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Jamie L. Williams

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TEENS, SEXTS, & CYBERSPACE: THE CONSTITUTIONAL IMPLICATIONS OF CURRENT SEXTING & CYBERBULLYING LAWS

Jamie L. Williams*

INTRODUCTION

Over the past decade, technology has revolutionized the lives of modern teens.¹ Indeed, for many teens it is hard to imagine a world without iPhones, Facebook, and Twitter.² There is no denying that technology has improved teens' everyday lives in various ways, but technology is not without its drawbacks.³ In addition to the infinite benefits that accompany technological advancements, technology has also helped usher in an era of online predators, child pornography, and identity theft.⁴ The most recent additions to the growing list of the negative effects of technology are sexting and cyberbullying. Sexting and cyberbullying—practices by which teens exchange nude or semi-nude photos with each other or bully fellow teens using technology, respectively—are on the rise, and their rapid growth has both parents and schools up in arms.⁵ In response to the public's outcry for action, legislators across the nation are drafting laws that criminalize both sexting and cyberbullying.⁶ Many of these laws, however, have been met with opposition because of their infringement of the First Amendment right of minors to exercise freedom of expression and the Fourteenth Amendment right of parents to direct the upbringing of their children.⁷

* J.D., William & Mary School of Law, 2012; B.S., Virginia Polytechnic Institute and State University, 2009. I would like to thank my parents, Mark and Lucy; my sister, Amanda; and David for their unwavering love and support. Additionally, many thanks to Neal Devins and the Editorial Board for their valuable insights and assistance with this Note.

¹ See Terri Day, *The New Digital Dating Behavior—Sexting: Teens' Explicit Love Letters*, 33 HASTINGS COMM. & ENT. L.J. 69, 70 (2010).

² See Catherine Arcabascio, *Sexting and Teenagers: OMG R U Going 2 Jail???*, 16 RICH. J.L. & TECH. 1, 5 (2010).

³ See Janna Quitney Anderson & Lee Rainie, *The Future of the Internet*, PEW RESEARCH CENTER'S INTERNET & AM. LIFE PROJECT 1–2 (2010), http://www.pewinternet.org/~media/Files/Reports/2010/PIP_Future_of_Internet_%202010_social_relations.pdf.

⁴ See Alison Virginia King, Note, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 846 (2010).

⁵ *Id.* at 847; 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, 687 (2010).

⁶ See *infra* Parts II.D, III.C.

⁷ See *infra* Part IV.

This Note examines the modern trends of teen sexting and cyberbullying and considers the proper legislative response. Part I of this Note provides a precedential history of minors' First Amendment right to free speech and its application within the realm of public schools. Part I also gives a historical account of the Supreme Court's protection of parents' Fourteenth Amendment right to parental autonomy and explains when this fundamental right must yield to the educational interests of public schools. Next, Part II of this Note defines sexting, analyzes its dangers, and examines current and pending legislation targeted at punishing and deterring sexting. Part III describes cyberbullying and explores its potential harms. Part III also looks at state and federal legislation aimed at policing cyberbullying. Part IV identifies the First and Fourteenth Amendment issues implicated by current sexting and cyberbullying laws and examines the constitutional hurdles these laws face. Finally, Part V explores the appropriate legislative response to sexting and cyberbullying. This Note argues that a partnership between parents and schools that is predicated on the concept of school connectedness is the most effective means of deterring teens' participation in sexting and cyberbullying because it allows parents and schools to combat these trends on multiple fronts, while also precluding courts' needs to address the constitutional issues that will inevitably accompany legislation criminalizing sexting and cyberbullying.

I. HISTORICAL FRAMEWORK: THE FIRST AND FOURTEENTH AMENDMENTS

One can hardly argue that sexting and cyberbullying are socially beneficial behaviors,⁸ and there is public demand for legislative action to combat them.⁹ Most of the current laws, however, do not account for technological advances, and are therefore not equipped to address sexting and cyberbullying.¹⁰ As state legislators attempt to create legislative solutions that will both deter and criminalize these behaviors, it is essential that lawmakers balance the need for consequences with the fundamental rights of expression and parental autonomy.¹¹ This Part discusses and analyzes the Supreme Court's precedential protection of these rights.

A. The First Amendment Rights of Minors

In order to understand the constitutional impact of criminalizing sexting and cyberbullying, it is essential to understand the free speech protections presently

⁸ King, *supra* note 4, at 865–66.

⁹ *Id.* at 848–49; see also Elizabeth C. Eraker, Note, *Stemming Sexting: Sensible Legal Approaches to Teenagers' Exchange of Self-Produced Pornography*, 25 BERKELEY TECH. L.J. 555, 558 (2010).

¹⁰ Eraker, *supra* note 9, at 573 (identifying potential problems with statutes that do not address technology); King, *supra* note 4, at 849.

¹¹ Robert H. Wood, *The Failure of Sexting Criminalization: A Plea for the Exercise of Prosecutorial Restraint*, 16 MICH. TELECOMM. & TECH. L. REV. 151, 169 (2009); King, *supra* note 4, at 846.

afforded to minors under the Constitution and the cases that have paved the way for modern First Amendment jurisprudence with regard to minors. It is particularly important to understand students' right to free speech within the realm of schools because schools are one of the primary avenues recent legislation uses to address sexting and cyberbullying.¹² It is also essential to acknowledge that there are limits on minors' First Amendment protections.¹³ This Part begins by discussing and analyzing four major Supreme Court cases. Each of these cases continues to play an integral role in the development of the modern free speech protections afforded to students in schools.

The foundational case for student free speech, *Tinker v. Des Moines Independent Community School District*,¹⁴ was decided by the Supreme Court in 1969.¹⁵ In *Tinker*, several students expressed their opposition to the Vietnam War by wearing black armbands to school.¹⁶ The students were sent home from school and suspended until they agreed to stop wearing the armbands.¹⁷ The students and their parents filed a Section 1983 lawsuit against the school, but the district court dismissed the complaint, stating that the school's action "was reasonable in order to prevent disturbance of school discipline."¹⁸ The Court of Appeals for the Eighth Circuit affirmed the district court's decision.¹⁹ The Supreme Court, however, granted certiorari and reversed the lower courts' decisions.²⁰ In its opinion, the Court noted that neither "students [n]or teachers shed their constitutional rights to freedom of speech . . . at the schoolhouse gate,"²¹ thereby acknowledging the need to balance school officials' authority to maintain control over the school environment with the protections afforded to minors under the First Amendment.²² The Court went on to state that "where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."²³ *Tinker* established the "substantial disruption" test as the standard for determining a school's right to regulate student speech.²⁴ This standard holds that school authorities can only repress student

¹² See Robert H. Wood, *The First Amendment Implications of Sexting at Public Schools: A Quandry for Administrators Who Intercept Visual Love Notes*, 18 J.L. & POL'Y 701, 728 (2010); King, *supra* note 4, at 858.

¹³ See *id.* at 729.

¹⁴ 393 U.S. 503 (1969); see also King, *supra* note 4, at 866.

¹⁵ *Tinker*, 393 U.S. 503.

¹⁶ *Id.* at 504.

¹⁷ *Id.*

¹⁸ *Id.* at 504–05 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 258 F. Supp. 971, 973 (1966)).

¹⁹ *Id.* at 505. The Court of Appeals for the Eighth Circuit affirmed the District Court's ruling without issuing an opinion. *Id.*

²⁰ *Id.* at 505, 514.

²¹ *Id.* at 506.

²² See *id.*

²³ *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

²⁴ King, *supra* note 4, at 867.

expression if they reasonably believe that the expression will lead to a “substantial disruption of or material interference with school activities.”²⁵

In 1986, the Supreme Court was again faced with the issue of school regulation of student speech.²⁶ This time, however, the Court acknowledged the limits placed on student speech and set forth a new standard for evaluating schools’ regulation of student expression.²⁷ In *Bethel School District v. Fraser*,²⁸ a student delivered a sexually explicit speech at a school assembly.²⁹ Following the speech, the school suspended the student for three days.³⁰ Both the district court and the court of appeals held that the school had violated the student’s First Amendment rights to freedom of speech.³¹ In its opinion, the Supreme Court noted a distinction between the armbands in *Tinker* and the sexually explicit content of the speech that was the subject of the appeal.³² Additionally, the Court found that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”³³ The Court said that the school had an interest in protecting minors from offensive speech³⁴ and went on to state that “[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as [the] respondent’s would undermine the school’s basic educational mission.”³⁵ Hence, the Court’s opinion in *Fraser* established that there are times when school officials have the authority to restrict student speech.

The Supreme Court took its analysis of student free speech one step further in *Hazelwood School District v. Kuhlmeier*³⁶ by distinguishing between particular student speech and school-sponsored student speech.³⁷ In *Hazelwood*, students sought to publish several stories in the school newspaper about Hazelwood students’ experiences with pregnancy and divorce.³⁸ The principal kept the stories from being published, claiming he was protecting the identity of the students in the stories.³⁹ The Supreme Court overturned the lower courts’ rulings that the school had violated

²⁵ *Tinker*, 393 U.S. at 514.

²⁶ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 677–78. In nominating a fellow student for student elective office, “Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.” *Id.*

³⁰ *Id.* at 678.

³¹ *Id.* at 679.

³² *Id.* at 685 (“Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint.”).

³³ *Id.* at 682.

³⁴ *Id.* at 683.

³⁵ *Id.* at 685.

³⁶ 484 U.S. 260 (1988).

³⁷ *See id.* at 261.

³⁸ *Id.* at 263.

³⁹ *Id.*

the students' First Amendment rights.⁴⁰ The Court held that "school facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public' or by some segment of the public."⁴¹ The Court found that the school had not created a public forum and thus was entitled to monitor the content of the school paper in a "reasonable manner."⁴² Furthermore, the Court stated that a school may "'disassociate itself' not only from speech that would 'substantially interfere with [its] work . . . or impinge upon the rights of other students,' but also from speech that is . . . unsuitable for immature audiences."⁴³ The Court distinguished *Hazelwood* from *Tinker* by stating that there is a different standard when a school chooses not to participate in the dissemination of the student speech in controversy.⁴⁴ In sum, the Court found that schools do not infringe on a student's First Amendment rights "so long as their actions are reasonably related to legitimate pedagogical concerns."⁴⁵

Morse v. Frederick,⁴⁶ the most recent case addressing the First Amendment rights of minors, was decided by the Supreme Court in 2007.⁴⁷ In *Morse*, a high school principal suspended a student for refusing to take down a banner that could have been interpreted as promoting illegal drug use.⁴⁸ The Court ruled for the school, holding that the school's reasons for impeding the student's speech were grounded in more than "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."⁴⁹ Preventing and deterring drug use by public school students is an "'important—indeed, perhaps compelling' interest"⁵⁰ and schools are not required to tolerate speech at school events that contributes to the dangers

⁴⁰ *Id.* at 266.

⁴¹ *Id.* at 267 (quoting *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 47 (1983)).

⁴² *Id.* at 270. The Court said that "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Id.* at 267 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)). The purpose of the school newspaper was to allow students to apply the skills they learned in a journalism course. *Id.* at 270. Because the school used the newspaper "as a supervised learning experience for journalism students," it did not create a public forum and, therefore, school officials had the authority to exercise reasonable control over the contents of the newspaper. *Id.*

⁴³ *Id.* at 271 (quoting *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (alterations in original) (citations omitted)).

