

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 message¹—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.² 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”³—the laws do not explicitly exempt images that were voluntarily produced and disseminated by the minors themselves.⁴ As a result, prosecutors have brought child pornography charges against some “sexters,”⁵ and others have

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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.

⁴ *See, e.g.*, 18 U.S.C. §§ 2251, 2252, 2252A (2006) (proscribing the possession, distribution, production, or receipt of child pornography in a manner affecting foreign or interstate commerce).

⁵ *See, e.g.*, Deborah Feyerick & Sheila Steffen, ‘Sexting’ Lands Teen on Sex Offender List, CNN.COM, Apr. 8, 2009, available at <http://www.cnn.com/2009/CRIME/04/07/sexting.busts/index.html#cnNSTCText> (reporting on the case of Phillip Alpert, an eighteen-year-old who is now required to register as a sex offender in Florida after being convicted of sending child pornography for forwarding a naked photograph of his sixteen-year-old girlfriend to a large group of people following an argument); David Rosen, *Sexting: The Latest Innovation in Porn*, COUNTERPUNCH, Mar. 25, 2009, <http://www.counterpunch.org/>

used the threat of prosecution to encourage cooperation 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 the high-profile case, *Miller v. Mitchell*. 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 pornography exception to the First Amendment, Part IV concludes that self-produced sexual images of

rosen03252009.html (“Two teens in Mason, OH, were recently charged with first-degree misdemeanors after police found nude photos of classmates on their cellphones.”).

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 Tunkahnock 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 Skunamick) (“[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 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).

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.

I. PROSECUTION & THE SEXTING PHENOMENON

Although a serious debate exists over whether it is appropriate to punish teenagers engaged in sexting in the criminal and juvenile justice systems, “[s]ome law enforcement officers and district attorneys have begun prosecuting teens who created and shared such images under laws generally reserved for producers and distributors of child pornography.”⁹ In *Miller v. Mitchell*, the U.S. Court of Appeals for the Third Circuit became the first federal appellate court to address the difficult questions surrounding “sexting, the reach of the state child pornography law, and the First Amendment.”¹⁰ The case began in 2008 when school officials in Tukahannock High School discovered saved images of scantily clad, nude, or semi-nude teenage girls on several students’ confiscated cell phones.¹¹ Believing that the male students were trading such images, the school district turned the phones over to the District Attorney of Wyoming County, George Skumanick.¹² The District Attorney’s office subsequently notified the parents of twenty students who appeared in or possessed such images that the students would be required to participate in a six to nine month education program or face criminal charges.¹³ Although most of the students implicated eventually agreed to participate in a five week education program to avoid criminal prosecution, Nancy Doe, Grace Kelly and Marissa Miller,¹⁴ and their parents, represented by the American Civil Liberties Union

⁹ AMANDA LENHART, PEW INTERNET & AM. LIFE PROJECT, TEENS AND SEXTING 3 (2009), available at <http://www.pewinternet.org/Reports/2009/Teens-and-Sexting.pdf>.

¹⁰ Nathan Gorenstein, *Appeals Court Considers: Is “Sexting” Pornography?*, PHILA. INQUIRER, Jan. 16, 2010, available at <http://www.philly.com/philly/news/local/81849207.html>; *Miller v. Mitchell*, No. 09-2144, 2010 U.S. App. LEXIS 5501 (3d Cir. Mar. 17, 2010).

¹¹ *Miller*, 605 F. Supp. 2d at 637.

¹² *Id.* Jeff Mitchell replaced George Skumanick as District Attorney of Wyoming County in January 2010, while the case was on appeal in the Third Circuit.

¹³ See Exhibit One, *supra* note 6.

