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The "Sexting" Case: Teenage Sexting, The New Constitutional Dilemma

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The "Sexting" Case: Teenage Sexting, The New Constitutional Dilemma

Carly DiFrancisco[†]

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I. INTRODUCTION: "SEXTING:" WHAT IT IS AND THE PROBLEMS IT CREATES

The term "sexting" is a socially created slang word that is a combination of the words "sex" and "texting."[1] While "sexting" has not been legally defined, there are several commonly accepted definitions. The National Center for Missing and Exploited Children, in its 2009 *Policy Statement on Sexting*, defined sexting as the action of a "youth writing sexually explicit messages, taking sexually explicit photos of themselves or others in their peer group, and transmitting those photos and/or messages to their peers."[2] The Crisis Intervention Center defines sexting as "sending, receiving, or forwarding sexually suggestive nude or nearly nude photos or sexually suggestive messages through text message or email."[3]

Sexting has become a rising problem in the United States because of the prevalence of technology that individuals use to communicate with one another.[4] Also, people are more likely to speak their minds and let go of their inhibitions when they hide behind the screen of a phone or computer, due to the anonymity technology provides along with its simplicity of communication.[5] But what many teens do not realize is that a private message, once sent, is no longer private and any message or photo sent between teens has the potential to be broadcast to the world on the Internet.[6] These actions result in serious consequences to the teenagers involved; such consequences are not only emotional, but legal

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[1] Theresa Edmund, *Ringwood Community Addresses Sexting*, NORTHJERSEY.COM (Feb. 21, 2010, 10:36 AM EST), http://www.northjersey.com/news/education/84932002_Parents__students_get__the_4-1-1_on_sexting_.html.

[2] NAT'L CENTER FOR MISSING & EXPLOITED CHILDREN, *Policy Statement on Sexting,* (Sept. 21, 2009), http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=4130.

[3] CRISIS INTERVENTION CENTER, *What is Sexting*, 2010, http://www.crisisinterventioncenter.org/index.php?option=com_content&view=article&id=147:what-is-sexting&catid=39:teens&Itemid=79 (last visited Sept. 25, 2011).

[4] Edmund, *supra* note 1.

[5] *Id*.

[6] Jillian Jorgensen, *There's No Privacy with 'Sexting,' Officials Warn, County Attorneys See Increase in Cases of Dangerously Intimate Messaging Practice*, EAGLE-TRIBUNE (North Andover, Mass), Mar. 21, 2010, http://www.eagletribune.com/newhampshire/x434657239/Theres-no-privacy-with-sexting-officials-warn.

as well.[7] As the issue of sexting continues to develop, the Third Circuit's decision in *Miller v. Mitchell*[8] will likely provide the groundwork for new legislation and potential circuit splits. This Comment argues that education is an important starting point in solving the problem of teenage sexting. In *Miller*, students suspected of sexting were given the option of either attending a sexting educational program or being criminally charged with felony possession or distribution of child pornography.[9] When three teenagers refused to participate in the educational program, their parents sued the District Attorney ("D.A.") in the Middle District of Pennsylvania in an effort to enjoin the D.A. from bringing criminal charges.[10] The District Court granted the parents a preliminary injunction and the Third Circuit affirmed.[11]

This Comment analyzes the Third Circuit's decision in *Miller* and argues that requiring students to attend an educational program about sexting does not violate the Fourteenth Amendment because the government has a compelling interest in protecting children from the harmful effects of sexting.[12] Additionally, requiring students to attend sexting educational classes does not violate children's constitutional rights because children do not receive the same constitutional protection of their rights that adults receive.[13] Children's rights are limited when they are in school and when their safety or well being is in danger.[14] This Comment examines the question: Who bears the responsibility of teaching children about the risks associated with sexting: parents or the government? The problems caused by sexting must be solved through government intervention. Specifically, the sexting education program described in *Miller* is a practical option that the government can use to educate teenagers about the dangers of sexting.

In Part II, this Comment provides background information surrounding the rise of sexting as a widespread phenomenon, including the growing problems associated with sexting. Additionally, Part II analyzes *Miller v. Mitchell*, and focuses on whether forcing students to participate in a sexting educational program violates parents' fundamental right under the Fourteenth Amendment to raise their

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[7] *See infra* Part II for a discussion on the legal and emotional consequences of sexting, such as pornography charges, bullying, and suicidal tendencies.

[8] 598 F.3d 139 (3d Cir. 2010).

[9] *Id.* at 142.

[10] *Id.*

[11] *Id.* at 143.

[12] *See* New Jersey v. T.L.O., 469 U.S. 325, 340 (1985); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988).

[13] *See* Bellotti v. Baird, 443 U.S. 622, 634 (1979).

[14] *See T.L.O.*, 469 U.S. at 339–40.

children free from government interference.[15] Part III discusses the history of this fundamental right. Also, it examines the subsequent judicial limitations of this right under the Fourteenth Amendment and explains that the government can constitutionally limit a parent's rights when a child's health or well being is in danger. Part III further illuminates the way in which this limitation should apply to sexting educational programs.

Part IV provides additional information about other instances in which the government can limit parents' Fourteenth Amendment right to raise their children. Government limitations on the Fourteenth Amendment right to parent without state interference are permissible when the limitation relates to education;[16] in particular, the government may impose such limitations through state truancy laws and mandatory educational subjects such as sex education classes.[17] Sexting education classes fall under this educational limit of the Fourteenth Amendment.

In Part V, this Comment argues that requiring students to attend sexting education classes does not violate children's constitutional rights. The scope of this Comment is restricted to a discussion of the limitations of children's constitutional rights while they attend public school. The government should be permitted to require students to attend sexting education classes because the constitutional rights of children are not as expansive as the rights of adults.[18] Although the government cannot threaten criminal prosecution if an adult exercises a constitutionally protected right, children's constitutional rights are restricted, especially while in school.[19] The limited breadth of children's constitutional rights is due to the state's role as custodian or *in loco parentis* to the children in its jurisdiction.[20]

Finally, Part V discusses possible remedies to help deal with the problem of teenage sexting. Education is an important starting point in solving the teenage sexting problem. This Comment argues that, although parents have a fundamental Fourteenth Amendment right to raise their children without government intervention,[21] the sexting

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[15] Quilloin v. Walcott, 434 U.S. 246 (U.S. 1978) (citing Wisconsin v. Yoder, 406 U.S. 205, 231–33 (U.S. 1972); Stanley v. Illinois, 405 U.S. 645 (U.S. 1972); Meyer v. Nebraska, 262 U.S. 390, 399–401 (1923)).

[16] *See T.L.O.*, 469 U.S. at 336, 339–40.

[17] *See* Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947); Smith v. Ricci, 89 N.J. 514, 525 (1982).

[18] *See* Bellotti v. Baird, 443 U.S. 622, 634 (1979).

[19] *See* New Jersey v. T.L.O., 469 U.S. 325, 339–40 (1985).

[20] *See T.L.O.*, 469 U.S. at 336.

[21] Quilloin v. Walcott, 434 U.S. 246 (U.S. 1978) (citing Wisconsin v. Yoder, 406 U.S. 205, 231–33 (U.S. 1972); Stanley v. Illinois, 405 U.S. 645 (U.S. 1972); Meyer v. Nebraska, 262 U.S. 390, 399–401 (1923)).

problem presents a compelling state interest that calls for government intervention. Such a resolution would continue the Supreme Court's established policy[22] of limiting parents' Fourteenth Amendment rights in order to uphold the state's power of *in loco parentis*[23] as well as the public school system's power under the special needs doctrine.[24] Sexting is a problem from which the government needs to protect children, especially because sexting affects children's school activities and education.

II. BACKGROUND

A. The Development of Sexting as a Widespread Problem

Not only is sexting becoming a phenomenon, but it is clear that teenagers do not perceive the negative effects associated with texting and are ill-equipped to deal with these consequences; because teenagers could face criminal charges in addition to reputational damage, the stakes of sexting are high. First, it is clear that sexting among school-age children is on the rise. The National Campaign to Prevent Teen and Unplanned Pregnancy and CosmoGirl.com conducted the first survey about sexting among teenagers in 2008.[25] The study found that twenty percent of teenagers and thirty-three percent of young adults have sent sexually suggestive pictures or videos of themselves to peers or have posted them on the Internet.[26] The study also found that thirty-nine percent of all teens and fifty-nine percent of all young adults have sent or posted sexually suggestive messages other than images.[27]

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[22] Prince v. Massachusetts, 321 U.S. 158 (1944); *See also* discussion *infra* Part III(A)(2).