⁴⁴ *Hazelwood*, 484 U.S. at 272–73.

⁴⁵ *Id.* at 273.

⁴⁶ 551 U.S. 393 (2007).

⁴⁷ *Id.*

⁴⁸ *Id.* at 396–97. The banner read, "BONG HiTS 4 JESUS." *Id.* at 397.

⁴⁹ *Id.* at 408 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–09 (1969)).

⁵⁰ *Id.* at 394–95 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995)).

associated with illegal activities.⁵¹ In *Morse*, the Court further narrowed *Tinker* by elaborating on schools' abilities to place limits on student speech.

It is important to note that the banner in *Morse* was not displayed on school property.⁵² The banner was unfurled across the street from the school, however, and the Court held that the banner still qualified as "'student' speech subject to school jurisdiction."⁵³ Yet this holding does not give schools carte blanche authority to control student speech that occurs off-campus.⁵⁴ In his dissent, Justice Stevens said that the student's speech in *Morse* would have been protected by the First Amendment but for the fact that the speech occurred at what the Court considered to be a school-sponsored event.⁵⁵

In each of the abovementioned cases, the speech at issue occurred either on school property or at a school-sponsored event,⁵⁶ and the Court has thoroughly addressed a school's ability to control student speech within a given set of boundaries.⁵⁷ Technological advancements, however, blur the limits of these boundaries. It is hard to definitively determine whether sexting and cyberbullying fall within the jurisdiction of schools because both activities occur in cyberspace, and it is unclear where cyberspace falls along the spectrum of a school's jurisdiction.⁵⁸ Furthermore, a school's ability to regulate student speech is directly analogous to state legislatures' ability to limit such speech. Both instances involve a governmental actor—whether it is a state-supported public school or the state government itself—placing limits on minors' free speech rights.

B. The Fourteenth Amendment Rights of Parents

In addition to the First Amendment concerns at issue in current and pending sexting and cyberbullying legislation, there are also potential Fourteenth Amendment issues. It is well established that parents have a fundamental right to direct and control the upbringing of their children, and there is no doubt that both parents and schools play an essential role in a child's development.⁵⁹ Consequently, "[p]ublic education creates opportunities for tension between parents and the state because each seeks to

⁵¹ See *id.* at 410.

⁵² *Id.*; see also Joseph A. Tomain, *Cyberspace Is Outside the Schoolhouse Gate: Offensive, Online Student Speech Receives First Amendment Protection*, 59 DRAKE L. REV. 97, 121 (2010).

⁵³ Tomain, *supra* note 52, at 121.

⁵⁴ *Id.* at 121–22.

⁵⁵ *Morse*, 551 U.S. at 434 (Stevens, J., dissenting); Tomain, *supra* note 52, at 122.

⁵⁶ Tomain, *supra* note 52, at 122.

⁵⁷ See *id.* at 122 (“[T]he *Morse* Court stated, ‘There is some uncertainty at the outer boundaries as to when courts should apply school speech precedents.’” (citing *Morse*, 551 U.S. at 401)).

⁵⁸ See *id.* at 122.

⁵⁹ Emily J. Brown, Note, *When Insiders Become Outsiders: Parental Objections to Public School Sex Education Programs*, 59 DUKE L.J. 109, 109–10 (2009).

influence child development,”⁶⁰ and issues arise when there is a divergence in the interests of parents and schools.⁶¹ For the purposes of this Note, it is important to analyze the parameters courts have placed on parents’ rights to control the upbringing of their children and how these parameters affect the criminalization of sexting and cyberbullying, particularly within the context of public schools.

The Supreme Court first addressed the relationship between parents’ fundamental right to choose how to raise their children and public schools’ authority to further educational goals in *Meyer v. Nebraska*.⁶² In that case, the Court invalidated a Nebraska law that prevented teachers from instructing students in any language other than English prior to eighth grade.⁶³ The Court interpreted the word “liberty,” as it is used in the Fourteenth Amendment, to include a person’s fundamental right to “establish a home and bring up children.”⁶⁴ The Court went on to state that the government cannot interfere with this right “under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation” to a substantial governmental purpose.⁶⁵ Although education is an important state interest that “should be diligently promoted,” the Court held that the law at issue did not further this governmental purpose.⁶⁶ Rather than protecting children’s health, Nebraska’s argued purpose, the Court found that the law stifled children’s health by restricting their mental activities.⁶⁷

The Court expanded on *Meyer* two years later in *Pierce v. Society of Sisters*,⁶⁸ which addressed an Oregon law requiring all children between the ages of eight and sixteen to attend public school.⁶⁹ The Court held that the statute was unconstitutional because it “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”⁷⁰ Once again acknowledging the important role public schools play in the proper development of children, the Court noted the states’ authority to reasonably regulate public schools in a manner that teaches students “good citizenship.”⁷¹ The Court continued, however, and said that “[t]he child is not the mere creature of the State [and] those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize

⁶⁰ *Id.* at 110.

⁶¹ *Id.* (discussing how tension can arise between parents and educators in this setting).

⁶² 262 U.S. 390 (1923).

⁶³ *Id.* at 397, 403; see also Brown, *supra* note 59, at 114–15; Gregory Z. Chen, Note, *Youth Curfews and the Trilogy of Parent, Child, and State Relations*, 72 N.Y.U.L. REV. 131, 140 (1997).

⁶⁴ *Meyer*, 262 U.S. at 399.

⁶⁵ *Id.* at 400.

⁶⁶ *Id.* at 400, 403.

⁶⁷ *Id.* at 403.

⁶⁸ 268 U.S. 510 (1925).

⁶⁹ *Id.* at 510.

⁷⁰ *Id.* at 534–35.

⁷¹ *Id.* at 534.

and prepare him for additional obligations.”⁷² *Pierce* established the precedent that public schools’ responsibility to educate children must yield to parents’ right to choose to teach their children through private education.⁷³

*Wisconsin v. Yoder*⁷⁴ is the last major case addressing parents’ fundamental right to control the upbringing of their children within the context of public schools.⁷⁵ At the time of the case, Wisconsin’s compulsory school-attendance law required children to attend school until they reached the age of sixteen.⁷⁶ Members of the Old Order Amish religion and the Conservative Amish Mennonite Church were convicted of violating the law because they refused to send their children to either public or private school once they had completed the eighth grade.⁷⁷ The Supreme Court overturned the convictions and held that the law was unconstitutional under both the First and Fourteenth Amendments.⁷⁸ Interpreting the “additional obligations” language in *Pierce* to include religious beliefs, the Court expanded the scope of *Pierce* and allowed parents’ right to control the religious upbringing of their children to trump states’ interest in public education. It is important to recognize that much of the Court’s decision was grounded in the religious justifications offered by the parents and the fact that the children would only miss two years of formal public education.⁷⁹ Therefore, it can be inferred that had the children been younger or prevented from attending public school for reasons not based on religious beliefs, the Court may have reached a different conclusion.

Despite the Court’s long history of protecting parental rights,⁸⁰ courts have not yet considered parents’ rights to condone or control their children’s actions in cyberspace. Many states’ sexting and cyberbullying statutes utilize public schools as a means of addressing these phenomena.⁸¹ Parental challenges to these statutes are inevitable, and the laws will have to overcome strict scrutiny⁸² in order to be

⁷² *Id.* at 535.

⁷³ *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

⁷⁴ 406 U.S. 205 (1972).

⁷⁵ *See Brown*, *supra* note 59, at 115.

⁷⁶ *Yoder*, 406 U.S. at 207.

⁷⁷ *Id.* at 207–08. The children at issue were fifteen and fourteen when they completed eighth grade. *Id.* at 207.

⁷⁸ *Id.* at 234. The First Amendment objections to the law were based on its infringement on the respondents’ right to freedom of religion. *Id.* at 218.

⁷⁹ *Id.* at 218, 222 (“The impact of the compulsory-attendance law on respondents’ practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs.”); *see also* Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 874 (2007).

⁸⁰ *See Wood*, *supra* note 11, at 169.

⁸¹ *See Wood*, *supra* note 12, at 702.

⁸² For the purposes of this Note, strict scrutiny “requires the government, in order to justify content-based regulations of protected speech, to demonstrate that the regulation is narrowly tailored to advance a compelling governmental interest.” Matthew D. Bunker, et al.,

deemed constitutional.⁸³ The effectiveness of these statutes will depend on whether courts will force public schools to yield to parents' interests within the context of sexting and cyberbullying.

II. SEXTING

“Sexting”—a trend in which teens send sexually explicit photographs to one another using electronic media—has gained national media attention in recent years.⁸⁴ This attention has sparked a debate “regarding the appropriate methods of prevention and response to adolescents” who sext.⁸⁵ In 2010, the United States Court of Appeals for the Third Circuit found itself in the center of this contentious debate.⁸⁶

In *Miller v. Mitchell*,⁸⁷ school officials in Tunkhannock, Pennsylvania, the school district where the accused teens resided, found nude and semi-nude pictures of the accused teens on the cell phones of other students.⁸⁸ After learning that several male students had traded the photos with one another, school officials turned both the images and the students over to local authorities.⁸⁹ Several months after the discovery of these photos, District Attorney George Skumanick sent a letter to the parents of the accused students.⁹⁰ In the letter, Skumanick threatened to charge the students with possession or distribution of child pornography unless the teens agreed to attend an educational class.⁹¹ The students' parents filed suit against the District Attorney, seeking a temporary restraining order that would prevent Skumanick from filing criminal charges against the teens.⁹² In their complaint, the plaintiffs alleged that Skumanick “had threatened prosecution in retaliation against their exercise of their First Amendment rights to free expression and right to be free from compelled expression, as well as their parents' exercise of their Fourteenth Amendment rights to direct their children's upbringings.”⁹³

Ruling for the plaintiffs, the court held that any prosecution would violate the parents' substantive due process right to raise their children without government

Strict in Theory, But Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech, 16 COMM. L. & POL'Y 349, 350 (2011) (citing *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000)).

⁸³ See Wood, *supra* note 11, at 169.

⁸⁴ See Wastler, *supra* note 5, at 687.

⁸⁵ *Id.* at 688.

⁸⁶ *Id.* at 689.

⁸⁷ 598 F.3d 139 (3d Cir. 2010).

⁸⁸ *Id.* at 143.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 145. As a procedural note, Jeff Mitchell defeated Skumanick while the case was on appeal. *Id.*

⁹³ Wastler, *supra* note 5, at 690.

interference.⁹⁴ The court did acknowledge, however, that there are some instances in which parents' Fourteenth Amendment right to control the upbringing of their children must yield to a school's interest in maintaining the school environment, due to school officials' "'secondary responsibility' in the upbringing of children."⁹⁵ District attorneys, however, can be distinguished from schools because they do not possess the same "secondary responsibility."⁹⁶ Further, the court held that any criminal charges filed against the teens would be retaliation in violation of the teens' constitutional right to be free from compelled speech.⁹⁷ Unfortunately, the opinion does not address what, if any, implications prosecution would have had on the teens' First Amendment right to free speech.⁹⁸

A. What Is "Sexting"?

Sexting is defined 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."⁹⁹ The phenomenon first gained media attention in the spring of 2009,¹⁰⁰ and empirical data suggests sexting is pervasive among teens and young adults.¹⁰¹ In a recent study, the National Campaign to Prevent Teen and Unplanned Pregnancy reported that twenty percent of the teens surveyed had electronically sent or posted online nude or semi-nude pictures or videos of themselves.¹⁰² Additionally, thirty-nine percent of the teens surveyed said they had sent sexually suggestive messages to another person, either by text message, e-mail, or instant message.¹⁰³ Even more alarming, thirty-six percent of teen girls and thirty-nine percent of teen boys surveyed reported that sexually suggestive messages are often shared with people other than the intended recipient.¹⁰⁴ These statistics highlight the prevalence and the danger of teen sexting.