¹⁴ *Miller*, 605 F. Supp. 2d at 640. Each of the girls was featured in photographs found on cell phones of other students. Marissa Miller and Grace Kelly were photographed “from the waist up, each wearing a white opaque bra. Marissa was speaking on the phone and Grace using her hand to make the peace sign.” *Id.* at 639. In another photograph Nancy Doe was shown “wrapped in a white, opaque towel. The towel was wrapped around her body, just below her breasts. It looked as if she had just emerged from the shower.” *Id.*

(“ACLU”), filed suit against Skumanick alleging that he 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.¹⁵ Plaintiffs argued that the images did not constitute child pornography and that the girls could not be charged because they did not consent to the distribution of the images that pictured them.¹⁶ Finding that plaintiffs were likely to prevail on the merits, the district court granted a temporary restraining order prohibiting Skumanick from initiating criminal charges against plaintiffs for the two photographs in question.¹⁷

Judge Ambro of the Third Circuit, writing for a unanimous three-judge panel, affirmed the grant of a preliminary injunction preventing the District Attorney from bringing charges against Nancy Doe.¹⁸ The court held that plaintiffs showed a likelihood of success on their claims—that any prosecution would not be based on probable cause, but instead would be in retaliation in violation of Nancy Doe’s exercise of her constitutional right to be free from compelled speech and in violation of Jane Doe’s right to direct her child’s upbringing.¹⁹ However, the court declined to address the additional claim that any prosecution would be in retaliation in violation of the “minors’ First Amendment right to free expression, the expression being their appearing in two photographs.”²⁰ The court also declined to rule on whether “the sexual abuse of children law applies to a minor depicted in the allegedly pornographic photograph” and whether “the photo in question could constitute a ‘prohibited sexual act.’”²¹ The court, however, was adamant that merely “appearing in a photograph provides no evidence as to whether that person possessed or transmitted the photo.”²² Although *Miller* is a peculiar case due both to the relatively innocuous nature of the photos in question²³ and an unusual nudity provision in the Pennsylvania child pornography statute,²⁴ it raised critical questions regarding the constitutionality of prosecuting minors for the production, dissemination, and possession

¹⁵ See *id.* at 640; see also Verified Complaint, *Miller*, 605 F. Supp. 2d 634 (No. 09-2144).

¹⁶ *Miller*, 605 F. Supp. 2d at 645–46.

¹⁷ *Id.* at 646.

¹⁸ The District Attorney determined he would not file charges against Marissa Miller and Grace Kelly, and the court, therefore, held that the appeal as to the two minors and their parents was moot. *Miller v. Mitchell*, No. 09-2144, 2010 U.S. App. LEXIS 5501, at *13–14 (3d Cir. Mar. 17, 2010).

¹⁹ *Id.* at *40.

²⁰ *Id.* at *16–17 (declining to consider the claim in the first instance).

²¹ *Id.* at *34.

²² *Id.*

²³ Neither of the two photographs at issue depicted any sexual activity or exhibited the girls’ genitalia or pubic area. *Miller v. Skumanick*, 605 F. Supp. 2d 634, 639 (M.D. Pa. 2009).

²⁴ Pennsylvania’s child pornography statute defines “prohibited sexual act” as “sexual intercourse . . . masturbation, sadism, masochism, bestiality, fellatio, cunnilingus, lewd exhibition of the genitals or *nudity if such nudity is depicted for the purpose of*

of self-produced sexually explicit images.²⁵ News articles abound with other examples of teenagers facing criminal charges for sexting and courts will likely have ample opportunity to address the outstanding constitutional questions.²⁶

Although the problem of young people photographing themselves is as old as the Polaroid, new mediums create new problems of over-exposure and permanency.²⁷ Sexted images are frequently forwarded by the original recipient without the consent of the individual pictured in the image.²⁸ Developing an appropriate response to the issue of sexting will require a serious inquiry into First Amendment doctrine, the purposes of child pornography regulations, and the consequences of conflating the sexual abuse of children with sexting, “a post-modern form of flirting, a game of sexual show-&-tell.”²⁹

II. THE FIRST AMENDMENT AND THE LIMITS OF PROTECTION

The First Amendment commands that “Congress shall make no law . . . abridging the freedom of speech.”³⁰ Despite this emphatic language, the protections of the First Amendment are not absolute.³¹ Expression, for example, may be restricted on the basis of time, place, or manner, “provided that such regulations are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant gov-

sexual stimulation or gratification of any person who might view such depiction.” 18 PA. CONST. STAT. § 6312(a) (2008) (emphasis added).

