cox Communications, Harris Interactive, and NCMEC, but these studies focused more on how prevalent sexting was and how teenagers viewed the practice rather than how it affects broader society. *See generally* The National Campaign to Prevent Teen and Unplanned Pregnancy, *Sex and Tech: Results From a Survey of Teens and Young Adults* (2008), *available at* http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf; Cox Communications, *Teen Online & Wireless Safety Survey: Cyberbullying, Sexting, and Parental Controls* (May 2009), *available at* http://www.cox.com/takeharge/safe_teens_2009/media/2009_teen_survey_internt_and_wireless_safety.pdf; *A Thing Line: 2009 AP-MTV Digital Abuse Study Executive Summary* (Dec. 2009), *available at* http://www.athinline.org/MTV-AP_Digital_Abuse_Study_Executive_Summary.pdf.

215. For further discussion of limited holding of *Miller*, see *supra* notes 112-142 and accompanying text.

216. *See* National Conference of State Legislatures, *2011 Legislation Related to "Sexting"* (Sept. 2, 2011), http://www.ncsl.org/default.aspx?tabid=2217 (describing actions being taken by some state legislators in drafting new laws).

217. *See* Ostrager, *supra* note 209, at 715-16 (listing cases where teenagers have been charged under child pornography laws).

218. *See* Sherman, *supra* note 79, at 146 (opining that legislature did not intend for sexting to be included under child pornography laws).

219. *See supra* notes 112-142 and accompanying text for discussion of court's holding.

220. *See supra* notes 112-142 and accompanying text for discussion of court's holding.

ally explicit.[221] What remains to be decided, however, is what reaches the level of sexually explicit and whether the court would have allowed prosecution if the pictures were sexually explicit.[222]

The pictures in *Miller* fit into a mild category of sexting.[223] One picture was the top portion of a girl in a bra and the other showed the girl's breasts.[224] The D.A. found these pictures to fit the definition of sexually explicit, probably because the "photo of a topless, 14-year-old girl is so shocking that the police just assume it's a crime. . . . They don't look at the definitions or at the actual application of the statute."[225] The court, however, held that these photographs did not fit the definition of sexually explicit.[226] While this gives some baseline for understanding what does not constitute sexually explicit, the court did not address how the court will define sexually explicit in the future.[227]

Although *Miller* did not define what constitutes sexually explicit, the prior Pennsylvania state case and Alpert's case shed some light on what other courts have considered to be sexually explicit.[228] In both cases, the photographs portrayed naked girls.[229] Thus, in both cases, child pornography charges were brought

221. *See supra* notes 112-142 and accompanying text for discussion of court's holding.

222. *See* Duncan, *supra* note 174, at 692-93 (asserting that essential element of new legislation is to define sexually explicit). One law professor has proposed the following definition:

> A sexually expressive image is a photograph, video, digitized image, or any visual representation that shows a minor engaging in sexual conduct. Sexual conduct for purposes of this act is defined as sexual intercourse, deviate sexual conduct, exhibition of the uncovered genitals intended to satisfy or arouse the sexual desires of any person, or any fondling or touching of a child by another person or of another person by a child intended to arouse or satisfy the sexual desires of either the child or another person.

Id. at 693.

223. *See* Leary, *supra* note 9, at 552-53 (explaining D.A. was overzealous in his attempt to prosecute because images were not child pornography).

224. *See* Miller v. Mitchell, 598 F.3d 139, 144 (3d Cir. 2010) (noting content of sexts at issue in case).

225. Richards & Calvert, *supra* note 6, at 14.

226. *See* Miller v. Mitchell, 2010 WL 1779925, at *3-6 (M.D. Pa. Apr. 30, 2010) (holding that, in accord with stipulations of both parties, no charges would be pressed against defendants).

227. *See* Miller, 598 F.3d at 143 (explaining what pictures showed and describing disagreement between parents and D.A. about what constitutes provocative pose).

228. *See supra* notes 97-142 and accompanying text for further discussion of ruling in prior cases.