[23] *See T.L.O.*, 469 U.S. at 336.

[24] *See* Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 653, 655 (1995).

[25] NAT'L CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY & COSMOGIRL.COM, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS, THENATIONALCAMPAIGN.ORG, at 1 (2008), http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf. The survey was conducted online with a total of 1,280 individuals; Six hundred and fifty-three of them were teenagers from ages thirteen to nineteen and 627 were young adults, ages twenty to twenty-six. *Id.*

[26] *Id.* In the National Campaign study, "young adults" encompassed those between the ages of twenty and twenty-six. The study defines sexually suggestive picture or video as "semi-nude or nude personal pictures or video taken of oneself and not found on the Internet, or received from a stranger (like spam), etc." *Id.*

[27] *Id.* The study defines sexually suggestive messages as "sexually suggestive written personal texts, emails, IMs, etc.—and not those you might receive from a stranger (like spam), etc." *Id.*

The study discovered that most teens and young adults send these pictures and messages to their boyfriends or girlfriends.[28] There are, however, many teens and young adults who send the pictures and messages to someone they have met only online or to someone they hope to date.[29] Twenty-one percent of teen girls and thirty-nine percent of teen boys who have "texted" sexually explicit material to someone else have also sent it to someone they were not currently dating, but only hoped to date.[30] The percentages were similar for young adults.[31] Fifteen percent of all teens who have sent nude or seminude pictures, sent them to someone they had never met and only knew online.[32] For young adults, this number was similar; fifteen percent of women and twenty-three percent of men stated that they had sexted nude or seminude photographs of themselves to someone they had never met and only knew online.[33]

Second, it is clear that teenagers who engage in sexting are unaware of the potential consequences of their conduct. Most polled teenagers and young adults stated that they knew that sending or posting sexually suggestive material is potentially dangerous, but they continued to do it anyway.[34] But less than half recognized that the material they send via text is often shared with other people.[35] The study found several reasons why teens and young adults send the sexually suggestive material. Most of the respondents said they send and post the pictures and messages because it is "fun and flirtatious."[36] About half of teen girls say that "pressure from a guy" is a reason they send the messages or pictures; only eighteen percent of boys cited pressures from girls as a reason for sexting.[37]

In 2009, Cox Communications conducted a different study on teen sexting.[38] The study found that one in five teenagers have sexted by

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[28] *Id.* at 2.

[29] NAT'L CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY & COSMOGIRL.COM, *supra* note 25.

[30] *Id.*

[31] *Id.* at 2 (reporting that twenty-one percent of young adult women and thirty percent of young men have sent sexually explicit material to someone else they met online or merely hoped to date).

[32] *Id.*

[33] *Id.*

[34] *Id.* at 3.

[35] NAT'L CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY & COSMOGIRL.COM, *supra* note 25, at 3.

[36] *Id.* at 4. This number was sixty-six percent of teen girls and sixty percent of teen boys and seventy-two percent of women and seventy percent of men. *Id.*

[37] *Id.* at 4.

[38] COX COMMC'NS, TEEN ONLINE & WIRELESS SAFETY SURVEY: CYBERBULLYING, SEXTING, AND PARENTAL CONTROLS (May 2009),

sending, receiving, or forwarding sexually explicit material.[39] About ten percent of these teenagers have sent sexually suggestive material to people they do not personally know or have only met online.[40] Almost all of the teenagers who have sent "sexts" believed that nothing bad has happened to them as a result of sexting, yet thirty percent of those teenagers reported that these photographs were forwarded to someone else.[41] Very few teenagers who have admitted to sexting have ever been caught sending or receiving a message.[42] Finally, almost all teenagers who participated in the study knew that it could be dangerous to send photographs of themselves.[43] The study also found that, by contrast, only slightly over half of the teenagers surveyed knew that there are legal consequences, such as criminal prosecution, for engaging in sexting.[44] Clearly, teenagers recognize that there are dangers associated with sexting, but they do not appreciate the gravity of the potential harm because they do not know all of the potential ramifications, such as legal consequences. Many teenagers continue to sext despite acknowledging that there are possible repercussions for their conduct.

Advances in technology exacerbate the dangers—legal and extralegal—posed to teenagers by sexting. In particular, most teenagers do not know the legal consequences of their actions.[45] In many states, teenagers who send, receive, and forward sexually explicit messages face consequences such as violating child pornography laws.[46] This is true even if the pictures and videos depict the sender.[47] There are also many nonlegal, often long term, consequences that teenagers do not understand.[48] Teenagers do not realize that once they send the photographs, the recipient has full control over the image.[49] The recipient of the photograph could choose to keep the image to himself or

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http://www.cox.com/takecharge/safe_teens_2009/research.html (last visited DATE) (web address no longer available). Cox Communications conducted this study among teens from ages thirteen to eighteen. *Id.* The study defines "sexting" as the practice of "sending sexually suggestive text messages or emails with nude or nearly-nude photos." *Id.* at 3.

[39] *Id.* at 11.

[40] *Id.*

[41] *Id.* at 38.

[42] *Id.* at 39.

[43] *Id.* at 43.

[44] COX COMMC'NS, *supra* note 38, at 43.

[45] *Id.*

[46] Elizabeth C. Eraker, *Stemming Sexting: Sensible Legal Approaches to Teenagers' Exchange of Self-Produced Pornography*, 25 BERKELEY TECH. L.J. 555, 557 (2010).

[47] *Id.*

[48] *Id.*

[49] NAT'L CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY & COSMOGIRL.COM, *supra* note 25, at 3.

herself, but could also choose to further disseminate it. Photographs on the Internet can be easily shared with others and can remain on the Internet forever.[50] This could negatively affect the individual's future education and career prospects if the photographs appear in a college or employer's investigation.[51]

Bullying is another problem that has been connected with sexting. In 2008, eighteen-year-old Jesse Logan committed suicide after being bullied about the nude photographs she had sent to her boyfriend.[52] After Jesse and her boyfriend broke up, he distributed the photographs to other girls in their high school.[53] The girls bullied Jesse by labeling her with slurs such as "whore" and "slut," and by throwing objects at her, causing Jesse to become depressed and ultimately commit suicide.[54] This case is not unique.[55]

Recently, in Washington State, eighth-grader Margarite used her phone to send a nude picture to her boyfriend, Isaiah.[56] After their relationship ended, he forwarded the saved picture to Margarite's friend, who then forwarded the picture to everyone in her phone's contact list.[57] Consequently, the entire school obtained a copy of the photograph; Margarite's friends shunned and bullied her.[58] Authorities charged three students, including Isaiah and Margarite's former friend, with felonies of disseminating child pornography.[59] The students faced prison time in a juvenile detention center and were required to register as sex offenders.[60] Margarite must permanently live with the consequences of her actions.

B. Miller v. Mitchell*: A New Problem for the Federal Courts*

Sexting has also caught the attention of the United States judicial system. Perhaps due to the increasing public attention given to the issue, the courts have taken up sexting as an important subject of criminal and

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[50] *Id.* Content can remain on the Internet even after it has been deleted by the person who posted it. Content can also be copied from the Internet before it is erased and saved on that person's computer. *See id.*

[51] Eraker, *supra* note 46, at 557.

[52] Mike Celizic, *Her Teen Committed Suicide Over 'Sexting,'* MSNBC TODAY: PARENTING (Mar. 6, 2009, 9:26 AM EST), http://today.msnbc.msn.com/id/29546030.

[53] *Id.*

[54] *Id.*

[55] *See,* Michael Inbar, *'Sexting' Bullying Cited in Teen's Suicide,* MSNBC TODAY: PEOPLE (Dec. 2, 2009, 10:26:16 AM EST), http://today.msnbc.msn.com/id/34236377.

[56] Jann Hoffman, *A Girl's Nude Photo, and Altered Lives*, N.Y. TIMES, Mar. 27, 2011, at A1.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 2.

[60] *Id.* at 3.

civil disputes. Sexting cases are relevant to the federal courts due to claims involving the constitutional rights of teenagers and their parents. *Miller v. Mitchell*[61] is the first circuit court case to address the constitutionality of prosecuting teenagers for sexting.