²⁵ See *Miller*, 605 F. Supp. 2d at 640 (plaintiffs contending that the photographs in question are not in violation of any obscenity law and are thus expression protected by the First Amendment).

²⁶ See, e.g., Missy Diaz, *Sexting is Nothing to LOL About; Teens Who Text Nude Pictures Could Be Guilty of a Felony*, SUN-SENTINEL, July 28, 2009, at 1A (reporting that an eighteen-year-old Florida boy is now required to register as a sex-offender after forwarding nude photos of his sixteen-year-old former girlfriend following an argument); *Girl Posts Nude Pics, Is Charged with Kid Porn*, MSNBC.COM, Mar. 27, 2009, <http://www.msnbc.msn.com/id/29912729/> (reporting on the case of a fourteen-year-old-girl in New Jersey facing child pornography charges after posting nude photographs of herself on her MySpace page); Kristen Schorsch, *Sexting May Spell Court for Children; Kids Trading Photos Seen as Child Porn, Which Is a Felony*, CHI. TRIB., Jan. 29, 2010, at 17 (describing a recent case involving two middle school students in Valparaiso, Indiana charged with child exploitation and possession of child pornography after a teacher confiscated a student’s cell phone during class and later discovered that the two had exchanged sexually explicit photos).

²⁷ See Ellen Goodman, *Is ‘Sexting’ Same as Porn?*, BOSTON GLOBE, Apr. 24, 2009, at 15, available at http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/04/24/is_sexting_same_as_porn (“Once you hit the send button, you’ve lost control.”).

²⁸ Calvert, *supra* note 8, at 3–4 (“These forwarded photos can—in the parlance of the day—go ‘viral,’ reaching large audiences as they spread wildly from minor to minor.”).

²⁹ Rosen, *supra* note 5.

³⁰ U.S. CONST. amend. I.

³¹ *Virginia v. Black*, 533 U.S. 343, 358–59 (2003) (explaining that the government may regulate certain categories of speech in a manner consistent with the Constitution).

ernmental interest, and that they leave open ample alternative channels for communication of the information.”³² The First Amendment, however, does generally proscribe efforts by the government to restrict speech or expressive conduct based on the disapproval of the ideas expressed.³³ Content-based regulations, especially those enforced by severe criminal penalties, “have the constant potential to be a repressive force in the lives and thoughts of a free people” and are therefore presumptively invalid.³⁴ When a statute regulates speech on the basis of content, the government bears the burden of proving that the regulation is narrowly tailored to promote a compelling government interest.³⁵

The First Amendment prohibits content-based regulations in order to prevent the government from “effectively driv[ing] certain ideas or viewpoints from the marketplace” of ideas.³⁶ However, the Supreme Court has recognized a few limited categories of speech 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.”³⁷ Within these narrow classes of material, including obscenity and, more recently, child pornography, the prevention and punishment of speech has never been thought to raise any serious constitutional objections.³⁸

Constitutional jurisprudence has long recognized that the “First Amendment needs breathing space” and that any statute that burdens the exercise of First Amendment rights “must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.”³⁹ As a result, even those statutes that have the demonstrably legitimate purpose of proscribing a category of unprotected speech are susceptible to constitutional challenges to the extent that an application of the statute burdens protected expression in a particular instance. Teenagers who engaged in the production or distribution of sexually explicit images and were charged under child pornography laws may challenge the statutes as applied to them, providing the court an opportunity to narrow the application of such statutes in order to ensure that any burdens on free expression are no more than is essential to achieve the gov-

³² *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

³³ *R. A. V. v. St. Paul*, 505 U.S. 377, 382 (1992) (explaining that content-based regulations are presumptively invalid).

³⁴ *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004).

³⁵ *United States v. Playboy Entm't Group*, 529 U.S. 803, 817 (2000).

³⁶ *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188 (2007) (quoting *R. A. V.*, 505 U.S. at 387).

³⁷ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

³⁸ *See id.* at 571–72 (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”).