229. *See* Pilkington, *supra* note 99 (reporting that three teenage girls sent nude pictures of themselves to three male classmates).

against the defendants.[230] Although the punishments for the Pennsylvania students and Alpert differed in their severity, in both cases, the court held that nude pictures fall into the sexually explicit category.[231] Thus, the guidance in state courts has been that full nudity is sexually explicit.[232] The guidance from the federal court in *Miller* is that a picture of breasts is not.[233]

The extreme ranges in types of exposure and provocative posing creates holes in the basic definition of sexually explicit from the court's holdings.[234] This confusion has created a body of case law across the country that looks very different and creates very different results.[235] In many cases, and particularly in *Miller*, the situation has become a misunderstood and coagulated application of the laws against people who just assume they must plead guilty.[236] This case might be a standing block for other states and federal courts to reconsider the way they have interpreted the term sexually explicit and make the requirements for child pornography more difficult to satisfy.[237]

D. Compelled Speech

Another important aspect of the case is the question of compelled speech in regard to alternative education programs as a form of legal punishment.[238] The court in *Miller* held that the D.A. could

230. *See id.* (recounting how girls were charged with manufacturing and disseminating pornography and boys were charged with possessing it).

231. For further discussion of punishment students received, see *supra* notes 97-142 and accompanying text.

232. *See* Pilkington, *supra* note 99 (discussing what has been categorized as sexually explicit).

233. *See* Miller v. Mitchell, 598 F.3d 139, 154 (3d Cir. 2010) (upholding temporary restraining order to prevent D.A. from pressing charges against students); *see also* Duncan, *supra* note 174, at 648-49 (explaining picture of girl's breast does not qualify as sexually explicit under child pornography laws).

234. *See generally,* Duncan, *supra* note 174, at 692-93 (arguing there needs to be a new definition for sexually explicit).

235. *See* Don Corbett, *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, 5 (2009) (listing various cases from Vermont, New Jersey, Wisconsin, Virginia, and Pennsylvania).

236. *See* Richards & Calvert, *supra* note 6, at 14 (arguing picture was not criminal, but misunderstood because society does not like these pictures to be revealed).

237. *See Miller*, 598 F.3d 139, 156 (2010) (offering narrow interpretation of "sexually explicit"); *see also* 18 U.S.C. § 2256 (defining child pornography in terms of what is "sexually explicit," yet never defining the term).

238. *See, e.g.*, State v. Canal, 773 N.W. 2d 528 (Iowa 2009); A.H. v. State, 949 So. 2d 234 (Fla. Dist. Ct. App. 2007); State v. Phillip Michael Alpert, No. 07-CF-0016350-O (Fla. Cir. Ct. 2008).

not compel attendance and performance at a program which required the students to make written statements under threat of criminal charges.[239] The *Miller* court did not address whether, without the compelled moral speech, the education program could be used as an alternative to pressing charges.[240] Thus, the form of education programs states can use is still open to interpretation.[241]

Alternative education programs have been used in sexting cases by several state courts.[242] In Ohio, minors caught sexting are required to attend an educational program, be under court supervision, and do community service.[243] The goal of the education program is to teach responsible use of the Internet, the effects of sexting on oneself and others, and understanding sexual boundaries.[244] If the program is not completed, charges will be filed.[245] A similar program has been enacted in New Jersey, requiring completion of the program to avoid charges.[246] Further, Pennsylvania has pending a state-wide education program, which will be created by a group of school districts, district attorneys, and legislators, with strict guidelines about what the education program will teach.[247]

These programs are similar to the program promoted by the D.A. in *Miller* and are teaching values about sexuality to the participating teenagers.[248] The distinction in *Miller* is that the students were required to write a statement explaining why their actions

239. *See* Lewin, *supra* note 28 (quoting letter, which claimed that program was voluntary but persons who did not participate would have charges filed against them). Specifically, the content of the education program was found to be a forcing of moral ideals rather than legal rules. *See* Miller, 598 F.3d at 152 (explaining that program required students to write sexting was morally wrong rather than merely legally wrong).

240. *See* Corbett, *supra* note 235, at 6 (explaining alternate programs from other states).

241. *See* Pilkington, *supra* note 99 (explaining how court required students to do community service and have curfew).

242. *See* Ryan, *supra* note 184, at 380 (describing efforts in other states, like Ohio and New Jersey, that have created alternative programs to deal with sexting).

243. *See id.* (listing requirements of Montgomery County, Ohio's alternative education program).

244. *See id.* (describing educational goals of program).

245. *See id.* (describing consequences of failing to complete program).

246. *See id.* (explaining that students must complete program if they do not want charges filed).

247. *See* S. 1121, Gen. Assemb., 2009 Sess. (Pa. 2009) (attempting to create new sexting legislation).