⁹⁴ *Miller*, 598 F.3d at 150–51.

⁹⁵ *Id.* (citation omitted).

⁹⁶ *Id.* at 151.

⁹⁷ *Id.* at 152.

⁹⁸ *See id.* at 151–52, 155 (discussing only the right not to speak considerations, but not the right to speech issues).

⁹⁹ *Id.* at 143.

¹⁰⁰ Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 *COMMLAW CONSPICUOUS* 1, 9 (2009).

¹⁰¹ *See* THE NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, *SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS* (2008), http://www.thenationalcampaign.org/sextech/pdf/sextech_summary.pdf [hereinafter NCPTUP].

¹⁰² *Id.* at 1.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 3.

What has led to the increasing rate at which teens are sexting? Technological advances have certainly played a role in facilitating the ease with which teens can engage in sexting.¹⁰⁵ Today, the cellular phone is the primary means by which teens communicate with one another.¹⁰⁶ In 2009, the Pew Research Center reported that fifty-eight percent of teens own a cellular phone by the age of twelve.¹⁰⁷ Teens use cellular phones to send text messages, post information on popular social media websites, and share pictures with friends.¹⁰⁸ Although technology has countless benefits, it can also produce harmful side effects.¹⁰⁹ The artificial atmosphere created by cellular phones and the Internet aggravates the dangers associated with sexting because it enables teens to operate under a cloak of anonymity, free from many of the repercussions that exist beyond the virtual world.¹¹⁰

B. Why Do Teens Sext, Anyway?

In order to understand the ramifications of sexting, it is important to look at why teens sext in the first place. At least one scholar suggests that sexting is the result of a combination of various factors including, among other things, technology, hormones, and peer pressure.¹¹¹ Recent studies support this assertion. Two-thirds of the sexting teens surveyed by the National Campaign to Prevent Teen and Unplanned Pregnancy reported sexting with other teens to be “fun or flirtatious.”¹¹² Forty-four percent of teens who sext said they sext in response to sexually suggestive messages they receive from other teens.¹¹³ Other teens reported sexting because they thought it was a “joke.”¹¹⁴ Moreover, fifty-two percent of teen girls said they sent the messages as a “sexy present” for their boyfriends.¹¹⁵

¹⁰⁵ Eraker, *supra* note 9, at 560.

¹⁰⁶ Calvert, *supra* note 100, at 16 (“The cellular phone, for example, is ‘the single-most popular consumer electronic device.’” (quoting Prashant Krishnamurphy, *Cell Phones*, in 3 *COMPUTER SCI.* 32, 35 (Roger R. Flynn ed., 2002))).

¹⁰⁷ AMANDA LENHART, PEW INTERNET & AM. LIFE PROJECT, *TEENS AND SEXTING 2* (2009), http://www.pewinternet.org/~media/Files/Reports/2009/PIP_Teens_and_Sexting.pdf.

¹⁰⁸ See, e.g., Arcabascio, *supra* note 2, at 5–6; LENHART, *supra* note 107, at 2.

¹⁰⁹ Anderson & Rainie, *supra* note 3, at 1–2.

¹¹⁰ Eraker, *supra* note 9, at 565–66.

¹¹¹ NANCY WILLARD, CTR. FOR SAFE & RESPONSIBLE INTERNET USE, *SEXTING & YOUTH: ACHIEVING A RATIONAL RESPONSE 1* (May 24, 2010), <http://csriu.org/documents/documents/sexting.pdf> (“Among teens, the sexting phenomenon appears to be the result of a combination of factors: digital imaging technology that can easily capture and send images, impulsivity, raging hormones, peer or partner pressure, and teen’s [sic] biological incapability of effectively predicting the potential negative harmful consequences of their actions.”).

¹¹² NCPTUP, *supra* note 101, at 4.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

An analysis of this empirical data supports several conclusions.¹¹⁶ First, it is clear that teens' sexting activity is closely tied to their personal relationships.¹¹⁷ Indeed, teens report engaging in sexting because they think it increases the likelihood that they will date or "hook up" with the sext's recipient.¹¹⁸ Second, sexting is equally prevalent among teen boys and girls.¹¹⁹ The increased sexualization of American youth is a driving force behind this statistic.¹²⁰ In 2007, the American Psychological Association Task Force on the Sexualization of Girls developed the theory of self-sexualization.¹²¹ This theory suggests that teen girls treat themselves as sexual objects in order to please and be rewarded by both their peers and society as a whole.¹²² Arguably, teen girls engage in sexting at the same rate as boys because "they perceive . . . social advantages and rewards from such conduct."¹²³ Although the theory of self-sexualization focuses on girls, evidence shows that sexualized images in the media influence teen boys and affect their "self-image and attitudes as well as their perceptions about girls and appropriate sexual behavior."¹²⁴ Finally, studies also support the conclusion that many teens engage in sexting because of peer pressure from other teens.¹²⁵ This is not surprising because peer pressure has long played a role in teens' decision-making processes.

C. Sexting Is Dangerous

In addition to the various arguments cited to explain this growing phenomenon, it is important to note the many dangers associated with sexting, particularly because teens are sexting at such a young age. Many of the dangers associated with sexting result from the dissemination of information contained in a sexually explicit electronic message.¹²⁶ Further, sexually suggestive messages sent by teens are often shared with people other than the intended recipient.¹²⁷ A large percentage of teen boys and girls report that sexually explicit text messages are often forwarded to people other than

¹¹⁶ WILLARD, *supra* note 111, at 3.

¹¹⁷ *Id.* Willard reports that both current and desired relationships play a role in teen sexting. *Id.*

¹¹⁸ *Id.*

¹¹⁹ LENHART, *supra* note 107, at 4; WILLARD, *supra* note 111, at 3.

¹²⁰ *See* WILLARD, *supra* note 111, at 6.

¹²¹ *See* Calvert, *supra* note 100, at 12–13 (citing AMERICAN PSYCHOLOGICAL ASSOCIATION, REPORT OF THE APA TASK FORCE ON THE SEXUALIZATION OF GIRLS 18 (2007), available at <http://www.apa.org/pi/wpo/sexualizationrep.pdf> [hereinafter APA REPORT]); *see also* WILLARD, *supra* note 111, at 6 (describing the sexualization of teens).

¹²² *See* Calvert, *supra* note 100, at 12–13 (citing APA REPORT).

¹²³ *See id.*

¹²⁴ WILLARD, *supra* note 111, at 6.

¹²⁵ *Id.* at 2.

¹²⁶ *See* Calvert, *supra* note 100, at 23–25 (listing dangers associated with sexting).

¹²⁷ NCPTUP, *supra* note 101, at 3.

the message's intended recipient.¹²⁸ Teens seem to know that the sexts they send rarely remain confidential,¹²⁹ but it is unclear whether teens truly understand the breadth of the negative impacts sexting can have on their lives.

1. Emotional Consequences

In 2008, eighteen-year-old Jessica Logan took nude photographs of herself and sent them to her boyfriend.¹³⁰ When they broke up, he forwarded the pictures to other teens.¹³¹ After enduring months of vicious harassment, Jessica hanged herself on July 3, 2008.¹³² In June of 2009, Hope Witsell sent topless photos of herself to a boy she liked.¹³³ She was only thirteen at the time.¹³⁴ The sext was subsequently forwarded to Hope's classmates and, as a result, Hope was relentlessly bullied.¹³⁵ Ultimately, the shame and embarrassment proved to be too much for Hope, and she killed herself in September of 2009.¹³⁶ Sadly, stories like Jessica Logan's and Hope Witsell's are becoming increasingly common.

Humiliation and embarrassment are among the most common emotional side effects of sexting, especially when nude photos are sent to people other than the intended recipients.¹³⁷ Teens featured in disseminated sexual images are often harassed by other teens who view the image.¹³⁸ "Revenge porn," an act by which teens disseminate images of an ex-boyfriend or ex-girlfriend following a break-up for the purposes of humiliating that person, is also an increasingly common consequence of sexting.¹³⁹ Unfortunately, as in the cases of Jessica Logan and Hope Witsell, the aftermath of sexting has led some teens to commit suicide.¹⁴⁰

¹²⁸ See *supra* note 105 and accompanying text.

¹²⁹ NCPTUP, *supra* note 101, at 3 ("75% of teens . . . say sending sexually suggestive content 'can have serious negative consequences.'").

¹³⁰ Mike Celizic, *Her Teen Committed Suicide Over 'Sexting,'* TODAY.COM (Mar. 6, 2009), <http://today.msnbc.msn.com/id/29546030>.

¹³¹ *Id.*

¹³² *Id.*; Sherry Capps Cannon, *OMG! "Sexting": First Amendment Right or Felony?*, 38 S.U. L. REV. 293, 294 (2011).

¹³³ Michael Inbar, *'Sexting' Bullying Cited in Teen's Suicide,* TODAY.COM (Dec. 2, 2009), <http://today.msnbc.msn.com/id/34236377>.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See Calvert, *supra* note 100, at 23 (citing Ellen Goodman, *It's Not About Sex; Sexting Is Really About Trust, and the Violation Thereof,* PITTSBURGH POST-GAZETTE, Apr. 24, 2009, <http://www.post-gazette.com/pg/09114/965103-109.stm>).

¹³⁸ *Id.*; see also WILLARD, *supra* note 111, at 4.

¹³⁹ See WILLARD, *supra* note 111, at 5 (citing *Revenge Porn Definition,* URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=revenge+porn>).

¹⁴⁰ Calvert, *supra* note 100, at 4 (citing Jim Siegel, *Lawmaker Crafting Bill to Set Penalty for Teens 'Sexting,'* COLUMBUS DISPATCH, Mar. 27, 2009, at B3); see also Celizic, *supra* note 130; Inbar, *supra* note 133.

2. Long-Term & Legal Consequences

In addition to emotional consequences, sexting can also have long-term consequences that will affect teens for the rest of their lives.¹⁴¹ Once an image is posted on the Internet or distributed to other teens, it is virtually impossible to ever truly make that image disappear.¹⁴² Parents, friends, and even strangers can gain access to the images long after the images are “deleted.”¹⁴³ Additionally, sexual images may resurface years later, resulting in economic harm.¹⁴⁴ “[J]ob loss or inability to obtain employment” may result if employers view “images that minors have sexted of themselves.”¹⁴⁵

Many teens are unaware that sending sexually explicit messages to other teens can also have legal ramifications.¹⁴⁶ In some states, teen sextors can be prosecuted under child pornography laws.¹⁴⁷ If convicted, a teen may be required to register as a sex offender—a label that will permanently alter the course of the teen’s life.¹⁴⁸ Rather than prosecute teen sextors under child pornography laws, some states have opted to enact laws that allow the direct prosecution of sexting itself.¹⁴⁹ Although it has been argued that prosecuting teens in this manner is both a waste of community resources and an ineffective means of deterring sexting,¹⁵⁰ the fact remains that the potential legal ramifications for teen sextors are serious.¹⁵¹

D. State Legislative Initiatives Aimed at Sexting

Over the last couple of years, many states have begun to explore legislative means of combating sexting.¹⁵² In 2011 alone “at least [twenty-one] states and Guam

¹⁴¹ Day, *supra* note 1, at 74–75.