³⁹ *Broadrick v. Oklahoma*, 413 U.S. 601, 611–12 (1973).

ernment’s specific compelling purpose.⁴⁰ Even individuals who produce, possess, or disseminate images of child sexual abuse clearly proscribed by child pornography laws may be in a position to challenge the child pornography statutes facially as a result of the overbreadth doctrine.⁴¹ However, a court will only apply the “strong medicine” of invalidating a statute on its face if it finds that the statute burdens a substantial amount of protected speech.⁴²

III. CURRENT CHILD PORNOGRAPHY REGULATIONS DO PROHIBIT SEXTING

Because “it is impossible to determine whether a statute reaches too far without first knowing what the statute covers,”⁴³ it is necessary to determine whether the production, dissemination, receipt, and possession of sexually explicit text messages fall within the prohibition under existing child pornography regulations. Although child pornography laws vary across jurisdictions, the statutes typically prohibit the production, dissemination, or possession of sexually explicit images of minors in terms broad enough to reach some self-produced images.⁴⁴

Determining whether self-produced images satisfy definitions of child pornography requires a fact intensive inquiry into the content of specific images in specific cases. Under federal law, for example, it is a crime for “any person” to knowingly receive, distribute, or possess any visual depiction the production of which “involve[d] the use of a minor engaging in sexually explicit conduct.”⁴⁵ Similarly, it is a crime for any person to “employ[], use[], persuade[], induce[], entice[], or coerce[] any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct”⁴⁶ Sexually explicit conduct, in turn, is defined to include not only several specifically enumerated sexual acts, but also “lascivious exhibition of the genitals or pubic area.”⁴⁷ Not all self-

⁴⁰ Cf. Edward B. Foley, “Narrow Tailoring” Is Not the Opposite of “Overbreadth”: Defending BCRA’s Definition of “Electioneering Communications”, 2 ELECTION L.J. 457, 473 (2003) (explaining that the court applies strict scrutiny in as-applied challenges to determine whether a statute is unconstitutional when applied in a specific circumstance); Steven G. Gey, *A Few Questions about Cross Burning, Intimidation, and Free Speech*, 80 NOTRE DAME L. REV. 1287, 1313 (2005) (“The successful litigation of an as-applied [challenge] will result in a narrow ruling carving out that plaintiff’s expression from the reach of the statute, but leaving the statute as a whole intact.”).

⁴¹ The overbreadth doctrine is an exception to the general rules of standing that permits an individual to attack an overly broad statute despite the fact that his conduct is clearly unprotected and could be regulated by a statute drawn with the requisite specificity. *New York v. Ferber*, 458 U.S. 747, 768–69 (1982); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

⁴² *Broadrick*, 413 U.S. at 613, 615.

⁴³ *United States v. Williams*, 553 U.S. 285, 293 (2008).

⁴⁴ Smith, *supra* note 2, at 513.

⁴⁵ 18 U.S.C. § 2252 (2006) (emphasis added).

⁴⁶ 18 U.S.C. § 2251 (2006) (emphasis added).

⁴⁷ 18 U.S.C. § 2256(2)(A) (2006).

produced images contain depictions of sexually explicit conduct, and there is also some question as to whether a minor has been “used” in the production of self-produced images. It seems clear that when the producer of the image is not the pictured individual or when more than one minor engages in and records a sexual act, the production of such images would involve the “use” of a minor. It is less clear, however, that when a minor takes an explicit photograph of him or herself, he or she could be charged with production. Can an individual employ, use, persuade, induce, or entice oneself? There is some argument, at least, that when read in context, “use” seems to contemplate or require another individual involved in the production other than the minor-subject of the images. With no explicit age restrictions such as the “Romeo and Juliet” exceptions found in some statutory rape laws,⁴⁸ minors, no less than adults, can be charged and found guilty of child pornography offenses if the sexted image satisfies the legal definition.