248. *See* Corbett, *supra* note 235, at 7 (recounting programs in Ohio and New Jersey where minors can complete educational program instead of having charges filed).

were wrong.[249] Without this addition of compelled speech, these programs, even with the education about sexuality, may be a viable alternative to prosecuting sexting.[250] By striking down the education program, however, *Miller* adds confusion as to what extent education programs are constitutional and at what point they cross the line of regulating morality, especially in regard to a question of appropriate sexual expression.[251]

The *Miller* court has added a federal perspective to an otherwise state-focused issue.[252] The court did not allow charges to be filed by upholding the constitutional arguments of the parents and students.[253] This adds a new dimension to prosecuting sexting and how to understand the issues surrounding sexting.[254] *Miller* creates the precedent for the federal courts to deal with sexting prosecution and appears to veer away from using child pornography laws.[255]

V. CONCLUSION

Sexting "represents a social and technological phenomenon that has outstripped the law, as there seems to be little or no agreement among authorities on how to proceed when sexting cases cross their desks."[256] In continuance of this sentiment, *Miller* brings little collusion to this area of the law; nonetheless, it does add a federal perspective.[257] Further, as the first federal sexting case, it brings fresh eyes to the issue and weighted importance to prove that movement in this area of law is necessary.[258]

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249. *See* Miller v. Mitchell, 598 F.3d 139, 152 (3d Cir. 2010) (explaining why students could not be forced to attend education program D.A. attempted to require).

250. *See* Leary, *supra* note 9, at 560-62 (describing educational programs designed by New Jersey and New York).

251. *See generally,* Corbett, *supra* note 235, at 7 (examining how such education programs are currently organized and operating).

252. *See* Duffy, *supra* note 143 (highlighting *Miller* as first federal sexting case).

253. *See Miller,* 598 F.3d at 154 (upholding temporary restraining order).

254. for further discussion of the analysis of the impact of *Miller,* see *supra* notes 143-255 and accompanying text.

255. *See Miller,* 598 F.3d at 154 (preventing D.A. from pressing charges against students); *see also* Leary, *supra* note 9, at 551-53 (describing D.A.'s overzealous prosecution).

256. Richards & Calvert, *supra* note 6, at 2 (internal citations omitted).

257. *See id.* (explaining convoluted response of courts in dealing with issue).

258. *See* Barry, *supra* note 23, at 152 (asserting need to clarify sexting law).

A. Questions Left Unanswered

While this case potentially opens a new era of federal sexting cases, it leaves many issues unanswered.[259] For example, only two girls of the many students who were threatened by the D.A. filed suit.[260] The court may have treated other students, such as the boys who received and distributed the picture, differently.[261] Also, the court did not provide clarity on when, or if, sexting is punishable.[262] The court did not define what sexted pictures are encompassed under the definition of sexually explicit and did not rule on whether child pornography laws could be applied to teenagers sexting generally.[263] Further, arguments such as the overbreadth of the statutes and the privacy rights of students were not fully addressed by the case and are still open for argument.[264] With such a narrow holding, there is still much for state and federal courts to conclude on the issue.[265]

B. Where the Law is Headed

Miller, along with multiple other sexting cases, makes obvious that there needs to be development in the law to deal with the issue of sexting.[266] One possible solution entails creating new laws to

259. *See* Lewin, *supra* note 28 (noting that some issues have been left open). The defense attorney and legal director of the ACLU, Witold Walczak, said of the case, "[i]t does not resolve all of the constitutional issues implicated in sexting prosecutions, but it's a terrific start for civil liberties." *Id.*

260. *See Miller,* 598 F.3d. at 143 (explaining only students who refused to attend education program filed suit).

261. *See States Struggle With Minor's Sexting, supra* note 80 (noting various ways Pennsylvania is proposing to deal with sexting).

262. *See generally Miller,* 598 F.3d 139 (holding limited to preventing D.A. from pressing charges against two specific girls without guidance on how sexting will be prosecuted in future).

263. *See generally id.* (limiting holding to issue at hand without broader implications to sexting generally).

264. *See* Wastler, *supra* note 8, at 692 (explaining argument for overbreadth of child pornography statutes when applied to sexting cases). Another argument for sexting relies on free expression and expressive conduct grounds. *See* Ryan, *supra* note 184, at 365 (exploring argument that sexting is protected). Some argue that privacy needs to be more guarded by students and respected by schools. *See* Richards & Calvert, *supra* note 6, at 2 (noting privacy right argument).

265. *See* Leary, *supra* note 9, at 551-53 (recognizing the narrow holding of *Miller*).