¹⁴² NCPTUP, *supra* note 101, at 2.

¹⁴³ *Id.*

¹⁴⁴ Calvert, *supra* note 100, at 24.

¹⁴⁵ *Id.*

¹⁴⁶ See Day, *supra* note 1, at 74 (“[T]eens rarely consider the possibility of serious future consequences from their digital flirting.”) (citing NCPTUP, *supra* note 101; Janice Gatti, *MTV & The Associated Press Digital Abuse Study Reveals Pervasiveness of ‘Sexting,’ Cyberbullying and Digital Dating Abuse*, MTV PRESS (Dec. 3, 2009), http://mtvpress.com/press/release/mtv_the_associated_press_digital_abuse_study_reveals_pervasiveness_of_sexti/).

¹⁴⁷ Day, *supra* note 1, at 75.

¹⁴⁸ *Id.* at 74–75. Terri Day argues that “[p]rosecuting teen sextors as child pornographers does not do justice to the victim, offender, or the community” and that “such a policy dilutes the importance of sex offender registries by including teen sextors.” *Id.* at 76 (citations omitted).

¹⁴⁹ See *infra* Part II.D.

¹⁵⁰ Day, *supra* note 1, at 76.

¹⁵¹ *Id.* at 74–75.

¹⁵² See *2011 Legislation Related to “Sexting,”* NATIONAL CONFERENCE OF STATE LEGISLATURES (updated Sept. 2, 2011), <http://www.ncsl.org/default.aspx?tabid=22127> [hereinafter NCSL, *2011 Sexting*]; *2010 Legislation Related to “Sexting,”* NATIONAL CONFERENCE OF STATE LEGISLATURES (updated Jan. 4, 2011), <http://www.ncsl.org/default.aspx?tabid=19696> [hereinafter NCSL, *2010 Sexting*]; *2009 Sexting Legislation*, NATIONAL

introduced bills or resolutions aimed at ‘sexting.’”¹⁵³ “Th[is] legislation generally aims to educate young people about the risks of sexting, deter them from the practice and apply appropriate penalties to those who do engage in sexting.”¹⁵⁴ In 2011, the California Assembly introduced a bill stating its intent to enact legislation addressing sexting.¹⁵⁵ Other states have considered creating commissions to study sexting and make recommendations based on their findings.¹⁵⁶ In 2009, for example, the Indiana Senate passed a resolution asking “the sentencing policy study committee [to study] issues concerning . . . the use of cellular telephones to send explicit photographs and video (‘sexting’), especially by children . . . as [it] appl[ies] to sex offenses covered by Indiana statutes.”¹⁵⁷ Similarly, in 2010, Rhode Island established a commission “to study and make recommendations to the Senate relating to . . . sexting.”¹⁵⁸

Some states have elected to pursue legislation that focuses on sexting education initiatives. For example, in 2011, New Jersey considered a bill requiring school districts to distribute annually information to students and parents about the dangers of sexting.¹⁵⁹ The New York Senate is considering a bill that establishes an educational outreach program aimed at educating the public of the dangers associated with sexting.¹⁶⁰ Although this list is not exhaustive, the initiatives of New Jersey and New York provide examples of the educational approaches some states are taking to counter teen sexting.

The most controversial sexting legislation, which is the focus of this Note, makes engaging in sexting unlawful.¹⁶¹ In 2011, South Carolina considered a bill that, if enacted, would amend the state’s Code and make sexting a civil offense.¹⁶² In

CONFERENCE OF STATE LEGISLATURES (revised Sept. 1, 2010), <http://www.ncsl.org/default.aspx?tabid=17756> [hereinafter NCSL, 2009 *Sexting*].

¹⁵³ NCSL, 2011 *Sexting*, *supra* note 152. Sixteen states introduced or considered similar bills in 2010. NCSL, 2010 *Sexting*, *supra* note 152.

¹⁵⁴ NCSL, 2010 *Sexting*, *supra* note 152.

¹⁵⁵ S.B. 916, 2011 Assemb. (Cal. 2011) (“It is the intent of the Legislature to enact legislation to address the activity commonly referred to as ‘sexting’ as it pertains to minors.”).

¹⁵⁶ NCSL, 2010 *Sexting*, *supra* note 152. At least twelve states considered similar bills in 2009. NCSL, 2009 *Sexting*, *supra* note 152.

¹⁵⁷ S. Res. 90, 116th Gen. Assemb., 1st Reg. Sess. (Ind. 2009).

¹⁵⁸ S. Res. 2871, 2010 Gen. Assemb., Jan. Sess. (R.I. 2010).

¹⁵⁹ S. 2698, 214th Leg., Reg. Sess. (N.J. 2011) (“The information shall include, but not be limited to, a description of the practice and its legal, psychological, and sociological implications.”).

¹⁶⁰ S.B. 3439-A, 2011–2012 Reg. Sess. (N.Y. 2011).

¹⁶¹ For examples, see NCSL, 2010 *Sexting*, *supra* note 152.

¹⁶² H. 3130, 119th Gen. Assemb., Reg. Sess. (S.C. 2011). The bill makes it unlawful for a minor who is at least twelve years of age . . . to use a telecommunications device to knowingly transmit or distribute to another person a photograph, text message with a photo attachment, or other transmitted material of any kind depicting himself or another person who is less than eighteen years of age in a state of sexual activity or a state of sexually explicit nudity.

2010, the Ohio General Assembly considered a bill prohibiting minors from sending any type of nude image using a telecommunications device.¹⁶³ Teens who violated the statute would be charged with a misdemeanor “of illegal use of a telecommunications device involving a minor in a state of nudity.”¹⁶⁴ Furthermore, Pennsylvania is seeking to amend its list of Crimes and Offenses to include an offense of “sexting by minors.”¹⁶⁵ The bill states that “[a] minor who knowingly transmits an electronic communication or disseminates a depiction of himself or herself or another minor, or possesses a depiction of another minor, engaging in sexually explicit conduct commits a misdemeanor of the second degree.”¹⁶⁶

Still other states have used child pornography laws to prosecute teen sextors.¹⁶⁷ Child pornography is a class of obscenity that is not afforded the protections of the First Amendment.¹⁶⁸ Child pornography statutes “typically prohibit the production, dissemination, or possession of sexually explicit images of minors.”¹⁶⁹ The problem with using child pornography laws in the context of sexting stems from the fact that the legislators who drafted these statutes did not anticipate a trend by which teenagers would willingly transmit sexually explicit or nude photographs of themselves to other minors.¹⁷⁰ Consequently, prosecuting sexting cases under child pornography laws has been met with opposition because doing so “would in effect be declaring the subjects of the images simultaneous victims and perpetrators.”¹⁷¹

Many states have acknowledged that sexting is a serious issue that must be addressed. As evidenced by the analysis above, however, these states have differing views on what constitutes the proper legislative response. Although this Note commends many of the states for utilizing non-criminal measures to tackle the

Id. The bill also grants judges the authority to require offenders to complete an educational program about the legal and non-legal harms of sexting. *Id.*

¹⁶³ S.B. 103, 128th Gen. Assemb., Reg. Sess. (Ohio 2009); H.B. 132, 128th Gen. Assemb., Reg. Sess. (Ohio 2009) (“No minor, by use of a telecommunications device, shall recklessly create, receive, exchange, send, or possess a photograph, video, or other material that shows a minor in a state of nudity.”).

¹⁶⁴ H.B. 132, 128th Gen. Assemb., Reg. Sess. (Ohio 2009).

¹⁶⁵ H.B. 815, 2011 Gen. Assemb., Reg. Sess. (Pa. 2011).

¹⁶⁶ *Id.* For the purposes of this bill, a “minor” is a person who is thirteen years of age or older and less than eighteen years of age. *Id.*

¹⁶⁷ Wastler, *supra* note 5, at 687.

¹⁶⁸ Wood, *supra* note 11, at 170 (“Since 1982, the U.S. Supreme Court has maintained that child pornography is a category of obscenity not covered by First Amendment protection.”).

¹⁶⁹ Wastler, *supra* note 5, at 693.

¹⁷⁰ *Id.* at 695 (“Legislators sought to target sexual abuse of children, ‘a most serious crime and an act repugnant to the moral instincts of a decent people.’”) (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002)).

¹⁷¹ *Id.* at 694; *see also* Calvert, *supra* note 100, at 46 (“To the extent that a sexting image is made by a minor, voluntarily and of his or her own free will, there would seem to be little reason to punish the creator at all.”).

problem of sexting, the inconsistency of the initiatives taken by the states leaves much to be desired.

III. CYBERBULLYING

Cyberbullying is another teen trend that has gained national media attention. This phenomenon is the “modern” way adolescents tease and torment one another.¹⁷² Cyberbullying first gained national attention in 2006, when thirteen-year-old Megan Meier took her own life after being bullied over the Internet.¹⁷³ Prior to her death, Megan engaged in an online relationship with a teen boy named Josh Evans.¹⁷⁴ Megan met Josh on a popular social networking site.¹⁷⁵ Over time, the relationship deteriorated and Josh began to verbally abuse Megan.¹⁷⁶ In October of 2006, the relationship took a fateful turn when Josh told Megan “the world would be a better place without her in it.”¹⁷⁷ Josh’s harsh comments led Megan into a deep depression and eventually caused her to take her own life.¹⁷⁸ Shockingly, following Megan’s suicide it was discovered that Josh Evans had never existed at all;¹⁷⁹ rather, he was the cruel fabrication of Lori Drew, the mother of one of Megan’s classmates.¹⁸⁰ Although the circumstances of Meier’s case are rare and most cyberbullying victims do not resort to suicide, cyberbullying has many other serious consequences.¹⁸¹

A. Defining Cyberbullying

The federal government has defined cyberbullying as

any type of harassment or bullying (i.e. teasing, telling lies, making fun of someone, making rude or mean comments, spreading rumors, or making threatening or aggressive comments) that occurs through e-mail, a chat room, instant messaging, a website (including blogs), text messaging, videos, or pictures posted on websites or sent through cell phones.¹⁸²

¹⁷² See Kevin Turbert, Note, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 SETON HALL LEGIS. J. 651, 652–53 (2009).

¹⁷³ See *id.* at 655; see also King, *supra* note 4, at 846.

¹⁷⁴ United States v. Drew, 259 F.R.D. 449, 452 (C.D. Cal. 2009).

¹⁷⁵ *Id.*

¹⁷⁶ King, *supra* note 4.

¹⁷⁷ Drew, 259 F.R.D. at 452.

¹⁷⁸ King, *supra* note 4, at 847.

¹⁷⁹ Drew, 259 F.R.D. at 452.

¹⁸⁰ King, *supra* note 4, at 847.

¹⁸¹ Turbert, *supra* note 172, at 656.

¹⁸² Clay Calvert, *Fighting Words in the Era of Texts, IMs and E-mails: Can a Disparaged Doctrine be Resuscitated to Punish Cyber-Bullies?*, 21 DEPAUL J. ART. TECH. & INTELL.