Even if the plain language of the statute permits prosecution of juveniles for sexting, courts may hesitate to apply the statute under circumstances that would produce results severely in conflict with its articulated purpose. Legislators who drafted child pornography statutes and authorized such severe penalties for the production, distribution, and possession of such images did not contemplate the phenomenon of sexting in which teenagers, not predators, snapped pictures of themselves.⁴⁹ Legislators sought to target sexual abuse of children, “a most serious crime and an act repugnant to the moral instincts of a decent people,”⁵⁰ and the laws were drawn to protect the child victims of this abuse. Prosecuting sexting cases would in effect be declaring the subjects of the images simultaneous victims and perpetrators. Although the plain language of a statute is considered the best evidence of its purpose, in some rare case where “the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters,” the intention rather than the strict language should control.⁵¹

Despite limited grammatical challenges to the plain meaning of the statutes, as well as purpose driven arguments against the application of child pornography regulations to sexters, it seems that neither the status of the perpetrator as a minor nor the voluntary nature of the conduct brings sexting outside the scope of child pornography regulations. Furthermore, there is evidence that both courts and legislatures believe existing child pornography laws encompass sexting. For example, in *A.H. v. State of Florida*, the First District Court of Appeal of Florida upheld the delinquency of a sixteen-year-old girl who photographed herself and her seventeen-year-old boyfriend en-

⁴⁸ See, e.g., 18 PA. C.S.A. § 3122.1 (2008) (“[A] person commits a felony of the second degree when that person engages in sexual intercourse with a complainant under the age of 16 years and that person is four or more years older than the complainant and the complainant and the person are not married to each other.”).

⁴⁹ Smith, *supra* note 2, at 517.

⁵⁰ Ashcroft v. Free Speech Coal., 535 U.S. 234, 244 (2002).

⁵¹ Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982).

gaging in sexual intercourse.⁵² The court found that the Florida child pornography statute was not “limited to protecting children only from sexual exploitation of adults” and was also applicable to minor offenders.⁵³ Similarly, on June 1, 2009, the Governor of Vermont signed into law a bill adding a Romeo and Juliet provision to the state child pornography laws, exempting minors from prosecution for child pornography provided that the sender voluntarily transmitted an image of him or herself.⁵⁴ This Act reflects the fact that Vermont legislators believed that under the state’s child pornography laws, juveniles engaged in the exchange of explicit photos of themselves were at risk of prosecution for child pornography offenses and punishment.⁵⁵

IV. SEXTING IS NOT CHILD PORNOGRAPHY

A. *Why Child Pornography Is Unprotected Speech*

Recent Supreme Court jurisprudence has defined child pornography as an unprotected category of speech separate from traditional obscenity limitations to the extent that such images are intrinsically related to the crime of child sexual abuse.⁵⁶ As previously discussed, content-based regulations are presumptively invalid and the government must show that any regulations that restrict free expression are narrowly tailored to promote a compelling government interest.⁵⁷ With regard to a narrow class of well-defined exceptions, the Court has foregone the necessity of case-by-case adjudication, reflecting the calculus that the “evil to be restricted so overwhelmingly outweighs the expressive interests . . . at stake.”⁵⁸ The “inherent dangers of undertaking to regulate any form of expression” and anxiety over heavy-handed censorship, however, have resulted in the careful tailoring of the scope of these categorical exceptions.⁵⁹

⁵² 949 So. 2d 234 (Fla. Dist. Ct. App. 2007).

⁵³ See *id.* at 238 (quoting *State v. A.R.S.*, 684 So. 2d 1383, 1387 (Fla. Dist. Ct. App. 1996)).

⁵⁴ Mike Celezic, *Vermont Moves to Reduce Teen ‘Sexting’ Charges*, MSNBC, Apr. 15, 2009, <http://www.msnbc.msn.com/id/30224261>; National Conference of State Legislatures, 2009 “Sexting” Legislation, <http://www.ncsl.org/default.aspx?tabid=17756> (last visited Apr. 1, 2010).

⁵⁵ See Celezic, *supra* note 54 (explaining that state legislators who are “[u]nwilling to force teens to go through life as registered sex offenders because they foolishly used their cell phones and computers to exchange revealing photos of themselves with friends” have moved to decriminalize sexting).

⁵⁶ See *United States v. Williams*, 553 U.S. 285, 288 (2008) (explaining that over the past twenty-five years the Court has developed child pornography as a category of proscribable speech that is separate from but overlapping with obscenity); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 240 (2002); *New York v. Ferber*, 458 U.S. 747, 764–65 (1982).