266. *See* McElroy, *supra* note 204, at 10 ("Undeniably, sexting among teens must be addressed, monitored, and curtailed; the question, however, remains whether the criminal justice system is the best avenue for addressing what some would characterize as quintessential hormone-driven teenager behavior."). "The child porn laws were really designed for a situation where an adult abuses a minor by forcing that minor . . . psychologically as well as physically . . . into taking these pictures." Bushnell, *supra* note 98.

specifically deal with sexting.[267] Many states have taken that route to avoid the harsh punishment child pornography laws have on sextors.[268] For example, in response to Phillip Alpert's case, Florida has proposed new legislation specifically for sexting.[269] The statute provides various penalties, starting with eight hours of community service, a fine of sixty dollars, or enrollment in an education program.[270] Sixteen other states also have sexting legislation pending, but only six states actually have specific sexting laws.[271] Each state has taken varying approaches in both legislation and enforcement.[272] While this does create disparate treatment of the issue, a conscientious legislator will follow the progress of different approaches and take note of the most effective.[273]

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267. *See* Duncan, *supra* note 174, at 692-98 (proposing legislation to address sexting directly); *see also* National Conference of State Legislatures, *2011 Legislation Related to "Sexting"* (Sept. 2, 2011), http://www.ncsl.org/default.aspx?tabid=2217 ("In 2011, at least 21 states and Guam introduced bills or resolutions aimed at "sexting". . . . Bills have been enacted in five states (Florida, North Dakota, Nevada, Rhode Island and Texas) and Guam so far this year.").

268. *See* McElroy, *supra* note 204, at 14 (explaining Arizona, Illinois, Nebraska, North Dakota, Utah, and Vermont have enacted specific sexting laws). Beyond just the issue of creating new laws is the problem of how those laws are shaped; most states have taken different directions, leading to inconsistencies in dealing with the issue. *See id.* (revealing that some states treat sexting as a misdemeanor while others keep activity out of child pornography laws by enacting affirmative defenses); *see also* Barry, *supra* note 23, at 134-37 (explaining how states' child pornography statutes are used against both adults and children and incorporate sexting). As an example, child pornography laws in Virginia and Florida are hard line rules that make no circumstantial exceptions: "[t]he way the laws are written now, if you're in possession of a naked picture of a child, you're personally guilty of child pornography." Olympia Meola, *Legislators Look into How Va. Laws Cover 'Sexting,'* RICHMOND TIMES-DISPATCH (May 20, 2009), http://www2.timesdispatch.com/news/2009/may/20/sext20_20090519-223511-ar-42939/.

269. *See* S. 2560, 112th Sess. (Fla. 2010) ("Section 1. Sexting; prohibited acts; penalties (1) A minor commits the offense of sexting if he or she knowingly uses a computer, or any other device capable of electronic data transmission or distribution, to transmit or distribute to another minor any photograph or video of himself or herself which depicts nudity as defined in s. 847.001(9), Florida Statutes, and is harmful to minors as defined in s. 847.001(6), Florida Statutes.")

270. *See id.* § 2 (outlining penalties of violating statute).

271. *See* McElroy, *supra* note 204, at 14 (listing sexting laws enacted by Arizona, Illinois, Nebraska, North Dakota, Utah, and Vermont); *see also* S. 103, 128th Gen. Assem., 2009-2010 Sess. (Ohio 2009), http://www.legislature.state.oh.us/analysis.cfm?ID=128_SB_103&hf=analyses128/s0103-i-128.htm; H.R. 1132, 67th Gen. Assemb., 1st Reg. Sess. (Colo. 2009).

272. *See id.* at 12 ("Each state has taken a different legislative approach to tackle teens' sexting proclivities, evidencing the lack of a consistent legal framework for dealing with sexting.").

273. *See* National Conference of State Legislatures, *2011 Legislation Related to "Sexting"* (Sept. 2, 2011), http://www.ncsl.org/default.aspx?tabid=2217 (listing proposed and enacted legislation in various states).