Cyberbullying most often occurs in chat rooms and on social networking websites,¹⁸³ but cellular phones are also commonly used by teens to cyberbully.¹⁸⁴ Teens also cyberbully using instant messaging.¹⁸⁵

Within the general conception of cyberbullying, several more specific subcategories exist.¹⁸⁶ This Note briefly discusses three of the most prevalent subcategories. Cyberbullying takes the form of harassment when mean, insulting messages are repeatedly sent to the victim.¹⁸⁷ Impersonation cyberbullying, the form of cyberbullying in Megan Meier's case, occurs when the cyberbully pretends to be someone else.¹⁸⁸ Arguably the most extreme form of cyberbullying is cyberstalking.¹⁸⁹ Cyberstalking occurs when teen cyberbullies use technology to instill significant fear in their victims, typically through intense harassment and threats.¹⁹⁰ As a result, teen victims "may fear for their safety offline due to harassment and threats conveyed online."¹⁹¹ Regardless of what form of cyberbullying a particular instance takes, there is no doubt that cyberbullying is a harmful form of social aggression.¹⁹²

Like sexting, technological advances have made it easy for teens to engage in cyberbullying.¹⁹³ Modern youth have virtually unlimited access to technology.¹⁹⁴ In fact, eighty percent of teens report that "they either did not have parental rules about Internet use or found ways around the rules."¹⁹⁵ Further, statistics show that

PROP. L. 1, 9 (2010).

¹⁸³ Sameer Hinduja & Justin W. Patchin, *Cyberbullying: Identification, Prevention, and Response*, CYBERBULLYING RESEARCH CENTER, at 1 (2010), http://www.cyberbullying.us/Cyberbullying_Identification_Prevention_Response_Fact_Sheet.pdf.

¹⁸⁴ NAT'L CRIME PREVENTION COUNCIL, STOP CYBERBULLYING BEFORE IT STARTS, <http://www.npcp.org/resources/files/pdf/bullying/cyberbullying.pdf>.

¹⁸⁵ Hinduja & Patchin, *supra* note 183, at 1.

¹⁸⁶ See, e.g., NANCY WILLARD, CTR. FOR SAFE & RESPONSIBLE USE OF THE INTERNET, EDUCATOR'S GUIDE TO CYBERBULLYING, CYBERTHREATS, & SEXTING (2005), <http://www.cyberbully.org/documents/documents/educatorsguide.pdf> (discussing the various forms of cyberbullying).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*; see also King, *supra* note 4, at 847 (describing the impersonation cyberbullying of Megan Meier); NAT'L CRIME PREVENTION COUNCIL, *supra* note 184 ("Nearly 20 percent of teens had a cyberbully pretend to be someone else in order to trick them online, getting them to reveal personal information. . . . Thirteen percent of teens learned that a cyberbully was pretending to be them while communicating with someone else.").

¹⁸⁹ See WILLARD, *supra* note 186, at 1.

¹⁹⁰ *Id.*

¹⁹¹ SAMEER HINDUJA & JUSTIN W. PATCHIN, CYBERBULLYING RESEARCH CTR., CYBERBULLYING RESEARCH SUMMARY: EMOTIONAL AND PSYCHOLOGICAL CONSEQUENCES 2 (2009), http://www.cyberbullying.us/cyberbullying_emotional_consequences.pdf.

¹⁹² See WILLARD, *supra* note 186, at 1.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ NAT'L CRIME PREVENTION COUNCIL, *supra* note 184, at 1.

cyberbullying occurs at an alarming rate.¹⁹⁶ A recent survey conducted by the National Crime Prevention Council reports that forty-three percent of teens surveyed have been victims of cyberbullying this year alone.¹⁹⁷ Of this number, almost twenty percent reported being cyberbullied by someone who pretended to be someone else online.¹⁹⁸ Seventeen percent of the teens surveyed said another person has started a false rumor about them on the Internet.¹⁹⁹ Cyberbullying, however, is not limited to words.²⁰⁰ Ten percent of the teens surveyed reported being victimized when someone posted “unflattering pictures of them online, without permission.”²⁰¹

So, why do teens cyberbully each other? Many teens report engaging in cyberbullying because they think it’s funny.²⁰² Others say they simply wish to hurt or embarrass their victim.²⁰³ Not surprisingly, many teens attribute their involvement in cyberbullying to peer pressure they feel from other teens.²⁰⁴ Regardless of the reasons teens give to explain why they cyberbully, the underlying motivations of cyberbullies are practically identical to those of traditional bullies.²⁰⁵

B. Dangers of Cyberbullying

1. Comparing Cyberbullying to Traditional Bullying

Although cyberbullying occurs through electronic communication rather than physical contact, a cyberbully’s ultimate goal is virtually the same as that of a traditional bully.²⁰⁶ Cyberbullies seek to assert a position of power from which they can make their victims feel weak and vulnerable.²⁰⁷ Reports show that cyberbullying can be more emotionally damaging to its victims than traditional bullying.²⁰⁸ This can be attributed in part to the role technology plays in cyberbullying.²⁰⁹ Once a cyberbully makes a post on a social networking site or writes something about another person in their blog, for example, the harmful comment is permanently on the Internet and is freely accessible to others.²¹⁰

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *See id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *See id.*

²⁰⁴ *Id.*

²⁰⁵ Turbert, *supra* note 172, at 653.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *See id.* at 653–54 (citations omitted).

²⁰⁹ *See id.* at 653–55.

²¹⁰ *Id.* at 654–55.

One of the main reasons cyberbullying is more dangerous than traditional bullying stems from the fact that cyberbullying victims lack a safe retreat.²¹¹ A cyberbully can follow his or her victim home from school and penetrate the home environment.²¹² Today's youth are connected to technology virtually twenty-four hours a day, and are therefore "susceptible to victimization (and able to act on mean intentions toward others) around the clock."²¹³ Even if a victim does not use technology, they can nevertheless be cyberbullied.²¹⁴ Cyberbullies often use the Internet to create defamatory websites about their victims.²¹⁵ Additionally, many cyberbullying victims do not know "who the bully is, or why they are being targeted."²¹⁶ Parents and schools have difficulty monitoring cyberbullying because it can be done discretely using technology.²¹⁷ Even if parents and schools do actively monitor teens' activities, many lack the technological expertise that would enable them to discover what teens are doing online.²¹⁸ Finally, cyberbullying is more dangerous than traditional bullying because cyberbullies cannot see the impact their taunting has on the victim.²¹⁹ Teens tend to be more cruel when they are sheltered from the victim's response.²²⁰ Cyberbullies are essentially desensitized to the harm they are causing and, as a result, may go beyond the boundaries of traditional bullying.²²¹

2. Effects on the Victim

"[C]yberbullying can elicit a strong emotional response from teens."²²² Indeed, it can cause teens to experience "serious psychological harm, including depression, low self-esteem, anxiety, alienation, and suicidal intentions."²²³ Anger is also a frightening side effect of cyberbullying.²²⁴ In fact, almost thirty percent of cyberbullying victims reported wanting revenge against their attacker.²²⁵ Cyberbullying can also

²¹¹ *Id.* at 654.

²¹² *See* Hinduja & Patchin, *supra* note 183, at 2.

²¹³ *Id.*

²¹⁴ Calvert, *supra* note 182, at 20 (quoting NANCY WILLARD, CYBERBULLYING AND CYBERTHREATS: RESPONDING TO THE CHALLENGE OF ONLINE SOCIAL AGGRESSION, THREATS, AND DISTRESS 48 (1st ed. 2007)).

²¹⁵ *Id.* at 20.

²¹⁶ HINDUJA & PATCHIN, *supra* note 191, at 2.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ Calvert, *supra* note 182, at 20 (citing WILLARD, *supra* note 215, at 33).

²²⁰ *See* Hinduja & Patchin, *supra* note 183, at 2.

²²¹ Calvert, *supra* note 182, at 20 (citing WILLARD, *supra* note 215, at 33).

²²² NAT'L CRIME PREVENTION COUNCIL, *supra* note 184.

²²³ King, *supra* note 4, at 851 (citing Megan Meier Cyberbullying Prevention Act, H.R. 6123, 110th Cong. (2008)).

²²⁴ NAT'L CRIME PREVENTION COUNCIL, *supra* note 184.

²²⁵ *Id.*

slow teens' cognitive development by affecting their ability to make emotional and social adjustments.²²⁶ Additionally, studies show that victims of cyberbullying are more likely to "engage in criminal conduct in the future."²²⁷ Most disheartening, cyberbullying increases the likelihood that a teen victim will commit or attempt to commit suicide.²²⁸

C. Current and Pending Cyberbullying Legislation

There is no doubt that cyberbullying has serious negative effects on its victims, and parents, communities, and schools across the country are demanding a solution.²²⁹ Consequently, legislators nationwide are attempting to create an appropriate legislative response aimed at both punishing and deterring teen cyberbullying.

1. State Legislation

As national media continues to highlight the negative impacts cyberbullying has on teens,²³⁰ there has been a push within the states to pass laws criminalizing cyberbullying.²³¹ While some states have opted to use existing laws to police cyberbullying,²³² others have implemented new laws that expressly address cyberbullying in order to avoid having to manipulate cyberbullying cases to fit the mold of preexisting laws.²³³

²²⁶ HINDUJA & PATCHIN, *supra* note 191, at 1.

²²⁷ King, *supra* note 4, at 852 (citing Cara J. Ottenweller, Note, *Cyberbullying: The Interactive Playground Cries for a Clarification of the Communications Decency Act*, 41 VAL. U. L. REV. 1285, 1294 (2007)); *see also*, HINDUJA & PATCHIN, *supra* note 191, at 1–2. Sociologist Robert Agnew conducted a study that suggests that "strain or stress experienced by an individual can manifest itself in problematic emotions that lead to deviant behavior." *Id.* Thus, Hinduja and Patchin assert that the stress cyberbullying victims experience can lead them to develop "deviant coping responses." *Id.* at 2.

²²⁸ Calvert, *supra* note 182, at 21–22. In fact, "researchers at the Cyberbullying Research Center at Florida Atlantic University have found that 'cyberbullying victims were almost twice as likely to have attempted suicide compared to youth who had not experienced cyberbullying.'" *Id.* (citation omitted).

²²⁹ *See* King, *supra* note 4, at 847. *See generally* Jessica P. Meredith, *Combating Cyberbullying: Emphasizing Education over Criminalization*, 63 FED. COMM. L.J. 311 (2010).

²³⁰ *See* Kate E. Schwartz, Note, *Criminal Liability for Internet Culprits: The Need for Updated State Laws Covering the Full Spectrum of Cyber Victimization*, 87 WASH. U. L. REV. 407, 409 (2009) (discussing the media attention and scholarly debates surrounding cyberbullying and its effects).

²³¹ *Id.* at 418 n.18 (citing Naomi Harlin Goodno, *Cyberstalking, a New Crime: Evaluating the Effectiveness of Current State and Federal Laws*, 72 MO. L. REV. 125, 147 (2007)).

²³² King, *supra* note 4, at 855.