⁵⁷ See *United States v. Playboy Entm’t Group*, 529 U.S. 803, 816–17 (2000).

⁵⁸ See *Ferber*, 458 U.S. at 763–64.

⁵⁹ *Id.* at 755 (quoting *Miller v. California*, 413 U.S. 15, 23 (1973)) (“[The] difficulty was not only to assure that statutes designed to regulate obscene materials sufficiently

Offensive sexual expression has historically been subject to regulation through the doctrine of obscenity.⁶⁰ Although rejection of obscenity was “implicit in the history of the First Amendment,”⁶¹ it was not until *Miller v. California* in 1973 that the Supreme Court articulated a definition.⁶² Obscenity regulation in general and the *Miller* standard in particular attempt to strike a balance “between the State’s interest in protecting the ‘sensibilities of unwilling recipients’ from exposure . . . and the dangers of censorship inherent in unabashedly content-based laws.”⁶³

In *New York v. Ferber*, however, the Supreme Court went beyond the *Miller* standard and defined a new categorical exclusion that denies First Amendment protection to sexually explicit visual depictions of minors.⁶⁴ In establishing this category of unprotected speech, the Court focused on the harm that occurs to a child in the course of production of the images rather than the harm that emanates from the later dissemination of the images.⁶⁵ It was New York’s particular interest in “prosecuting those who promote the sexual exploitation of children” that gave the legislature greater leeway in proscribing child pornography than other forms of sexual expression.⁶⁶ In *Ferber*, the Court upheld prohibitions against not only production, but also distribution, of child pornography because it was “intrinsically related to the sexual abuse of children,” in that it created a permanent record of the child’s abuse and provided an economic motive for the production of such images.⁶⁷ Similarly in *Osborne*, the Court held that these same reasons justified a ban on the possession of child pornography, whereas the private possession of mere obscenity could not be prohibited.⁶⁸ The basis for creating a distinct

defined what was prohibited, but also to devise substantive limits on what fell within the permissible scope of regulation.”).

⁶⁰ *Roth v. United States*, 354 U.S. 476, 485, 487 (1957).

⁶¹ *Ferber*, 458 U.S. at 754.

⁶² *See id.* at 754–55; *see also Miller*, 413 U.S. at 24 (“A state [obscenity] offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”).

⁶³ *Ferber*, 458 U.S. at 756.

⁶⁴ *See id.* at 749–50 (explaining that the case arose after several state legislatures enacted regulations which prohibited sexual content involving children and which did not incorporate the *Miller* standard).

⁶⁵ *See id.* at 758–59 (explaining that child pornography laws reflect the legislative judgment that the “use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child” and holding that the distribution of child pornography is “intrinsically related to the sexual abuse of children”); *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250–51 (2002) (explaining that in *Ferber* the Court’s judgment that child pornography is of exceedingly modest or *de minimis* value was based on how it was made rather than on what it communicated).

⁶⁶ Brian Slocum, *Virtual Child Pornography: Does it Mean the End of the Child Pornography Exception to the First Amendment?*, 14 ALB. L.J. SCI. & TECH. 637, 645; *see also Ferber*, 458 U.S. at 756.

⁶⁷ *Ferber*, 458 U.S. at 759–60.

⁶⁸ *Osborne v. Ohio*, 495 U.S. 103, 108–09 (1990) (holding possession of child pornography may be proscribed in an effort to protect child victims and “destroy [the] market for the exploitative use of children,” whereas possession of mere obscenity may

category of unprotected material and articulating a test separate from the obscenity standard is the compelling government interest in preventing and punishing the sexual exploitation of children balanced against the *de minimis* value of child pornography.