The differences in approach stem from the difficulty of defining the act of sexting; sexting happens in a myriad of ways.[274] Teenagers can send a sext of their own initiative or under coercion.[275] The sext can vary in content from flirtatious to full nudity.[276] Further, the recipient can forward the picture on, with or without consent, to an infinite number of people.[277] Each scenario creates a different dilemma in potential prosecution and creating specific sexting legislation; in response to such complication, there is the temptation to oversimplify the definition or refrain from action.[278] The complications of the problem should not discourage action, however, but reveal how ignoring the issue will lead to too harsh, or too lenient, legislation and enforcement.[279]

Beyond the legal system, some scholars argue that there must be social understanding and education about the issue, including what sexting is and why young adults do it.[280] Prosecutors' unfocused and haphazard attempts to deal with the problem are partially due to technology's ever-changing face.[281] A stronger working relationship between policymakers and social scientists would help to frame these laws to effectively deal with the issue.[282] Once the problem is correctly understood, various actors, such as parents, teachers, and pediatricians can be educated to participate in pre-

274. *See id.* ("[S]exting can manifest itself in a variety of forms – no single type of minor, reason, image, or situation characterizes sexting."); *see also* Duncan, *supra* note 174, 689-99 ("The complexity of this problem makes it easy for legislators to draft laws that fail to effectively address the many dimensions of this problem."); Richards & Calvert, *supra* note 6, at 16 (asserting that there is no "one-size-fits-all" statute for sexting).

275. *See* Leary, *supra* note 9, at 508 (explaining different types of compulsion to send sext).

276. *See id.* (describing varying forms sext can take).

277. *See id.* (describing varying ways sexts can be distributed).

278. *See id.* (urging that situation not be oversimplified to one picture being sent to one person because issue is much more complicated). Differing "scenarios add components of victimization. . . . It is tempting to ignore this but that does not solve the problem." *Id.*

279. *See id.* (arguing legislators need to tackle issue with all its complications).

280. *See* Palfrey, *supra* note 8, at 7 ("For a complex problem such as sexting, the best solution is likely to involve a combination of approaches that address the underlying drivers and practices involved and bring a range of actors into the process of developing and implementing solutions.").

281. *See* McElroy, *supra* note 204, at 10 (explaining that because technology has changed so fast, legal system is unequipped to deal with sexting).

282. *See* Palfrey, *supra* note 8, at 6 (arguing that because youth culture is so different, there needs to be more research into how public policy can be more effective in regard to social media); *see also* Wastler, *supra* note 8, at 702 (claiming that any understanding of issue needs to come from balancing of two interests); Richards & Calvert, *supra* note 6, at 14 ("[Sexting] is a social problem that needs to be addressed by the social machinery, not the criminal justice system.").

vention and education.[283] Then, when the legal system is required to step in, there will be a better understanding of the issues and how to properly criminalize.[284] With collaboration between both formal and informal policy, sexting can be properly addressed.[285]

In tackling this issue, however, the law needs to not only keep up, but think progressively.[286] Sexting will soon be enveloped by a new form of technology that will cause a new issue.[287] By laying a solid foundation, the law can create a base from which it can deal with the future issues technology brings.[288]

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283. *See* Palfrey, *supra* note 8, at 7 (suggesting utilizing various people and institutions to deal with sexting as more constructive than just using legal system). A possible problem with using teachers is the potential liability against themselves or schools. *See* Barry, *supra* note 23, at 144 (suggesting potential problems schools could face by becoming more involved in issue).

284. *See* Leary, *supra* note 9, at 559 (promoting multidisciplinary approach that recognizes prosecutors' important role).

285. *See* Palfrey, *supra* note 8, at 10 (explaining need to use both law and culture to deal with issue of sexting); *see also* Duncan, *supra* note 174, at 647 ("The casual and ubiquitous use of cell phones equipped with cameras and the ease with which photos may be disseminated has made a timely response critical to safeguarding the interests of minors and society."). "We should consider methods of both direct and indirect regulation. . . . Our approaches to public policy need to take advantage of these multiple approaches and modes of regulation, with public officials providing leadership and a backstop where things go wrong." *Id.* at 17. Some even suggest that the law should not hold any position in regards to sexting, but that the issue should be dealt with from a public policy perspective. *See* Richards & Calvert, *supra* note 6, at 10 (stating view of Phillip Alpert's attorney that sexting should not be criminally prosecuted but instead be addressed through use of community leaders, religious leaders, and counselors).

286. *See* Walters, *supra* note 26, at 98 (explaining how technology has outpaced law and may "turn a generation of the growing population against ordered society").

287. *See* Richards & Calvert, *supra* note 6, at 25 (suggesting sexting will no longer be issue in later years and will become normal practice).

288. *See, e.g.*, S. Res. 90, 116th Gen. Assem., 1st Reg. Sess. (Ind. 2009) (suggesting that "mental and sexual development of individuals as related to criminal offenses must be studied in depth to ensure that our criminal justice system remains fair and equitable").

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