²³³ *Id.*

Some states have passed laws that allow cyberbullying to be prosecuted under a preexisting law.²³⁴ Iowa, Massachusetts, South Dakota, and South Carolina, among others, use harassment laws to punish cyberbullies.²³⁵ The Iowa, South Dakota, and South Carolina statutes, for example, qualify electronic communications as a way in which someone can commit harassment.²³⁶ Massachusetts goes one step further by including telecommunications devices, Internet communications, and instant messages within the definition of communication in its harassment statute.²³⁷ Other states have elected to use their stalking laws to bring criminal charges in cyberbullying cases;²³⁸ Kansas, Michigan, and Nebraska, as well as the District of Columbia, are among the jurisdictions that have taken this route.²³⁹ The downside to using this method as the primary means of prosecuting cyberbullies is that most of the stalking statutes do not explicitly address the use of computers or the Internet within the definition of victimization.²⁴⁰

The most common form of cyberbullying legislation adopted by the states focuses on the implementation of policies within local schools to police and prevent cyberbullying.²⁴¹ For example, in April of 2008, Florida passed the “Jeffrey Johnston Stand Up for All Students Act.”²⁴² The Act expands Florida’s definition of bullying to include bullying that occurs over the Internet, both on and off school property.²⁴³ The Act also requires schools to implement a student code of conduct prohibiting bullying, as well as procedures to help both school officials and parents identify incidents of bullying.²⁴⁴ Similarly, Virginia has charged its Board of Education with developing a model code of student conduct, which must include “standards . . . for school board policies on . . . bullying, the use of electronic means for the purposes of bullying . . . and dissemination of such policies to students, their parents, and school personnel.”²⁴⁵

²³⁴ See *Cyberbullying and the States*, NATIONAL CONFERENCE OF STATE LEGISLATURES (July 9, 2010), <http://www.ncsl.org/default.aspx?tabid=20753> [hereinafter NCSL, *Cyberbullying*].

²³⁵ IOWA CODE ANN. § 708.7 (West 2011); MASS. GEN. LAWS ANN. ch. 265, § 43A (West 2011); S.C. CODE ANN. § 16-3-1700 (2010) (defining stalking as including cyberstalking); S.D. CODIFIED LAWS § 49-31-31 (2011); see also NCSL, *Cyberbullying*, *supra* note 235.

²³⁶ IOWA CODE ANN. § 708.7 (West 2011); S.C. CODE ANN. § 16-3-1700 (2010); S.D. CODIFIED LAWS § 49-31-31 (2011); see also NCSL, *Cyberbullying*, *supra* note 235.

²³⁷ MASS. GEN. LAWS ANN. ch. 265, § 43A (West 2011).

²³⁸ See NCSL, *Cyberbullying*, *supra* note 235.

²³⁹ See D.C. CODE § 22-404 (2011); KAN. STAT. ANN. § 21-5427 (West 2011); MICH. COMP. LAWS ANN. § 750.411h (West 2011); NEB. REV. STAT. § 28-311.02 (West 2011); see generally NCSL, *Cyberbullying*, *supra* note 235.

²⁴⁰ See Schwartz, *supra* note 231, at 416.

²⁴¹ See NCSL, *Cyberbullying*, *supra* note 235.

²⁴² FLA. STAT. ANN. § 1006.147 (West 2011).

²⁴³ *Id.*

²⁴⁴ *Id.* at § 1006.147(4).

²⁴⁵ VA. CODE ANN. § 22.1-279.6(A) (2011).

Other states have taken more direct measures by incorporating cyberbullying into their criminal code.²⁴⁶ In 2010, Louisiana passed a bill making cyberbullying a criminal offense.²⁴⁷ Under the law, first-time offenders can be fined up to \$500 and imprisoned for up to six months.²⁴⁸ In Kentucky, the crime of harassing communications, which includes cyberbullying, is a Class B misdemeanor.²⁴⁹ Virginia's computer harassment law qualifies the act of cyberbullying as a Class 1 misdemeanor.²⁵⁰

2. Federal Legislation

Cyberbullying has also grabbed the attention of legislators at the federal level.²⁵¹ California Representative Linda Sanchez introduced the Megan Meier Cyberbullying Prevention Act in 2009.²⁵² The Act states that "[w]hoever transmits in interstate or foreign commerce any communication with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person, using electronic means . . . shall be fined under this title or imprisoned not more than two years, or both."²⁵³

Unfortunately, the Act was never passed into law.²⁵⁴ Because the Act was proposed but not passed in a previous session of Congress, it was removed from the books at the close of that session.²⁵⁵ It is possible, however, that supporters of the bill will reintroduce it in a subsequent session.²⁵⁶

The House of Representatives also considered the Student Internet Safety Act of 2009 as an alternative means of policing cyberbullying.²⁵⁷ The stated purpose of the bill was "[t]o promote the safe use of the Internet by students."²⁵⁸ Under this legislation, schools that receive funding under the Elementary and Secondary Education Act of 1965 would be allowed to use federal funds to implement programs that encourage safe Internet use by students.²⁵⁹ These programs would include the education

²⁴⁶ See NCSL, *Cyberbullying*, *supra* note 235.

²⁴⁷ LA. REV. STAT. ANN. § 40:7 (2011). This statute provides that if the offender is under the age of seventeen, the matter will be governed by Title VII of the Louisiana Children's Code. *Id.* at § 40:7(D)(2).

²⁴⁸ *Id.* at § 40:7(D)(1).

²⁴⁹ KY. REV. STAT. ANN. § 525.080 (West 2011). In Kentucky, persons convicted of a Class B misdemeanor can be sentenced to up to ninety days' imprisonment. *Id.* at § 532.090(2).

²⁵⁰ VA. CODE ANN. § 18.2-152.7:1 (2009). A Class 1 misdemeanor can carry a prison sentence of up to 12 months and a fine of up to \$2,500. *Id.* § 18.2-11(a) (2011).

²⁵¹ See King, *supra* note 4, at 864.

²⁵² Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009).

²⁵³ *Id.*

²⁵⁴ H.R. 1966: *Megan Meier Cyberbullying Prevention Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h111-1966> (last visited Mar. 15, 2012).

²⁵⁵ *Id.*

²⁵⁶ See *id.*

²⁵⁷ Student Internet Safety Act of 2009, H.R. 780, 111th Cong. (2009).

²⁵⁸ *Id.*

²⁵⁹ *Id.*

of students about acceptable online behavior and cyberbullying and promotion of the involvement of parents in their children's use of the Internet.²⁶⁰ Unfortunately, the Student Internet Safety Act of 2009 suffered the same fate as the Megan Meier Cyberbullying Prevention Act.²⁶¹ Although neither of the abovementioned acts was passed into law, they illustrate two important points: first, that Congress has recognized that cyberbullying is a serious problem that needs to be addressed, and second, that because of the unique issues that accompany cyberbullying, it is difficult to draft and successfully implement cyberbullying legislation.

IV. CONSTITUTIONAL IMPLICATIONS OF SEXTING AND CYBERBULLYING LAWS

As previously discussed, there is both a need and a demand for an appropriate legislative response to sexting and cyberbullying.²⁶² Although criminalizing both acts seems like a quick fix that would allow the states to both punish sextors and cyberbullies and deter other teens from engaging in sexting and cyberbullying in one all-embracing swoop, this Note argues that legislators should resist this impulse because of the extensive constitutional implications of such legislation.

A. First Amendment Implications

The cases cited in Part I.A shed light on public school officials' ability to police sexting and cyberbullying among students consistent with the First Amendment.²⁶³ *Tinker* established schools' authority to regulate student speech if the speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."²⁶⁴ In *Fraser*, the Supreme Court found that schools can prohibit vulgar language on school property.²⁶⁵ Next, *Hazelwood* held that school officials are permitted to regulate any speech "so long as their actions are . . . related to legitimate pedagogical concerns" and in a context that a reasonable observer would think is school-sponsored.²⁶⁶ Finally, in *Morse*, the Court held that schools have the right to restrict student speech at school-sponsored events if the restriction serves an important interest.²⁶⁷

These cases give schools the authority to regulate student speech if the speech causes a substantial, material disruption.²⁶⁸ It is important to note, however, that the

²⁶⁰ *Id.*

²⁶¹ *H.R. 780: Student Internet Safety Act of 2009*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h111-780> (last visited Mar. 15, 2012).

²⁶² See Meredith, *supra* note 230; Schwartz, *supra* note 231, at 409; Wastler, *supra* note 5, at 687.

²⁶³ See *supra* Part I.A.

²⁶⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

²⁶⁵ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 676 (1986).

²⁶⁶ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

²⁶⁷ *Morse v. Frederick*, 551 U.S. 393, 410 (2007).

²⁶⁸ See King, *supra* note 4, at 869–70.

speech at issue in all the cases mentioned above occurred either on school property or at a school-sponsored event.²⁶⁹ Consequently, the biggest challenge legislators and school officials face when combating sexting and cyberbullying is the fact that a majority of sexting and cyberbullying occurs off of school property,²⁷⁰ and schools' authority over off-campus speech is much more limited.²⁷¹ This problem is compounded by the fact that technology blurs the line both with regard to what is deemed to be "school property" and what actions school officials can take when off-campus events affect students while they are at school.²⁷² It remains unclear whether public schools have the authority to impinge on student speech that occurs off of school property,²⁷³ and the current case law provides little insight.²⁷⁴

Without guidance from the Supreme Court, lower courts have disagreed over whether student speech that originates off-campus is protected by the First Amendment.²⁷⁵ For example, in *J.S. v. Bethlehem Area School District*, the Supreme Court of Pennsylvania held that a public school was justified in punishing a student for a website that was created off-campus.²⁷⁶ In that case, an eighth grade student created a webpage that made offensive and threatening comments about his algebra teacher.²⁷⁷ The student was suspended and eventually expelled after the school discovered the webpage.²⁷⁸ Applying the *Tinker* standard,²⁷⁹ the court upheld the school's authority to regulate student speech created off-campus when the speech creates "an actual and substantial interference with the work of the school."²⁸⁰

Conversely, other courts have ruled that student speech created off-campus is outside a school's realm of authority.²⁸¹ For example, in 2001, a student created a

²⁶⁹ See *id.*; *supra* Part I.A.; see also Turbert, *supra* note 172, at 671.

²⁷⁰ See Turbert, *supra* note 172, at 671.

²⁷¹ Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 454 (W.D. Pa. 2001) (discussing how lower court decisions relying on Supreme Court precedent have interpreted schools' authority over off-campus speech as limited).

²⁷² See King, *supra* note 4, at 870.

²⁷³ See *id.*

²⁷⁴ NANCY WILLARD, CTR. FOR SAFE & RESPONSIBLE INTERNET USE, SCHOOL RESPONSE TO CYBERBULLYING AND SEXTING: THE LEGAL CHALLENGES 1 (Aug. 2, 2010), http://csriu.org/documents/documents/cyberbullyingsextinglegal_000.pdf.

²⁷⁵ King, *supra* note 4, at 871 (citing Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1054 (2008)).

²⁷⁶ *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002).

²⁷⁷ *Id.* at 850–51.

²⁷⁸ *Id.* at 852–53.

²⁷⁹ King, *supra* note 4, at 871.

²⁸⁰ *Bethlehem Area Sch. Dist.*, 807 A.2d at 869. It is important to note that in most of the cases in which a court has found in favor of a school's authority to control off-campus student speech, the student speech in question was directed at a member of the school staff. WILLARD, *supra* note 275, at 6.