The plaintiffs in *Miller* defined "sexting" as "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."[62] In *Miller*, school district officials in Pennsylvania found students' cell phones containing nude photos of several teenage female students in their district.[63] The district officials discovered that students had been exchanging the images on their phones and gave the phones to the Wyoming County District Attorney's Office.[64] The District Attorney, George Skumanick, launched an investigation and announced to reporters that students possessing these images could be prosecuted for violating either of two Pennsylvania statutes.[65]

District Attorney Skumanick's claims against the students were twofold. First, he claimed that the students could be prosecuted for possessing or distributing child pornography under a statute involving the sexual abuse of children.[66] The statute makes it a crime for any person to depict a child under eighteen years old engaging in a sexual act or an imitation of the act and makes it a crime to knowingly distribute or transfer any material that shows a child engaging in a sexual act or simulation.[67] It is also an offense to "intentionally view" or "knowingly possess" this material.[68] Second, the District Attorney claimed that the students could be prosecuted under the statute prohibiting the "criminal use of a communication facility,"[69] which states that it is a criminal offense to use a communication facility, such as a phone, to commit or facilitate a felony.[70]

District Attorney Skumanick then sent a letter to the parents of sixteen to twenty students whose cell phones allegedly contained the sexually explicit images and to the students depicted in the photos.[71] The letter stated that charges would be brought against the students unless

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[61] 598 F.3d 139 (3d Cir. 2010).
[62] *Id.* at 143.
[63] *Id.* School officials learned that male students were trading these images over their phones and then confiscated the suspected students' phones. *Id.*
[64] *Id.*
[65] *Id.*
[66] 18 PA. CONS. STAT. § 6312 (2011).
[67] *Id.* at § 6312(b)–(c).
[68] *Id.* at § 6312(d).
[69] *Miller*, 598 F.3d at 143 (citing 18 PA. CONS. STAT. § 7512 (2011)).
[70] 18 PA. CONS. STAT. § 7512 (2011).
[71] *Miller*, 598 F.3d at 143.

they participated in an educational program.[72] Participation in the program was voluntary; however, if the student completed it, then no charges would be filed and there would be no record of the student's involvement in criminal activity.[73] The District Attorney's office, the Juvenile Probation Department, and the Victims Resource Center designed the program, the goal of which was to counsel and educate students about the dangers of sexting.[74] The proposed program would last six to nine months,[75] and if a student did not complete the program, the District Attorney would file charges against that student for possessing or distributing child pornography.[76]

The proposed educational program separated male from female students and required each student to write an essay explaining what he or she did and why it was wrong.[77] The topics comprising the program included sexual violence, sexual harassment, and sessions titled "Gender identity-Gender strengths" and "Self Concept."[78] An example of one of the female group objectives was to "gain an understanding of what it means to be a girl in today's society, both advantages and disadvantages."[79] All of the parents agreed to the program except for the parents of the three students who filed the suit.[80]

The parents of these three students responded by obtaining assistance from the American Civil Liberties Union of Pennsylvania, and filing for a temporary restraining order enjoining the District Attorney from charging the teenagers. At the trial level, the plaintiffs in *Miller* brought a claim under 42 U.S.C. § 1983, which provides a civil cause of action when a state official has deprived an individual of his or her constitutional rights.[81] To prevail on a § 1983 claim, plaintiffs must

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[72] *Id.*
[73] *Id.*
[74] *Id.* at 143–44.
[75] *Id.*
[76] *Id.* at 144.
[77] *Miller*, 598 F.3d at 144. In the first session of the program, the students were required to write "a report explaining why you are here, [w]hat you did, [w]hy it was wrong, [d]id you create a victim? If so, who? [A]nd how their actions affect[ed] the victim[,] [t]he school[, and] the community." *Id.* (internal quotations omitted).
[78] *Id.*
[79] *Id.*
[80] *Id.* at 145.
[81] Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

prove that their actions were constitutionally protected and the government retaliated in response to those actions.[82] The plaintiffs claimed that Pennsylvania's District Attorney threatened prosecution as retaliation for the exercise of three different constitutionally protected rights.[83]

First, the plaintiffs maintained that the District Attorney's threat of prosecution and imposition of a sexting education requirement was made in retaliation for the students' exercise of their First Amendment right of free speech and expression.[84] They asserted that the students' actions of appearing in the photographs were constitutionally protected expressions under the First Amendment.[85] Second, plaintiffs maintained that the District Attorney's threat of prosecution violated the students' First Amendment right against compelled speech because the program required the students to write an essay explaining their actions and why they were wrong.[86] They claimed that the essay requirement constituted a violation of the students' First Amendment rights because it forced the students to write something they may not have believed: that in sending sexually explicit text messages, they engaged in improper or unethical acts.[87] Lastly, the plaintiffs claimed that the District Attorney's threat of prosecution was retaliatory and violated the parents' Fourteenth Amendment right to be free from governmental interference in raising their children.[88] They claimed that the required educational program would violate this right because parents should decide whether the material contained in the program is necessary and beneficial for their children's upbringing.[89]

The plaintiffs sought immediate relief in the form of a temporary restraining order restricting the District Attorney from filing criminal charges against the students who refused to participate in the program.[90] The District Court granted the plaintiffs' injunction on their First Amendment compelled speech and Fourteenth Amendment claims only; the court rejected the First Amendment free speech and expression claim.[91] The court granted the temporary restraining order, thereby

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42 U.S.C. § 1983 (2006).

[82] *Miller*, 598 F.3d at 147 (3d Cir. 2010) (citing Eichenlaub v. Twp. of Indiana, 385 F.3d 274, 282 (3d Cir. 2004)).

[83] *Id.* at 147.

[84] *Id.* at 148.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Miller,* 598 F.3d at 148.

[89] *Id.*

[90] *Id.*

[91] *Id.*

restricting the District Attorney from bringing charges against the students.[92] The District Attorney subsequently filed an interlocutory appeal to the Third Circuit.[93] The Third Circuit declined to consider the First Amendment freedom of expression claim because the parties did not defend the claim before the court, but the court would allow the parties to continue with the claim in the event that the case proceeded on the merits.[94]

The Third Circuit decided that the District Attorney's original threat of prosecution was not a retaliatory measure against the exercise of the students and parents' First and Fourteenth Amendment rights.[95] The District Attorney's threat of prosecution was made before the students exercised their First Amendment rights; thus the threat could not be classified as retaliatory.[96] The circuit court found, however, that future prosecution by the District Attorney would be a retaliatory act and affirmed the injunction on this ground.[97] Because the students had, by that point, exercised their rights by not attending the sexting program, any future prosecution would be akin to retaliation. Retaliation, however, could not have occurred before the students exercised their rights.

Although the plaintiffs in *Miller* failed to successfully establish that the District Attorney had retaliated against the exercise of their constitutional rights, the Court concluded that future prosecution would be retaliation.[98] Thus, the Court proceeded to make findings under 42 U.S.C. § 1983 to support its decision for an injunction. A plaintiff must prove three elements under 42 U.S.C. § 1983 to establish a retaliation claim: that the plaintiff engaged in a constitutionally protected act; that the government's response to that act was retaliatory; and that the protected actions caused the retaliation.[99] The court found that the plaintiffs satisfied all three elements.[100]

First, plaintiffs satisfied the first element of 42 U.S.C. § 1983 by demonstrating that their conduct was protected by the Constitution. Plaintiffs asserted that the District Attorney infringed on their Fourteenth Amendment right to raise their children as they saw fit without

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[92] *Id.* at 145.
[93] *Id.*
[94] *Miller,* 598 F.3d at 148.
[95] *Id.*
[96] *Id.*
[97] *Id.* at 149.
[98] *Id.* at 149–50.
[99] *Id.* at 147.
[100] *Miller,* 598 F.3d at 150, 152, 153.

governmental interference.[101] Here, the parents objected to the pedagogy that instructed students that their actions were *per se* "wrong."[102] The parents also did not agree with the educators teaching their children views about a girl's role in society, when they did not share the same views.[103] Specifically, one parent objected to the teaching that her daughter's "actions were morally 'wrong,'" and argued that the program turned her daughter into a victim because it contradicted the "beliefs she wishes to instill in her daughter."[104] The Third Circuit agreed and stated that the District Attorney cannot coerce parents into allowing state actors to impose their ideas about "morality and gender roles" on the children.[105] The District Attorney could offer the education program as a truly voluntary program, but could not threaten prosecution for failing to attend it.[106] The court held that the plaintiffs are "likely to succeed in showing that the education program required by the District Attorney impermissibly usurped and violated [their] fundamental right[s] to raise [their] child[ren] without undue state interference."[107]

The plaintiffs further satisfied the first element of their § 1983 claim by alleging that defendant's actions violated their First Amendment right to be free from compelled speech.[108] Specifically, they argued that the program's paper-writing requirement constituted compelled speech, particularly because the paper necessitated the conclusion that the students' appearances in the photographs were morally wrong.[109] The court agreed and held that, at this early stage, it was likely that the plaintiffs could prove that the program would violate the students' First Amendment rights.[110]

The second element of a retaliation claim requires that the government respond with a retaliatory act.[111] An act is retaliatory if it is "sufficient to deter a person of ordinary firmness from exercising his constitutional rights."[112] The court held that in this instance, the District

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[101] *Id.* at 150.
[102] *Id.*
[103] *Id.* The program would have discussed what it means to be a girl in today's society, including the advantages and disadvantages of being a girl, the formation of gender identity, sexual violence and harassment, and forming self concepts. *Id.* at 144.
[104] *Id.*
[105] *Id.* at 151.
[106] *Miller*, 598 F.3d at 151.
[107] *Id.*
[108] *Id.*
[109] *Id.* at 152 (quoting W.V. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).
[110] *Id.*
[111] *Id.*
[112] *Miller*, 598 F.3d. at 152 (citing Mitchell v. Horn, 318 F.3d 523, 530 (3d Cir. 2003)).

