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

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INTRODUCTION

A new trend among teenagers has recently triggered concern among parents and educators and fascinated the media. However, unlike many adolescent fads that provoke dismay from the older generation, “sexting”—the transmission of sexually explicit photos via text message—has resulted in serious consequences for some participants. Creating, possessing, or disseminating sexually explicit photographs of a minor, even when self-produced, may violate state and federal child pornography statutes. Although the statutes prohibiting child pornography (as well as the severe penalties for violation) were enacted to address a very different crime—the rape and molestation of children, captured on film or in other visual formats—the laws do not explicitly exempt images that were voluntarily produced and disseminated by the minors themselves. As a result, prosecutors have brought child pornography charges against some “sexters,” and others have used the threat of prosecution to encourage cooper-

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1 The National Center for Missing & Exploited Children, Policy Statement on Sexting (Sept. 21, 2009), http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=4130 (“Sexting is a term coined by the media that generally refers to youth writing sexually explicit messages, taking sexually explicit photos of themselves or others in their peer group, and transmitting those photos and/or messages to their peers.”).

2 Stephen F. Smith, Jail for Juvenile Pornographers?: A Reply to Professor Leary, 15 VA. J. SOC. POL’Y & L. 505, 513 (2008) (noting that although child pornography offenses vary across jurisdictions, they are generally broad enough to apply to self-produced child pornography).

3 Id. at 516.


ation with non-penal actions designed to deter the practice of sexting and to educate minors about its dangers.⁶

These cases not only give rise to a contentious debate regarding the appropriate methods of prevention and response to adolescents who voluntarily produce and disseminate sexually explicit images of themselves,⁷ but also raise serious questions regarding the constitutionality of prosecuting such juveniles under existing child pornography frameworks. In reality, there is a wide range of circumstances under which minors engage in the production and dissemination of sexually explicit images of themselves that involves varying levels of coercion and consent.⁸ Although existing societal mores and social dynamics may undermine a vision of such conduct as an exercise of free choice, this Note posits that under some circumstances, these images must be considered voluntary. This Note focuses its analysis on a sexting paradigm in which a minor takes explicit photographs of him or herself or records a sexual encounter with the cooperation and consent of any other participants and voluntarily distributes, at least to an initial recipient or recipients, such images.

This Note argues that existing child pornography statutes are unconstitutional to the extent that they proscribe the voluntary production and dissemination of self-produced pornographic images. Part I introduces the legal issues raised by sexting prosecutions by examining the facts of a high-profile case. Part II outlines the scope of permissible First Amendment regulations. Part III discusses the applicability of statutory definitions of child pornography to sexting images in their plain language and purpose. After analyzing the child por-

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⁶ See, e.g., Miller v. Skumanick, 605 F. Supp. 2d 634, 637–39 (M.D. Pa. 2009) (describing actions of Wyoming County, Pennsylvania District Attorney Skumanick, when he threatened approximately twenty students of Tunkahnnock High School implicated in a sexting scandal with criminal prosecution to compel participation in a re-education program); Exhibit One, Miller, 605 F. Supp. 2d 634 (No. 09-2144) (Letter to Mary Jo Miller from District Attorney Skumanick) (“[C]harges will be filed against those that do not participate [in a six to nine month program which focuses on education and counseling] or those that do not successfully complete the program.”).

⁷ Compare Smith, supra note 2, at 507 (arguing that it is a mistake to assume the R severe penalties associated with child pornography are appropriate for minors who produce sexually explicit images of themselves), with Mary Graw Leary, Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation, 15 VA. J. SOC. POL’Y & L. 1, 39 (2007) (arguing that the proper societal response to self-exploitation should include the possibility of juvenile prosecution).

⁸ See, e.g., Clay Calvert, Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law, 18 COMM.LAW CONSPECTUS 1, 27 (2009) (noting that one of the difficulties in addressing sexting is the multiple variations of the act); Smith, supra note 2, at 508–12 (discussing the scenarios under which minors produce and distribute pornographic images of themselves).
nography exception to the First Amendment, Part IV concludes that self-produced sexual images of minors do not satisfy the definition of child pornography so as to warrant inclusion within the category of unprotected speech because such images are not intrinsically related to the sexual abuse of children. This Note concludes by proposing potential methods for regulating self-produced pornographic images of minors outside the framework of child pornography and articulates lingering questions that must be addressed before a comprehensive response to the problem of sexting can be implemented.

[You don’t need the rest.]