Child pornography statutes, like all content-based regulations, “run the risk of suppressing protected expression”⁶⁹ and the category, therefore, must be adequately defined by statutes, either as written or as authoritatively construed.⁷⁰ The definition must be tailored to the “nature of the harm to be combated” and limited, as originally articulated in *Ferber*, to visual depictions of children below a specified age engaged in certain sexual conduct that is also adequately limited and described.⁷¹ Even in this most sensitive area, the Supreme Court has demonstrated its willingness to police the limits of the child pornography exception.⁷² In *Ashcroft v. Free Speech Coalition*, for example, the Supreme Court invalidated portions of the Child Prevention Pornography Act of 1996 (“CPPA”) because its virtual pornography provisions proscribed a large universe of speech that is neither obscene under *Miller* nor child pornography under *Ferber*.⁷³ The Court held that “[w]here the images are themselves the product of child sexual abuse . . . the State ha[s] an interest in stamping it out without regard to any judgment of its content. . . . The production of the work, not its content, was the target of the statute.”⁷⁴ The Court explained that its prior decisions in *Osborne* and *Ferber* were anchored in its concern for the victims of child sexual abuse and that, without such a basis, the other articulated government interests would not necessarily suffice.⁷⁵ *Free Speech Coalition* clarified that child pornography was limited to those images that are the “record of sexual abuse”⁷⁶ and that sexually explicit images of minors that are “neither obscene nor the product of sexual abuse” retain the protection of the First Amendment.⁷⁷

not be proscribed because it is based on a paternalistic desire to control a viewers thoughts).

⁶⁹ *Ferber*, 458 U.S. at 756.

⁷⁰ *Id.* at 764.

⁷¹ *Id.*

⁷² For example, in *Ferber*, Justice O’Connor, concurring, opined that the statute may be overbroad in the sense that it “bans depictions that do not actually threaten the harms identified by the Court” or “might not involve the type of sexual exploitation and abuse targeted.” *Id.* at 775 (O’Connor, J., concurring); *see also* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (invalidating portions of the CPPA that proscribe speech outside the definition of child pornography articulated in *Ferber*).

⁷³ *Free Speech Coal.*, 535 U.S. at 256.

⁷⁴ *Id.* at 249.

⁷⁵ *Id.* at 250.

⁷⁶ *See id.*

⁷⁷ *Id.* at 251.

B. Sexting and the Harm Principle

Sexting should be considered outside the scope of the child pornography exclusion because such images, like virtual child pornography, do not involve the sexual abuse of a child.⁷⁸ When, as in sexting, the images in question lack a proximate connection to the crime of child rape, the images fall outside the confines of the child pornography category of speech because the government interest in protecting the victims of child sexual abuse is no longer present and cannot justify the wholesale exclusion from First Amendment protection. An adolescent taking nude or scantily clad photos of themselves or recording their consensual sexual encounters does not suffer the immediate psychological, physical, and emotional harm of the kind suffered by child sexual abuse victims.⁷⁹ “Far from being forced or enticed into submitting to sexual acts to be recorded in some fashion—the usual, incredibly harmful means through which child pornography is created—with self-produced child pornography, it is the minor who decides to create or distribute sexually explicit images of themselves.”⁸⁰ When the images are not coerced, the immediate and violent harm to a child that is the foundation of the child protection rationale is decidedly absent.

Even though self-produced images create a lasting permanent record that may cause future emotional and psychological harm to the minor, the circulation of such images does not “revictimize” the juvenile with every viewing.⁸¹ Without the underlying criminal and coercive methods of production, the circulation of self-produced images does not subject the minor to the same type of continued invasion and exploitation of his or her sexual autonomy and bodily integrity that is *so* degrading that it can only be characterized as a *continuation* of the act of sexual abuse.⁸² Although such images surely hold unlimited potential for subsequent harm if disseminated without the minor’s consent, or even if the minor merely regrets having voluntarily distributed such images in the future, this harm is not *identical* or even substantially similar to the harm suffered by victims of child pornography. Like virtual pornography, the harm in sexting “does not necessarily follow from

⁷⁸ See *id.* at 250.

⁷⁹ Calvert, *supra* note 8, at 46 (“For instance, if a fourteen year-old girl snaps a picture of herself posing naked and lying on her own bed while alone in her own bedroom, she likely is not suffering either physical abuse or emotional abuse when the image is being captured.”).

⁸⁰ Smith, *supra* note 2, at 521.