Attorney's actions qualified as retaliatory because "[t]here is no doubt a prosecution meets this test and the District Attorney does not argue otherwise."[113]

The third element of a retaliation claim is causation.[114] There must be a causal connection between the first two elements: the plaintiffs' constitutionally protected activity and the District Attorney's retaliatory act.[115] The Third Circuit found that this connection existed because of the District Attorney's own statement that he would "respond"[116] to the plaintiff's decision to forego the educational program by prosecuting her.[117] The court emphasized that an offer to attend a pre-indictment program followed by prosecution for refusal to attend the program would not constitute causation for retaliation in every instance.[118] Rather, the key factor for the retaliation claim is that the plaintiffs' choice not to participate in the sexting educational program is protected under the Constitution.[119] Thus, the court ensured that, under its holding, programs such as court-ordered traffic school or mandated Alcoholics Anonymous meetings could not be considered retaliation under 42 U.S.C. § 1983.

Additionally, the court noted that any future prosecution of the students for additional crimes in connection with the sexts at issue would be a retaliatory act due to the District Attorney's lack of evidence.[120] There was no probable cause to charge plaintiffs with possession or distribution of child pornography.[121] The District Attorney asserted that their mere appearance in the photographs constituted sufficient grounds to bring charges against the students, but the court found that being photographed is not evidence of possessing or distributing child pornography.[122] The Third Circuit, however, allowed the District Attorney the opportunity to vacate the injunction if he produced evidence of probable cause at a later time.[123]

Thus, the Third Circuit found that without injunctive relief from the court, the students and parents would either have to relinquish their Fourteenth and First Amendment rights to evade prosecution or maintain

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[113] *Id.* at 152 (citing Hartman v. Moore, 547 U.S. 250 (2006)).
[114] *Id.* at 152.
[115] *Id.*
[116] The court interpreted the word "respond" to mean "retaliate for." *Id.* at 153.
[117] *Id.* at 153.
[118] *Miller*, 598 F.3d at 153.
[119] *Id.*
[120] *Id.* at 154.
[121] *Id.* (citing *Hartman*, 547 U.S. at 263; Barnes v. Wright, 449 F.3d 709, 720 (6th Cir. 2006)).
[122] *Id.*
[123] *Id.*

those rights but face prosecution.[124] The court held that the "Hobson's Choice" the District Attorney presented the students was unconstitutional.[125] The Third Circuit concluded that the "plaintiffs have shown a likelihood of success on their claims that any prosecution would not be based on probable cause . . . but instead in retaliation" for the exercise of constitutionally protected rights.[126] Thus, the court affirmed the district court's award of a preliminary injunction.[127]

III. ANALYSIS: SEXTING EDUCATIONAL CLASSES DO NOT AUTOMATICALLY VIOLATE CONSTITUTIONALLY PROTECTED RIGHTS

Some parents, like those in *Miller,* claim that the government cannot regulate their child's sexting activity because of their Fourteenth Amendment right to raise their child without government interference. This right, however, is not absolute.[128] The government can limit this right and use its role as *parens patriae* to regulate sexting when a child's safety or well being is in danger.[129] Thus, the government has the authority to regulate sexting through educational programs.

A. Parental Fourteenth Amendment Rights

Although the Third Circuit held that the state could not constitutionally require students to attend a sexting educational program, its holding was narrow and does not preclude the institution of sexting educational programs *per se*. The court in *Miller* held that future retaliation by the District Attorney would be unconstitutional because it would deprive the students of their rights by requiring them to either attend the program or face criminal prosecution.[130] Under the facts of *Miller* and the court's focus on a retaliatory act of the District Attorney,[131] the Third Circuit correctly decided the case. The Third Circuit, however, ruled too broadly in its more general holding: that the requirement that children attend a program that educates students about the dangers of sexting violates the Fourteenth Amendment. On the

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[124] *Miller*, 598 F.3d. at 155.

[125] *Id.* at 155. A Hobson's Choice is defined as "an apparently free choice when there is no real alternative." MERRIAM-WEBSTER, *Hobson's Choice Definition*: MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/hobson%27s+choice (last visited May 13, 2011).

[126] *Miller*, 598 F.3d at 155.

[127] *Id.*

[128] *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[129] *Id.* at 166 (citing Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878)).

[130] *Miller*, 598 F.3d at 148.

[131] *Id.* at 155.

contrary, absent retaliation by a state official in violation of 42 U.S.C § 1983, a court is likely to rule that requiring students to attend an educational program about sexting does not violate the Fourteenth Amendment because the government has a compelling interest in protecting children from the harmful effects of sexting.

1. History of the Protection of the Fourteenth Amendment

Even though the court in *Miller* found that requiring sexting education classes likely violates a parent's Fourteenth Amendment right to raise his or her children without governmental interference,[132] it is more likely that the government can require students to participate in sexting education classes without infringing on Fourteenth Amendment rights. The decision in *Miller* is not fatal to the principle that children in public schools may be required to take educational classes about sexting. Although the Fourteenth Amendment protects a parent's right to raise his or her children without government interference, this protection is not absolute.[133] There are circumstances in which the government can intervene in parenting decisions and the Supreme Court has upheld such interference.[134]

The Due Process Clause of the Fourteenth Amendment provides that,

> [n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[135]

The Supreme Court has held that a parent's right to raise his or her child without governmental interference under the Fourteenth Amendment is a fundamental right.[136]

A court must apply strict scrutiny when examining cases that involve an alleged infringement of a person's Fourteenth Amendment right.[137] This is the highest standard the court can apply in evaluating

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[132] *Id.* at 151.

[133] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[134] *See id.*

[135] U.S. CONST. amend. XIV § 1 (2010).

[136] See Santosky v. Kramer, 455 U.S. 745, 753 (1982); Quilloin v. Walcott, 434 U.S. 246 (U.S. 1978) (citing Wisconsin v. Yoder, 406 U.S. 205, 231–33 (U.S. 1972); Stanley v. Illinois, 405 U.S. 645 (U.S. 1972); Meyer v. Nebraska, 262 U.S. 390, 399–401 (1923)).

[137] *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)). The court stated that "the Fourteenth Amendment 'forbids the government to infringe . . . fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state

whether the government has an interest that conflicts with the constitutional right of a citizen.[138] In order to survive strict scrutiny, the government must have a compelling interest that justifies interfering with a person's constitutional right.[139] Additionally, the interference must be narrowly tailored to serve the government's interest.[140] The court must also look at the means by which the state attempts to accomplish its purpose and decide whether they are reasonable.[141]

A parent's Fourteenth Amendment right to make decisions about raising his or her child has been developed through several decisions from the Supreme Court of the United States. The first Supreme Court case to discuss the parental right was *Meyer v. Nebraska*.[142] In *Meyer*, a Nebraska state law prohibited teaching a language other than English to any child in eighth grade or any student twelve years of age or under.[143] The Court held that parents have a Fourteenth Amendment right to allow the teacher to teach the language.[144] Additionally, the Court held that the Nebraska law interfered with parental authority to manage the education of one's children.[145]

Next, the Supreme Court in *Pierce v. Society of Sisters*[146] held that the right of parents to choose the upbringing of their children is fundamental.[147] In this case, the Compulsory Education Act of 1922 required every parent or guardian to send his or her children between the ages of eight and sixteen to a public school; thus, the law excluded private schools as a possible means to educate children between ages eight and sixteen.[148] The Supreme Court held that the Compulsory Education Act "unreasonably" interfered with the right of parents and guardians to control the upbringing of their children and the ability to make educational decisions for them, including where to send their children to school.[149] The Court notably stated that "[t]he child is not the

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interest.'" *Id.* (internal quotations omitted). *See also* Troxel v. Granville, 530 U.S. 57, 66 (2000) ("In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").