²⁸¹ King, *supra* note 4, at 871; see, e.g., Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 454 (W.D. Pa. 2001).

list of derogatory comments about the school's athletic director and e-mailed the list to several friends.²⁸² Although the list was not made on school property, it eventually made its way onto school grounds and the student was suspended.²⁸³ The District Court for the Western District of Pennsylvania applied the *Tinker* standard and found that the school had violated the student's First Amendment rights.²⁸⁴ The court found that the school presented no evidence that the list disturbed school activities,²⁸⁵ nor did the content of the list qualify as vulgar under the *Fraser* standard.²⁸⁶

It is clear that, "[l]acking clear guidance from the Supreme Court, lower federal courts and state courts have disagreed whether online speech created off-campus is protected."²⁸⁷ Unfortunately, this leaves states unable to craft a uniform response to both sexting and cyberbullying,²⁸⁸ and, as a result, much of the legislation passed to combat sexting and cyberbullying will be subject to strict constitutional scrutiny.²⁸⁹

1. Constitutional Implications of Criminalizing Sexting

The utilization of public schools as the primary means of policing sexting brings several constitutional implications into play,²⁹⁰ and those related to the First Amendment are at the forefront of the sexting debate.²⁹¹

Expression . . . may be restricted on the basis of time, place, or
manner, "provided that such regulations are justified without

²⁸² *Killion*, 136 F. Supp. 2d at 448.

²⁸³ *Id.* at 448–49.

²⁸⁴ *Id.* at 455.

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 456–57. The court acknowledged that portions of the list were lewd and vulgar, however, "the relevant speech . . . occurred within the confines of [the student's] home, far removed from any school premises or facilities." *Id.* at 457. The court found support for its conclusion in Justice Brennan's concurrence in *Fraser*. *Id.* at 456. ("[I]f respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate." (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 688 (1986) (Brennan, J., concurring))).

²⁸⁷ *King*, *supra* note 4, at 871.

²⁸⁸ *Id.*; Wood, *supra* note 12, at 728–29 ("Unfortunately, there is no simple, uniform response to the issue of sexting by students.").

²⁸⁹ *See King*, *supra* note 4, at 871. King notes the Supreme Court's lack of a uniform answer about whether schools can regulate student speech that is created off-campus. *Id.* In spite of this lack of guidance, states are creating legislation aimed at combating cyberbullying irrespective of whether the speech took place on- or off-campus. *Id.* Assuming the Court will resolve this issue at some point in the future, some of the current laws may be ruled unconstitutional "insofar as they seek to regulate student speech that originates off-campus." *Id.*

²⁹⁰ Wood, *supra* note 12, at 728 ("The Constitutional implications of sexting by students in the public school environment involve a complicated intersection between the *Tinker* line of student speech cases and the *Ginsberg/Pacifica* cases on obscenity/indecency as to minors, as well [as] the implications of the *Ferber* obscenity decision.").

²⁹¹ Wastler, *supra* note 5, at 691.

reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”²⁹²

The government, however, is generally forbidden from “restrict[ing] speech or expressive conduct based on the disapproval of the ideas expressed.”²⁹³ Moreover, the Supreme Court has found that there are certain categories of speech and expression, such as obscenity and child pornography, “that do not play an essential role in the expression of ideas and are of such slight value that ‘any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’”²⁹⁴ It is difficult to place sexting within one of these categories²⁹⁵ because sexting seems, in many ways, to fall into both. On the one hand, it can be argued that teens’ exchange of sexually explicit images is a form of obscenity that offers no value to society. On the other, it can be asserted that criminalizing the exchange of such images stifles teens’ freedom of expression based on the government’s desire to repress the content of the messages and images. In this scenario, the government would bear the burden of proving that its restrictions on sexting are constitutional.²⁹⁶ Additionally, when the government seeks to restrict speech based on its content, it must prove that the regulation promotes a compelling government interest and is grounded in more than a “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”²⁹⁷ Because sexting is a nontraditional form of speech, it is hard to predict how the Supreme Court’s gavel would fall on the issue.

2. Constitutional Implications of Criminalizing Cyberbullying

The constitutional repercussions of cyberbullying laws deal with a public school’s ability to impinge on students’ First Amendment rights in schools for acts that occur off of school property.²⁹⁸ Clearly, if the speech at issue was created on-campus using school resources, the incident falls within the realm of *Kuhlmeier* and a school would be justified in restricting the speech.²⁹⁹ But, a school’s authority is less clear when the questioned speech originates off of school property.³⁰⁰ Under *Tinker*, in order for a

²⁹² *Id.* at 691–92 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

²⁹³ *Id.* at 692.

²⁹⁴ *Id.* (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

²⁹⁵ *See id.* at 693.

²⁹⁶ *See United States v. Playboy Entm’t Group*, 529 U.S. 803, 817 (2000); *see also*, *Wastler*, *supra* note 5, at 692.

²⁹⁷ *Playboy Entm’t Group*, 529 U.S. at 817 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)); *see also Wastler*, *supra* note 5, at 692.

²⁹⁸ *Turbert*, *supra* note 172, at 677.

²⁹⁹ *See King*, *supra* note 4, at 877.

³⁰⁰ *See id.*

school to punish a student for off-campus cyberbullying, “courts would have to determine that cyberbullying in some way materially and substantially disrupts the school environment.”³⁰¹ In arguing before a court, a school might seek to show that off-campus cyberbullying substantially disrupts the school environment because the harm imposed on the victim “negatively affect[s] the victim’s in-school social and educational performance . . . weaken[s] the morale of the school community, cause[s] possible physical retaliation on school grounds, create[s] a specter of fear among students . . . and cause[s] agitation and frustration among parents and school officials.”³⁰² Even if the Supreme Court adopted this reasoning,³⁰³ it is hard to see how the Court could craft a bright-line rule from such a decision.³⁰⁴ Indeed, instances of cyberbullying would need to be evaluated on a case-by-case basis, rendering any such holding subject to the interpretation of lower courts.

B. Infringement of the Fourteenth Amendment Right to Parental Autonomy

In addition to the First Amendment issues implicated by criminalization of sexting and cyberbullying, such laws may also infringe on parents’ Fourteenth Amendment right to maintain autonomy over their children’s upbringing.³⁰⁵ The Supreme Court has long recognized this right, and, as a result, the government must satisfy a heavy burden when justifying a law that interferes with this parental right.³⁰⁶ In *Miller v. Mitchell*, a recent sexting case out of Pennsylvania, the court noted that “[p]arents have a Fourteenth Amendment substantive due process right ‘to raise their children without undue state interference.’”³⁰⁷ A parent’s right to control the rearing of their children, however, is not absolute.³⁰⁸ Indeed, “school officials have a ‘secondary responsibility’ in the upbringing of children, and ‘in certain circumstances 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.’”³⁰⁹

One can certainly imagine situations in which school policies would be at odds with a parent’s fundamental right to direct the upbringing of his or her child.³¹⁰ The

³⁰¹ Turbert, *supra* note 172, at 677.

³⁰² *Id.* at 677–78.

³⁰³ *Id.* (noting that this line of “reasoning is purely speculative”).

³⁰⁴ See King, *supra* note 4, at 877.

³⁰⁵ Wood, *supra* note 11, at 169 (“[A] parent’s desire for and right to the companionship, care, custody, and management of his or her children is an important interest, one that undeniably warrants deference and, absent a powerful countervailing interest, protection.”) (quoting *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 (1996)).

³⁰⁶ *Id.*

³⁰⁷ *Miller v. Mitchell*, 598 F.3d 139, 150 (3d Cir. 2010) (quoting *Gruenke v. Seip*, 225 F.3d 290, 303 (3d Cir. 2000)); see also Wood, *supra* note 11, at 169.

³⁰⁸ See Wood, *supra* note 11, at 169.

³⁰⁹ *Miller*, 598 F.3d at 151 (citing *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 182 (3d Cir. 2005) (quoting *Gruenke*, 225 F.3d at 307)).

³¹⁰ *Gruenke*, 225 F.3d at 305.

cases discussed in Part I.B provide examples of this conflict. In *Meyer v. Nebraska*,³¹¹ for example, parents clashed with school administrators over the school's curriculum.³¹² The *Pierce* and *Yoder* cases addressed the divergence of parents and the state regarding mandatory school attendance.³¹³ In response to these cases, courts have held that where the interests of parents and schools diverge, a parent's authority "should yield only where the school's action is tied to a compelling interest."³¹⁴ Therefore, states passing sexting and cyberbullying legislation that is implemented through public schools bear a heavy burden of proving a governmental interest that is compelling enough to overcome the fundamental right of parental autonomy.³¹⁵ It is therefore the recommendation of this Note that the federal legislature address sexting and cyberbullying outside the criminal justice system by creating a uniform educational diversion program aimed at teaching teens about the dangers associated with both sexting and cyberbullying.

V. THE ROLES OF PARENTS AND SCHOOLS ARE KEY

The most effective means of deterring sexting and cyberbullying is through the utilization and cooperation of parents and schools. Parents and schools play pivotal roles in a child's development,³¹⁶ and combating cyberbullying and sexting both at home and in school has the potential to be extremely effective.³¹⁷ Indeed, without the cooperation of parents and schools, it will be nearly impossible for states to create an effective legislative response to sexting and cyberbullying.³¹⁸

"The simplest and most informal way to prevent and eliminate cyberbullying without the use of judicial standards is through parenting,"³¹⁹ and the same is true with regard to sexting.³²⁰ Parental authority can be distinguished from other modes of authority because parents are in the best position to prevent sexting and cyberbullying before they begin.³²¹ "Parents are a powerful first line of defense against cyberbullying and with their nurturing authority and support, cyberbullying can be thwarted before schools and the judicial system get involved."³²² Again, the same

³¹¹ 262 U.S. 390 (1923)

³¹² *Id.* at 396–97.

³¹³ *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972), *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

³¹⁴ *Gruenke*, 225 F.3d at 305.

³¹⁵ *Wood*, *supra* note 11, at 169.

³¹⁶ *Brown*, *supra* note 59, at 110.

³¹⁷ *See Arcabascio*, *supra* note 2, at 28; *King*, *supra* note 4, at 880.

³¹⁸ *Id.*

³¹⁹ *Turbert*, *supra* note 172, at 688.

³²⁰ *See Day*, *supra* note 1, at 91 (discussing how morals and ethics involved with sexting are best taught by parents).

³²¹ *See Turbert*, *supra* note 172, at 689; *see also Calvert*, *supra* note 100, at 34.

³²² *Turbert*, *supra* note 172, at 690.

is true with regard to the deterrence of sexting.³²³ Because technology plays such a large role in the occurrence and growth of sexting and cyberbullying,³²⁴ parents can help reduce the occurrence of sexting and cyberbullying by monitoring and controlling the amount of access teens have to cell phones and the Internet.³²⁵ For example, in a recent study, a teenage boy said he does not sext because his “mom goes through [his] phone.”³²⁶ Candid communication between parents and teens about the risks associated with sexting and cyberbullying is the best way to deter these activities before they start.³²⁷

Schools also have an important role to play in the prevention and deterrence of sexting and cyberbullying. First, there is no doubt that schools have the ability to punish students who engage in sexting and cyberbullying while on school property.³²⁸ Although this Note acknowledges that a majority of sexting and cyberbullying occurs off-campus, schools should exercise their authority over students as much as possible and impose penalties on students who sext and cyberbully during school.³²⁹

Teens continue to sext and cyberbully despite the fact that most of them know that such activities “can have serious negative consequences” on both them and their peers.³³⁰ Schools can, and should, play an active role in the prevention of sexting and cyberbullying through educational initiatives because schools are in the best position to educate both parents and students on the safe use of the Internet and technology as well as the harmful effects of sexting and cyberbullying.³³¹

A. A National Educational Partnership Between Schools and Parents

The independent efforts of schools and parents are not enough to win the battle against sexting and cyberbullying. This Note suggests that the most effective means of deterring sexting and cyberbullying is through the implementation of a national educational partnership between schools and parents. Research shows “that second only to family, school is the most important stabilizing force in the lives of young people.”³³² This Note argues that education is a crucial part of preventing and

³²³ See Arcabascio, *supra* note 2, at 28.