138 *See generally* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 218 (1995).

139 *See id.* at 202, 230.

140 *See Adarand,* 515 U.S. at 202, 227; Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986).

141 *Id.*; Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

142 262 U.S. 390 (1923).

143 *Id.* at 396.

144 *See id.* at 403.

145 *Id.* at 401.

146 268 U.S. 510 (1925).

147 *See id.* at 532–34.

148 *Id.* at 530.

149 *Id.* at 534–35 (citing Meyer v. Nebraska, 262 U.S. 390 (1923)).

mere creature of the [s]tate; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[150]

Nearly fifty years later, the Supreme Court returned to the discussion of compulsory education laws in *Wisconsin v. Yoder*.[151] Wisconsin law required children to attend either public or private school until they reached the age of sixteen.[152] The Supreme Court extended the *Pierce* decision and held that the state could not force parents to send their children to a formal school because it violated parents' rights under the First and Fourteenth Amendments.[153] The Court also noted that there was no evidence of "any harm to the physical or mental health of the child[ren] or to the public safety, peace, order, or welfare" that would potentially allow for the state to step in and regulate their education.[154]

Recent Supreme Court decisions have reiterated these earlier holdings, which clearly demand that courts bolster the Fourteenth Amendment by protecting against governmental attempts to control the education of the nation's children. Justice Ginsburg, in *M.L.B. v. S.L.J.*,[155] stated that "choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as of basic importance in our society, rights sheltered by the Fourteenth Amendment against the [s]tate's unwarranted usurpation, disregard, or disrespect."[156] The most recent case on the issue of parents' fundamental right to raise their children is *Troxel v. Granville*.[157] In *Troxel,* the Supreme Court struck down a state law that allowed third parties, including grandparents, to petition for visitation rights over the protests of the child's parents.[158] The Court reiterated: "the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."[159] The Supreme Court has consistently held parents' Fourteenth Amendment rights in high regard in the past.[160]

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[150] *Id.* at 535.
[151] 406 U.S. 205 (1972).
[152] *Id.* at 207.
[153] *Id.* at 234.
[154] *Id.* at 230.
[155] 519 U.S. 102 (1996).
[156] *Id.* at 116 (citing Boddie v. Connecticut, 401 U.S. 371, 376 (1971)) (internal quotations omitted) (emphasis removed).
[157] 530 U.S. 57 (2000).
[158] *Id.* at 63, 75.
[159] Troxel v. Granville, 530 U.S. 57, 65 (2000) (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Prince v. Massachusetts, 321 U.S. 158 (1944)).
[160] *See* discussion *supra* Part III.A.1.

The developing problem of sexting has recently fueled the debate about when the government has the authority to limit parents' Fourteenth Amendment right to raise their children without government interference. At first glance, a mandatory sexting education course seems to conflict with the fundamental right because parents' rights to choose whether their children participate in these programs seems to fall under the protection of the Fourteenth Amendment. Parents could argue that these classes conflict with their beliefs and how they want their children raised. Thus, following the standard set out by the Supreme Court over the past century, it seems that a mandatory sexting education class would infringe on a parent's Fourteenth Amendment right. But the parental right to raise one's child without government interference is not a complete freedom, and the government may be able to impose the sexting program on the students under certain circumstances. [161]

2. Limitations on Parents' Fourteenth Amendment Rights

Protection of a parent's Fourteenth Amendment right to make decisions regarding how to raise his or her child is not absolute. The state can interfere with parenting decisions if it is necessary to protect a child. For example, in *Prince v. Massachusetts*, the defendant was convicted of violating state child labor laws by allowing her child to preach on the street and sell religious pamphlets.[162] The Court departed from its earlier decisions restricting the government's interference with parents' control over their children and held that when it is in the public's interest, "the family itself is not beyond regulation."[163] The court recognized that when it is necessary to protect a child's safety and well being the state can act as *parens patriae* and can "restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways."[164] Thus, the Court held that the need to protect children from harm or exploitation justified the state's interference.

The Court has also indicated that the state has broader authority over the lives and activities of children than it has over adults.[165] For example, in *Prince,* the Court held that the state has the power to control the conduct of children in order to protect them against the dangers of

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[161] *See Prince*, 321 U.S. at 166.
[162] *Id.* at 161–62.
[163] *Id.* at 166 (citing Reynolds v. United States, 98 U.S. 145 (1879); Davis v. Beason, 133 U.S. 333 (1890)).
[164] *Id.*
[165] *Id.* at 168.

preaching religion on a highway.[166] The Court reasoned that "[p]arents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."[167] Here, the Supreme Court appropriately balanced parents' Fourteenth Amendment right against the state's right to intervene for the welfare and safety of children.

The Supreme Court has not only held that government may intervene in a parental decision normally protected under the Fourteenth Amendment due to its *parens patriae* power, but the Court has also held that a public school system may intervene in certain circumstances because public schools are recognized as "instruments of the state."[168] As such, school officials can restrict students' rights when they exercise their authority as *in loco parentis* in order to protect the students at school.[169] Courts have recognized that because children spend a significant amount of the day in school, while in school they are in the custody of the school system.[170]

The Third Circuit in *Gruenke v. Siep*[171] held that there are situations in which school officials need to impose standards and restrict the conduct of students even when parents may disagree.[172] These situations arise because the school must "maintain order and a proper educational atmosphere."[173] In *Gruenke*, the parents of a high school student sued a high school swim team coach under 42 U.S.C. § 1983 for requiring their daughter to take a pregnancy test in violation of her First and Fourth Amendment rights.[174] The Third Circuit accepted that there are times when the school's views and actions may conflict with the parents' right to raise their children.[175] When such a conflict occurs, the parents' right should take precedent over the school's policies unless "the school's action is tied to a compelling interest."[176] In *Gruenke,* the Third Circuit

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[166] *Prince*, 321 U.S. at 169.
[167] *Id.* at 170.
[168] Bethel Sch. Dist. v. Fraser, 478 U.S 675, 683 (1986).
[169] *Id.* at 684 (citing Ginsberg v. New York, 390 U.S. 629 (1968); Bd. of Educ. v. Pico, 457 U.S. 853, 871–72 (1982)).
[170] *See* Gruenke v. Seip, 225 F.3d 290, 304 (3d Cir. 2000) (quoting Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 655 (1995)).
[171] *Id.*
[172] *Id.*
[173] *Id.* (citing Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 654–55 (1995); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988); New Jersey v. T.L.O., 469 U.S. 325, 347–48 (1985)).
[174] *Id.* at 295.
[175] *Id.* at 305.
[176] *Gruenke*, 225 F.3d at 305.

decided that the coach's actions were unreasonable and violated the student's rights; however, the court held that there are some instances where this conduct would be reasonable, such as when there is a legitimate concern for the student's health.[177] Significantly, the court stated that the right to familial privacy is inevitably restricted while students are in a public school setting where "the state's power is 'custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.'"[178]

Further, the Third Circuit, in *C.N. v. Ridgewood Board of Education*,[179] held that there are times when "the parental right to control the upbringing of a child must give way to a school's ability to control curriculum and the school environment."[180] In this case, students in the seventh through twelfth grades were asked to complete a survey entitled, "Profiles of Student Life: Attitudes and Behaviors."[181] The survey consisted of questions involving the students' "drug and alcohol use, sexual activity, experience of physical violence, attempts at suicide, personal associations and relationships (including the parental relationship), and views on matters of public interest."[182] The court held that even if the survey was a requirement, it did not amount to a violation of a family's constitutional right to privacy.[183] Further, the court stated that "[i]t is clear . . . that [a parent's right to control a child's upbringing and education] is neither absolute nor unqualified."[184] Finally, the court decided that the school officials did not violate the students' constitutional rights.[185]

The dangers of sexting justify a limitation on parents' Fourteenth Amendment right to raise their children without governmental intervention because the potential harm caused by sexting poses a significant threat to the public interest. As previously discussed, teenagers who are caught sexting face potential criminal charges for the dissemination or viewing of child pornography, the possible

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[177] *Id.* at 301.

[178] *Id.* at 304 (quoting Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 655 (1995)).

[179] 430 F.3d 159 (3d Cir. 2005).

[180] *Id.* at 182 (citing Swanson v. Guthrie Independent Sch. Dist., 135 F.3d 694 (10th Cir. 1998); Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174 (4th Cir. 1996); Immediato v. Rye Neck Sch. Dist., 73 F.3d 454 (2d Cir. 1996); Brown v. Hot, Sexy and Safer Prods., Inc., 68 F.3d 525, 533 (1st Cir. 1995)).

[181] *Id.* at 161.

[182] *Id.*

[183] *Id.* at 183–84.

[184] *Id.* (citing Lehr v. Robertson, 463 U.S. 248, 256 (1983); Croft v. Westmoreland Co. Children and Youth Servs., 103 F.3d 1123, 1125 (3d Cir. 1997); Hodge v. Jones, 31 F.3d 157, 163–64 (4th Cir.1994)).

[185] C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 190 (3d Cir. 2005).

dissemination of their own private sexual images, and bullying.[186] In addition, it is necessary for the government to protect children's well being and safety because many are vulnerable and unable to make mature decisions; the choice to sext is clearly one of these decisions.

In particular, when sexting occurs at a public school during school hours, the sexting falls within the bounds of both the government and the school board's compelling interests. A student's act of sexting can interfere with the educational atmosphere. The school needs to affirmatively act in order to protect a student who directly engages in sexting, as well as to safeguard all other students who may be affected by such conduct. The compelling interest of both the school and the state justifies any infringement on a parent's right to raise his or her child that is affected by the sexting education class requirement.

3. Additional Limitations on Parents' Fourteenth Amendment Rights with Respect to Education

Courts have found that parents' Fourteenth Amendment rights are subject to government intervention when there is potential for substantial harm to the child.[187] Additionally, the government has imposed other limitations on parents' Fourteenth Amendment rights, further indicating that this right is not absolute.[188] When it comes to education, both children's rights and parents' rights are limited. Thus, with respect to sexting in the educational atmosphere, parents' Fourteenth Amendment rights should also be limited. This discussion will focus on those requirements the states in the Third Circuit impose that effectively limit parents' with respect to their children's education.

First, the state can mandate compulsory education attendance through state truancy laws.[189] New Jersey law requires parents to send their children, ages six through sixteen, to public school or a school that would provide an equivalent standard of education.[190] The courts have also held that the statute enforcing mandatory attendance is constitutional and that education, "is a matter of public concern and legislative regulation and should be enforced as long as the requirements are reasonable."[191]

In Pennsylvania, a compulsory school attendance law requires every child of the "compulsory school age" who resides in the state to

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[186] Eraker, *supra* note 46, at 577.
[187] *See* discussion *supra* Part III.A.2.
[188] *See* discussion *infra* Part III.A.3.
[189] *See* Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).
[190] N.J. STAT. ANN. § 18A:38-25 (2011).
[191] *Everson*, 133 N.J.L. 350, 355–56 (E. & A. 1945), *aff'd*, 330 U.S. 1, 18 (1947).

attend school.[192] The statute defines "compulsory school age" as between the ages of eight and seventeen.[193] The State Board of Education must provide standards for the subjects and activities that all children must learn in school.[194] The subjects must be taught in English, and the child must continuously attend school throughout the entire time public school is in session.[195] The statute also provides an allowance for children to attend private schools, boarding schools, and to be home schooled as long as the education meets the standards set out by the State Board of Education.[196] Parents or guardians who do not comply with this law are subject to fines, required attendance of a parenting course, or even jail time.[197] One of Pennsylvania's two Superior Courts has held that the compulsory education laws are not unconstitutionally overbroad or vague.[198]

Finally, Delaware laws require compulsory attendance for children between the ages of five and sixteen years old.[199] The statutes require anyone who has legal custody of a child in this age range to enroll the child in public school, where the student must attend the minimum number of school days and attend any activity required by state law.[200] The statute states that a student is considered a "truant" if he or she misses three or more days of school per year without a valid excuse.[201] The statute also allows students to enroll in private school or to receive homeschooling so long as they would receive an education that is equivalent to the curriculum required in public schools.[202]

Second, schools and the government also regulate children's activities in schools through mandatory subjects and curriculum. One subject of controversy is sexual education classes. Sexual education requirements vary from state to state. New Jersey requires schools to offer classes that provide lessons on abstinence and sexually transmitted disease (STD) prevention.[203] Similarly, Delaware public schools are legally required to provide sex education and information, but also must

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[192] 24 PA. CONS. STAT. ANN. § 13-1327(a) (2011).
[193] *Id.* at § 13-1326(a).
[194] *Id.* at § 13-1327(a).
[195] *Id.*
[196] *Id.* at § 13-1327(b)–(d).
[197] *Id.* at § 13-1333(a).
[198] *See In re* C.C.J., 799 A.2d 116, 123 (Pa. Super. Ct. 2002).
[199] 14 DEL. CODE. ANN. 14 § 2702(a)(1) (2011).
[200] *Id.* at § 2702(a)(1)–(3).
[201] *Id.* at § 2702(a)(3).
[202] *Id.* at § 2703.
[203] TEEN-AID.ORG, *State Sex Education Laws*, http://www.teen-aid.org/State_Resourses/State_Sex_Education_Laws.htm (last visited Sept. 25, 2011).

include other contraception information.[204] In Pennsylvania, however, schools are not legally required to offer a sex education class; instead, they are merely required to be able to give information on abstinence and methods for STD prevention if students inquire about it.[205]

In *Smith v. Ricci*,[206] the New Jersey Supreme Court examined the constitutionality of a sex education course requirement. The State Board of Education required school districts to teach a "family life" educational program.[207] The Board's regulation also included an "excusal clause," which stated that if a parent or guardian did not agree with any part of the educational program because it conflicted with their moral or religious beliefs, then the child would be excused from only the portion of the program that was in conflict; however, the regulation still required the student to attend the remaining portion of the class.[208] Despite this clause, parents challenged the regulation by arguing that the program infringed on the students' and parents' First Amendment rights of freedom of religion.[209] They also argued that the educational program was an establishment of religion.[210] The court held that because it included an option for parents to remove their children from the portions of the program that violated their beliefs, the regulation did not infringe on parent or children's rights.[211]

The plaintiffs also argued that the program violated parents' rights under the Fourteenth Amendment to raise their children.[212] They claimed that there was no reasonable relation between the requirement of an educational program and the goals that this educational program sought to achieve.[213] The court, however, held that the program did not violate the Fourteenth Amendment, because it was a reasonable and necessary means to achieve the school's interest in the "reduction of teenage pregnancy, venereal disease, and other social problems."[214] Thus, if a sexting education program is narrowly tailored to the government's goal of preventing the dangers associated with sexting, and

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[204] *Id.*
[205] *Id.*
[206] 446 A.2d 501 (N.J. 1982).
[207] *Id.* at 502.
[208] *Id.* at 504–05.
[209] *Id.* at 502–03.
[210] *Id.* at 503.
[211] *Id.* at 505 (citing Medeiros v. Kiyosaki, 478 P.2d 314 (Haw. 1970); Citizens for Parental Rights v. San Mateo Bd. of Ed., 124 Cal. Rptr. 68 (Cal. Ct. App. 1975), *appeal dismissed*, 425 U.S. 908 (1976); Hopkins v. Hamden Bd. of Ed., 289 A.2d 914 (Conn. Super. Ct. 1970), *appeal dismissed*, 305 A.2d 536 (Conn. 1973)).
[212] *Ricci*, 446 A.2d at 507.
[213] *Id.*
[214] *Id.*

the program is a necessary means of achieving that goal, then it is unlikely that the imposition of such a program would violate parents' Fourteenth Amendment rights.