³²⁴ Eraker, *supra* note 9, at 560; Hinduja & Patchin, *supra* note 183, at 2.

³²⁵ See Arcabascio, *supra* note 2, at 28; NCPTUP, *supra* note 101, at 4.

³²⁶ LENHART, *supra* note 107, at 10.

³²⁷ See Hinduja & Patchin, *supra* note 183, at 3.

³²⁸ Calvert, *supra* note 100, at 36; see King, *supra* note 4, at 870–71 (discussing how online speech can impact the campus).

³²⁹ See Calvert, *supra* note 100, at 36 (discussing the harmful effects of sexting and cyberbullying on school communities).

³³⁰ See *id.*; NCPTUP, *supra* note 101, at 3.

³³¹ See Calvert, *supra* note 100, at 35; Turbert, *supra* note 172, at 690.

³³² ROBERT BLUM, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH, SCHOOL CONNECTEDNESS: IMPROVING STUDENTS’ LIVES, <http://cecp.air.org/download/MCMonographFINAL.pdf> (last visited Mar. 15, 2012).

extinguishing sexting and cyberbullying. Further, this Note posits that a program analogous to the Drug Abuse Resistance Education (D.A.R.E.) program would be a powerful and effective way to combat sexting and cyberbullying because it would allow schools and parents to work together to fight sexting and cyberbullying on multiple fronts.

1. Concept of School Connectedness

Empirical evidence suggests that a program analogous to D.A.R.E., a national drug education program taught in schools across the country, would be an effective means of preventing sexting and cyberbullying.³³³ The D.A.R.E program's success is grounded in its use of a concept called "school connectedness."³³⁴ The Centers for Disease Control and Prevention (CDC) defines school connectedness as "the belief by students that adults and peers in the school care about their learning as well as about them as individuals."³³⁵ A recent study reports that "[s]chool connectedness was found to be the strongest protective factor for both boys and girls to decrease substance use, school absenteeism, early sexual initiation, violence, and risk of unintentional injury."³³⁶ The same study found that school connectedness is an important "protective factor against emotional distress, disordered eating, and suicidal ideation and attempts."³³⁷

Four factors influence the school connectedness model: adult support, belonging to positive peer groups, commitment to education, and school environment.³³⁸ With respect to adult support, studies show that students are more likely to be engaged in school and in learning when they feel that important adult figures in their life support them.³³⁹ Also, "[b]eing part of a stable peer network protects students from being victimized or bullied."³⁴⁰ Students' behavior is often "dictated" by the "cliques with whom

³³³ See *D.A.R.E./iKeepSafe Program Deemed Effective*, D.A.R.E. (Nov. 28, 2010, 6:15 PM), <http://www.dare.com/parents/effective.asp>.

³³⁴ See D.A.R.E., D.A.R.E. AND SCHOOL CONNECTEDNESS 1, <http://www.dare.com/home/Resources/documents/D.pdf> (last visited Mar. 15, 2012).

³³⁵ U.S. DEPT. OF HEALTH AND HUMAN SERVS., CTR. FOR DISEASE CONTROL AND PREVENTION, *SCHOOL CONNECTEDNESS: STRATEGIES FOR INCREASING PROTECTIVE FACTORS AMONG YOUTH 3* (2009), <http://www.cdc.gov/healthyyouth/adolescenthealth/pdf/connectedness.pdf> [hereinafter USDHHS].

³³⁶ *Id.* at 5.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.* at 6 (citing Robert G. Croninger & Valerie E. Lee, *Social Capital and Dropping Out of High School: Benefits to At-Risk Students of Teachers' Support and Guidance*, 103 TCHR. C. REC. 548 (2001)).

³⁴⁰ *Id.* (citing Maria Bartini & A.D. Pellegrini, *A Longitudinal Study of Bullying, Victimization, and Peer Affiliation During the Transition from Primary School to Middle School*, 37 AM. EDUC. RES. J. 699 (2000)).

they associate,”³⁴¹ and as a result, it is important for schools and parents to help teens choose a positive peer group. By monitoring teens’ social circles and helping them develop strong interpersonal skills, parents and schools can help ensure that teens develop and maintain healthy relationships.³⁴² Third, it is essential that students, parents, and schools have a strong commitment to education.³⁴³ The CDC has found that

[s]tudents’ dedication to their own education is associated with the degree to which they perceive that their peers and important adults in their lives 1) believe school is important and 2) act on those beliefs. Students who are personally invested in school . . . spend more time on homework and in school activities and have an increased sense of connectedness to school.³⁴⁴

Keeping teens focused on their education and encouraging them to be active in positive extracurricular activities can help reduce their interest in sexting and cyberbullying, as well as the amount of time they have to spend on such activities. Finally, a “healthy and safe school environment and a supportive psychosocial climate” play a crucial role in school connectedness.³⁴⁵ Schools that embrace a positive, supportive climate help teens build “positive, respectful relationships”³⁴⁶ and have lower rates of peer harassment.³⁴⁷ This type of supportive environment is essential to deterring teens’ participation in sexting and cyberbullying.

D.A.R.E. has successfully contributed to each of the four factors of school connectedness for over twenty-five years.³⁴⁸ Further, there is evidence suggesting that D.A.R.E.’s structure would be a successful means of addressing sexting and cyberbullying. A recent report conducted by D.A.R.E. indicates that the program “provides an understanding of the essential parameters of this successful delivery system that can be used in the development of other types of national infrastructures for community-based prevention services.”³⁴⁹ D.A.R.E. gives parents the opportunity to be involved in both the academic and social development of their children.³⁵⁰ Thus, this Note argues that D.A.R.E. is an exceptional program after which to model a similar initiative aimed at sexting and cyberbullying education.

³⁴¹ BLUM, *supra* note 332, at 13.

³⁴² See USDHHS, *supra* note 335, at 6.

³⁴³ *Id.* at 7.

³⁴⁴ *Id.* (citations omitted).

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ See BLUM, *supra* note 332, at 13.

³⁴⁸ See D.A.R.E., *supra* note 334, at 1.

³⁴⁹ *Id.* at 3.

³⁵⁰ *Id.* at 2.

2. Applying the School Connectedness Framework to Sexting and Cyberbullying

Within the contexts of sexting and cyberbullying, parents and schools are in the best position to provide teens with the adult support necessary to make good decisions.³⁵¹ Parents and schools are prominent figures in teens' lives, and, consequently, their guidance is extremely influential.³⁵² Further, parents and schools must reinforce the principle that "a good education is important for reaching . . . life goals."³⁵³ Helping teens focus on educational and personal success leaves them with less time to participate in detrimental activities like sexting and cyberbullying.³⁵⁴

Furthermore, there is evidence to support the conclusion that the power of deterrence is at its strongest when school and parental interests are aligned.³⁵⁵ Indeed, it makes sense that educational initiatives are most effective when students receive a consistent message from both teachers and parents. "Schools need to help parents create a home environment that supports education and to involve parents in school decision-making."³⁵⁶ Additionally, parents need to emphasize the important role education plays in teens' lives.

As a practical matter, forming a partnership between parents and schools makes the most sense because it alleviates any burden on the courts to evaluate potential infringement of the First and Fourteenth Amendments, assertions of which would inevitably accompany laws criminalizing sexting and cyberbullying.³⁵⁷ As discussed in Parts II.D. and III.C. of this Note, states are pursuing a variety of different solutions in hopes of addressing sexting and cyberbullying. Of these various solutions, statutes criminalizing sexting and cyberbullying have the most potential to have serious constitutional implications. Inevitably, such statutes will be argued to be unconstitutional, causing an influx of First and Fourteenth Amendment challenges in the courts. A national educational partnership between parents and schools avoids this result and attempts to stop sexting and cyberbullying before they begin.

CONCLUSION

The tragic stories of Jesse Logan, Hope Witsell, and Megan Meier demonstrate that sexting and cyberbullying are serious issues that must be addressed.³⁵⁸ Low self-esteem, depression, and suicide are just a few of the ways sexting and cyberbullying

³⁵¹ See Turbert, *supra* note 172, at 681.

³⁵² See generally Blum, *supra* note 332.

³⁵³ USDHHS, *supra* note 335, at 7.

³⁵⁴ See *id.*

³⁵⁵ See D.A.R.E., *supra* note 334, at 1.

³⁵⁶ BLUM, *supra* note 332, at 10.

³⁵⁷ See Turbert, *supra* note 172, at 690–91 (discussing how these methods avoid First Amendment issues).

³⁵⁸ See *United States v. Drew*, 259 F.R.D. 449, 452 (C.D. Cal. 2009); Celizic, *supra* note 130; Inbar, *supra* note 133.

affect their teen victims.³⁵⁹ In response to public outcries for action, state legislatures across the country are attempting to craft laws aimed at the deterrence and prevention of sexting and cyberbullying.³⁶⁰ Many of these laws, however, are riddled with potentially unconstitutional provisions that infringe the First Amendment rights of the minors they aim to protect.³⁶¹ Furthermore, sexting and cyberbullying laws have met opposition from parents, who assert that the laws usurp their Fourteenth Amendment right to control and direct the upbringing of their children.³⁶² Consequently, the best way for the legislature to address sexting and cyberbullying is found outside the courtroom.³⁶³

Parents and schools are among the most influential figures in teens' lives.³⁶⁴ As a result, it is important for legislatures to recognize them as key players and utilize them in the fight against sexting and cyberbullying. The best chance legislatures have at winning the war against sexting and cyberbullying is the implementation of a national program aimed at educating teens about the dangers of sexting and cyberbullying, while simultaneously supporting teens and facilitating their positive personal growth.³⁶⁵ Not only does such a partnership avoid any potential constitutional issues that would inevitably arise from sexting and cyberbullying legislation,³⁶⁶ but also, because parents and schools are at their most powerful when their interests are aligned,³⁶⁷ it gives the legislature its greatest chance at success. Although it is doubtful that society will ever be able to completely eradicate sexting and cyberbullying, a national educational program that is based on the concept of school connectedness and employs the help of both parents and public schools is the most effective and least problematic way to deter teens from engaging in these activities.

³⁵⁹ See *supra* Parts II.C.1, III.B.2.

³⁶⁰ See *supra* Parts II.D, III.C.

³⁶¹ See *supra* Part IV.A.

³⁶² See *supra* Part IV.B.

³⁶³ See *supra* Part V.

³⁶⁴ See BLUM, *supra* note 332.

³⁶⁵ See *supra* Part V.A.

³⁶⁶ See Turbert, *supra* note 172, at 690–91.

³⁶⁷ See D.A.R.E., *supra* note 334, at 1.