IV. LIMITATIONS ON CHILDREN'S RIGHTS

The government can also constitutionally require students to attend sexting education classes because children's constitutional rights are not as expansive as those of adults.[215] Although the government cannot threaten criminal prosecution if an adult exercises a constitutionally protected right, children's constitutional rights are restricted, especially while in school.[216] This limitation is due to the state's role as a custodian or *in loco parentis* to the children in its jurisdiction.[217]

In *Bellotti v. Baird*,[218] the Supreme Court held that minors are in a unique position and their rights are not equal to those of adults.[219] The Court stated that "the peculiar vulnerability of children" and "their inability to make critical decisions in an informed and mature manner" are justifications for the necessary reduction of a child's rights.[220] Courts have applied this concept to hold that laws that limit the rights of minors, such as age limits on marriage, are constitutional.[221]

Further, the Supreme Court has given schools the discretion to limit the rights of students while they are in the school's custody by diminishing students' Fourth Amendment rights.[222] The Court has justified this limitation by invoking the school's special need to protect children on school grounds.[223] The Fourth Amendment provides that individuals have the right to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and that this right "shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[224] In *New Jersey v. T.L.O.*,[225] the Court held that there are limits on the Fourth Amendment's privacy protection when school authorities

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[215] *See* Bellotti v. Baird, 443 U.S. 622, 634 (1979).
[216] *See* New Jersey v. T.L.O., 469 U.S. 325, 339–40 (1985).
[217] *See id.* at 336.
[218] 443 U.S. 622 (1979).
[219] *Id.* at 634; Vernonia Sch. Dist. v. Acton, 515 U.S 646, 655 (1995).
[220] *Id.*
[221] *See* Moe v. Dinkins, 669 F.2d 67, 68 (2d Cir. 1982).
[222] *See T.L.O.*, 469 U.S. at 34–41; *see also Acton*, 515 U.S. at 655.
[223] *Acton*, 515 U.S at 655.
[224] U.S. CONST. amend. IV.
[225] 469 U.S. 325 (1985).

perform searches while children are on school property.[226] The Court stressed that ordinarily the Fourth Amendment protects students from unreasonable searches and seizures.[227] Reasonable expectations of privacy, however, are more limited for students in school than they are elsewhere.[228]

The Supreme Court noted that school officials have the authority to limit students' rights in order to foster public policy.[229] The Court explained that there is a need to balance the students' right to privacy and the school's interest in providing a proper educational atmosphere.[230] In balancing these interests, "[i]t is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject."[231] Due to this necessity, the Supreme Court held that a warrant is not necessary for school authorities to search a student's person or property while that student is under the school's control.[232] Therefore, school officials do not need to meet the high level of probable cause to search students, so long as they have a reasonable suspicion.[233] The Court concluded that, for the school to have the ability to maintain order, the "legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."[234] Thus, a search will be justified when a school official has "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."[235]

The Third Circuit's ruling in *Miller* seems consistent with the trend towards reducing privacy rights and increasing government interference with schoolchildren's rights, which the Supreme Court began with its ruling in *T.L.O.* Ten years later, in *Vernonia School District v. Acton*,[236] the Supreme Court strengthened the holding in *T.L.O.* by further narrowing constitutional protections for students.[237] In *Vernonia,* an Oregon school district had instituted a student athlete drug policy that called for random drug testing of student athletes.[238] The issue before the Court was whether this policy violated the students' Fourth and

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[226] *Id.* at 332.
[227] *See id.* at 333–35 (internal citations omitted).
[228] *Id.*
[229] *Id.* at 336.
[230] *Id.* at 340.
[231] *T.L.O.*, 469 U.S. at 340.
[232] *Id.*
[233] *Id.* at 341.
[234] *Id.*
[235] *Id.* at 541–42.
[236] 515 U.S. 646 (1995).
[237] *Id.* at 656.
[238] *Id.* at 648.

Fourteenth Amendment rights. Under the policy, all students in the school who wanted to play sports were required to sign a form consenting to random drug testing and to obtain the written consent of their parents.[239] The school tested the athletes at the beginning of the season and then randomly tested ten percent of the athletes each week during their sports season.[240]

The Supreme Court stated that courts must apply a reasonableness standard to determine whether such searches are constitutional.[241] This standard requires balancing the degree of governmental infringement on a person's Fourth Amendment right against the government's interest.[242] When there are "special needs," a warrant is not required for a search; when a warrant is not required, neither is probable cause.[243] The Court stated that "special needs" are present in the school setting because minors are not entitled to the same degree of constitutional protection that is accorded to adults.[244] For example, minors do not have the same rights to liberty—"the right to come and go at will"—because their parent or guardian controls their physical freedom.[245] When parents place their children in private school, the school officials must act *in loco parentis* to the children, and when children are placed in public schools, the officials have a "custodial and tutelary" power over them.[246] This creates control over minors that is not constitutionally permissible with respect to adults.[247] The Supreme Court clarified, however, that students do not lose their rights entirely when they are at school; the "nature of those rights" only becomes what is "appropriate for children in school."[248] The Court concluded that "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere."[249]

The Supreme Court in *Hazelwood School District v. Kuhlmeier*[250] also held that students' rights, which would ordinarily be constitutionally protected, are limited while in the custody of the school.[251] In *Kuhlmeier*, a group of students claimed that various school officials

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239 *Id.* at 650.
240 *Id.*
241 *Id.* at 652.
242 *Acton*, 515 U.S. at 652–53 (citing Delaware v. Prouse, 440 U.S. 648, 654 (1979)).
243 *Id.* at 653 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).
244 *Id.* at 655.
245 *Id.* at 654 (citing 59 AM. JUR. 2D *Parent and Child* § 10 (1987)).
246 *Id.* at 655.
247 *Id.*
248 *Acton*, 515 U.S. at 655–56.
249 *Id.* at 656.
250 484 U.S. 260 (1988).
251 *Id.* at 266.

violated their First Amendment right to free speech when the officials removed two articles from the school newspaper.[252] One article concerned pregnant teenagers within the school and sexuality of students, while the other discussed how students were affected by their parents' divorces.[253] School officials were concerned about protecting the identity of the pregnant teenagers as well as protecting younger students from the "inappropriate" references to teen sexuality and birth control discussed in the articles.[254] The court held that students' right to free expression can be limited if it "substantially interfere[s] with the work of the school or impinge[s] upon the rights of other students."[255] Additionally, it is for the school, not a federal court, to decide what conduct is inappropriate within the school, and whether that conduct can be restricted.[256]

The aforementioned cases—*Bellotti*,[257] *T.L.O.*,[258] and *Kuhlmeier*[259]—demonstrate the Supreme Court's mandate that, in certain circumstances, schools may have a compelling interest that justifies their interference with parents' and children's constitutional rights.[260] Clearly, children's constitutional rights can be limited in the school setting.[261] Thus, if a school system establishes that protecting students from sexting is a compelling interest, and also shows that providing sexting education classes is narrowly tailored to protect that interest, then such classes would be immune from claims by parents or students arguing that these classes violate their constitutional rights. Because students are under the custody of school officials while attending school,[262] the school has a compelling interest in protecting them from the dangers of sexting. Additionally, the school has an interest in protecting other students from the disruptions that sexting can cause in their education.[263]

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[252] *Id.* at 262, 264.
[253] *Id.* at 263.
[254] *Id.*
[255] *Id.* at 266 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)).
[256] *Kuhlmeier,* 484 U.S. at 267–68 (citing Bethel Sch. Dist. v. Frasier, 478 U.S. 675 (1986)).
[257] 443 U.S. 622 (1979).
[258] 469 U.S. 325 (1985).
[259] 484 U.S. 260 (1988).
[260] *See generally* sources cited *supra* notes 257–59.
[261] *Id.*
[262] *See* Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 655 (1995).
[263] *See* New Jersey v. T.L.O., 469 U.S. 325, 340 (1985); *Kuhlmeier,* 484 U.S. at 266.

V. POSSIBLE REMEDIES TO SOLVE THE TEENAGE SEXTING PROBLEM

Sexting is a pervasive problem that has generated a compelling state interest and is a problem that needs to be solved through government intervention. Retaliatory prosecution, like that in *Miller*, of a student who elects not to attend a sexting education program is not the correct way to solve the problem of sexting. Like truancy and child labor, sexting is another danger against which the government should protect children by following the pattern of limiting parents' Fourteenth Amendment rights and children's rights. There are two potential solutions to the sexting problem that call for government intervention rather than retaliatory prosecution.

One option would require state legislatures to create sexting educational classes or integrate sexting education into their family and sex education classes. Education is an important starting point to solving the problem of teenage sexting. Unlike the situation in *Miller*, in which the implementation of classes only came after students were caught sexting, implementing these programs would help to prevent the problem through preemptive action. Implementation of sexting education courses is also likely to evade Fourteenth Amendment scrutiny by the courts because the government has a compelling interest in regulating children's sexting activities.[264] If, however, courts find that requiring students to attend a sexting education program does violate the Constitution, the government may still be able to teach students about the dangers of sexting by imposing the requirement to make the sexting class an option or by utilizing an excusal clause.

The second potential solution to the sexting problem in schools is to create specific sexting criminal legislation. Currently, many states have responded to the problem in this manner.[265] Pennsylvania, the home state of *Miller*, is in the process of approving a bill—House Bill 815—that would make sexting among minors a second-degree misdemeanor crime, instead of a felony.[266] On May 23, 2011, the Pennsylvania House of Representatives approved the bill, and it currently awaits the Senate's approval.[267]

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[264] *See* discussion *supra* Part IV.

[265] NAT'L CONFERENCE OF STATE LEGISLATURES, *2010 Legislation Related to 'Sexting,'* http://www.ncsl.org/default.aspx?tabid=19696 (last updated Jan. 4, 2011).

[266] Tom Barnes, *State House votes for 'sexting' bill*, PITTSBURGH POST GAZETTE, (May 24, 2011), http://www.post-gazette.com/pg/11144/1148751-178.stm; Matt Paul, *Teen "Sexting" Bill Passes PA House*, PAMATTERS.COM, (May 24, 2011), http://www.pamatters.com/2011/05/24/teen-%E2%80%9Csexting%E2%80%9D-bill-passes-pa-house/.

[267] *Id.*

The bill defines the offense of "sexting" as " knowingly transmit[ing] an electronic communication or disseminat[ing] a depiction of himself or another minor, or possess[ing] a depiction of another minor, engaging in sexually explicit conduct."[268] The bill, however, will not cover the depictions of minors engaged in sexual activity, which is punishable under other Pennsylvania laws regarding the sexual abuse of a child.[269] It also does not apply to depictions of a minor engaged in "sexually explicit conduct," if the depiction was "taken, made, produced, used or intended to be used for or in furtherance of a commercial purpose."[270] This offense would also be punishable under different Pennsylvania laws.[271]

Pennsylvania State Representative and the bill's sponsor, Seth Grove, stated that the goal of the sexting bill "ensures that students don't ruin the rest of their life because of making some childish decisions, and sending nude photographs of themselves or others."[272] Because of this goal, the bill also allows for a minor to avoid prosecution, through judicial discretion, by permitting the minor to participate in a diversionary program and allowing for eventual expungement.[273]

Parents are likely to challenge any statute concerning sexting by arguing that it infringes on their Fourteenth Amendment rights to raise their children without governmental interference. As explained in Part IV,[274] however, this right is not absolute and the state can regulate sexting over parents' objections. Sexting is not only a private problem between the child and the parent; it is a public concern. Parents may lack the ability to catch the sexting or to effectively deter future behavior. Parents also may choose not to punish their children because they do not believe sexting is wrong. Although some parents may not believe that sexting is wrong, the dangers of sexting certainly could have a negative effect upon a child's future and on the welfare of society. Without proper guidance and prevention, the sexting phenomenon is likely to escalate, leading to an increase in the harms that stem from sexting, such as bullying.[275] This is a significant harm to children and, as such, the government is justified in protecting against the harm. Thus, there is a

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[268] H.R. 815, 2011 Gen. Assem., (Pa. 2011).
[269] *Id.*
[270] *Id.*
[271] *Id.*
[272] Matt Paul, *Teen "Sexting" Bill Passes PA House*, PAMATTERS.COM, (May 24, 2011), http://www.pamatters.com/2011/05/24/teen-%E2%80%9Csexting%E2%80%9D-bill-passes-pa-house/.
[273] *Id.*; H.R. 815, 2011 Gen. Assem., (Pa. 2011).
[274] *See* discussion *supra* Part IV.
[275] *See* discussion *supra*, at Part II.

strong justification for the government to intervene by educating children about the effects of sexting.

Other states are also looking into legislative alternatives to the criminal prosecution of sexting. On September 27, 2011, New Jersey's Acting Governor, Kim Guadagno, signed new sexting legislation into law.[276] The law creates a "diversionary" education program for juveniles who are criminally charged for sexting or posting sexual images.[277] This program is intended to be an "alternative to prosecution" of minors who are "charged with a criminal offense for posting sexually suggestive or sexually explicit photographs, or who engage in the behavior commonly known as 'sexting,' in which these pictures are transmitted via cell phones."[278] It will be limited to juveniles who are charged with an offense under the New Jersey statute that protects against the endangerment of children's welfare; such endangerment includes the "creation, exhibition or distribution without malicious intent of a photograph depicting nudity . . . through the use of an interactive wireless communications device or a computer."[279]

The bill gives the prosecutor the discretion of admitting the minor into the program; additionally, those who complete the program avoid prosecution.[280] If the prosecutor does not exercise this discretion, court intake services can recommend the diversionary program based on the following factors: the severity of the offense or conduct and the circumstances surrounding the act, the offender's "age and maturity," whether the juvenile is a "substantial danger to others," the juvenile's family history and circumstances, including drug, alcohol, or child abuse, whether the juvenile or his family have had prior interaction with court intake services, the outcome, the result of those interactions, the availability of the educational program, recommendations by the victim, arresting officer, recommendation by the prosecutor, and the "amenability of the juvenile to participation in a remedial education or counseling program."[281]

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[276] Tom Hester, Sr., *N.J. law makes juvenile 'sexting' an educational issue, not a crime*, NEWJERSERYNEWSROOM.COM, (Sept. 27, 2011), http://www.newjerseynewsroom.com/state/nj-law-makes-juvenile-sexting-an-educational-issue-not-a-crime.

[277] S. 2700, 214th Leg. (N.J. 2011).

[278] SENATE BUDGET AND APPROPRIATIONS COMMITTEE, STATEMENT TO SENATE COMMITTEE SUBSTITUTE FOR SENATE, S. 2700, 214th Leg., at 1 (N.J. 2011).

[279] S. 2700, 214th Leg. (N.J. 2011); *see also* N.J. STAT. ANN. § 2C:24-4 (2001).

[280] S. 2700, 214th Leg. (N.J. 2011).

[281] *Id.*

The proposed educational program would consist of the "juvenile's participation in a remedial education or counseling program."[282] It will educate juveniles about the "legal consequences and penalties for sharing sexually suggestive or explicit materials," as well as the "non-legal consequences," such as the effect the activity could have on relationships and the damage it could do to the child's future opportunities in employment and education, and the effect it could have on current school activities.[283] Additionally, the program would discuss the "long-term and unforeseen consequences for sharing sexually suggestive or explicit materials" and the connection between bullying, cyber-bullying and sharing the material.[284] The state's Attorney General and the New Jersey Judiciary will develop the educational program.[285] The law will go into effect in April 2012.[286]

Bill A-4069 helps avoid decisions like the one in *Miller,* because it creates an educational program in lieu of prosecution before an act takes place. By offering this discretion to prosecutors, the legislature avoids the issue of prosecution as retaliation; yet, the bill could still face Fourteenth Amendment scrutiny. As explained in Parts III and IV, however, the state's interest in protecting children is a significant and compelling reason to limit this right.

Out of these options, a sexting education class is the best choice to prevent the sexting problem before it escalates, because it would teach children about how a sext could greatly affect and damage their futures. The number of prosecutions teenagers could face would likely be reduced if they were informed about the dangers of sexting and were instructed that sexting could lead to criminal child pornography charges. The proposed legislation is also laudable because it seeks to avoid automatic prosecution for a child who sexts. Although New Jersey and Pennsylvania are creating criminal statutes, these statutes are acceptable because they first give children a chance to learn from their mistakes. The statutes provide opportunities for children to learn about the dangers of sexting before they are charged with a crime and before anything is placed on their record.

V. CONCLUSION

The practice of teenage sexting implicates many issues arising from teenagers' actions. One of the most important aspects of the problem is

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[282] *Id.*
[283] *Id.*
[284] *Id.*
[285] Hester, *supra* note 276.
[286] *Id.*

the question of whether schools should be able to educate teens about the dangers associated with sexting, with the intention that such education will curb the increase in the growing number of teenagers who sext. *Miller v. Mitchell* illustrated one attempt to deter the problem: offer children the option of taking a sexting education class.[287] Although the retaliatory means employed by the District Attorney in this case were held unconstitutional, ordinary sexting educational programs likely would avoid the same fate. Even though the program will have to withstand judicial strict scrutiny, the government's compelling interest in protecting the nation's teenagers will likely be enough to overcome constitutional protection. Even if the courts do not consider the government's interest to be sufficiently compelling to survive strict scrutiny, it is still vital to educate children about the dangers of sexting. The government can try to educate students by creating sexting classes or introducing antisexting material into already formed sex education classes in schools. To survive constitutional protections, the government could also make such sexting programs optional or institute an excusal clause for parents who do not want their children to participate in these classes.

The sexting educational programs proposed in this Comment are only a starting point for preventing child sexting practices. Unfortunately, these programs cannot control what children do outside of school and cannot ensure that children will listen and absorb what the programs are teaching. It is important to start somewhere, however, and the classes can provide necessary lessons about the dangers of sexting. If an educational program can save one child's future by informing him or her about the consequences of sexting, then the government should attempt to provide the program in a sufficiently tailored manner so as to withstand strict constitutional scrutiny.

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[287] Miller v. Mitchell, 598 F.3d 139, 143 (3d Cir. 2010).