⁸¹ See *Free Speech Coal.*, 535 U.S. at 249 (explaining that with pornographic images involving abused children “the continued circulation itself would harm the child who had participated” because “each new publication of the speech would cause new injury to the child’s reputation and emotional well-being”).

⁸² *But see* Leary, *supra* note 7, at 40 (“That a minor lacks the understanding of the destructiveness of her actions at the time of the crime does not mean she forfeits the harm she will more tangibly experience when she realizes the permanency of her actions. . . . Later in life a minor becomes aware of that continued exploitation and deserves the same protection from further victimization.”).

the speech, but depends upon some unquantified potential for subsequent criminal acts.”⁸³ This is not to discount the potential harm that follows from sexting. Certainly very real danger exists to minors engaging in sexting, and protecting minors from these potential harms may even justify regulation or prohibition of these images, but they are not the harm identified by the Supreme Court as the basis for a wholesale child pornography exemption from First Amendment protection.⁸⁴

It is important to note, however, that self-produced images, unlike virtual images, involve real children. Some of the language in *Ashcroft v. Free Speech Coalition* suggests the Court may be willing to include under its definition of child pornography images that harm children only through circulation.⁸⁵ The relevant dicta referred to an unchallenged provision of the CPPA that prohibited the morphing of innocent pictures of real children so that an identifiable minor appears to be engaged in sexual activity.⁸⁶ The Court noted that “[a]lthough morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber*.”⁸⁷ Even if a court finds that such morphed images are unprotected speech by way of the child pornography exception, as some lower courts have subsequently held,⁸⁸ it does not automatically follow that self-produced images are necessarily also unprotected speech. Significantly, morphed images can be distinguished from self-produced images because they contain an element of exploitation and invasion of sexual autonomy that is absent from self-produced images. Furthermore, in the case of morphed images the law is being exercised purely in the favor of child victims, whereas in the case of self-produced images the children who appear in such images risk severe criminal penalties in exchange for “protection.”

⁸³ *Free Speech Coal.*, 535 U.S. at 250.

⁸⁴ *Cf. id.* at 246 (finding that in order to prohibit virtual child pornography without violating the First Amendment, it would be necessary to recognize an additional category of unprotected speech).

⁸⁵ *See id.* at 242.

⁸⁶ *See* 18 U.S.C. § 2256(8)(C) (2006) (“[C]hild pornography means any visual depiction . . . where . . . such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.”).

⁸⁷ *See Free Speech Coal.*, 535 U.S. at 242.

⁸⁸ *See, e.g.,* *United States v. Bach*, 400 F.3d 622, 632 (8th Cir. 2005) (holding that images that morphed the face of a well-known child celebrity onto the body of a young boy gratuitously exposing his genitals involved the type of harm that can be constitutionally prosecuted under *Ferber* and *Free Speech Coalition*); *United States v. Hotaling*, 599 F. Supp. 2d 306, 321 (N.D.N.Y. 2008) (“18 U.S.C. § 2256(8)(C), which criminalizes morphed images of child pornography created without the filming or photographing of actual sexual conduct on the part of an identifiable minor, does not violate the First Amendment.”). *But see* *State v. Zidel*, 940 A.2d 255, 265 (N.H. 2008) (“[A]pplication of [New Hampshire’s child pornography possession laws] to the defendant’s conduct violates his First Amendment right to free speech . . . where the defendant is charged with mere possession of morphed images that depict heads and necks of identifiable minor females superimposed upon naked female bodies, and the naked bodies do not depict body parts of actual children engaging in sexual activity.”).

Even though self-produced images of minors may contribute to the problem of the sexual abuse of children because these images may “whet[] the appetites of pedophiles”⁸⁹ and may be used to groom future victims, such indefinite potential for future harm cannot bring sexting images within the definition of child pornography. *Free Speech Coalition* emphatically rejected the government’s arguments that prohibition of virtual child pornography could be justified by the need to avoid these indirect threats to children.⁹⁰ The Court held that “[t]here are many things innocent in themselves . . . that might be used for immoral purposes”⁹¹ and that “[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.”⁹² Such a ban would not attack the harm flowing from the production of the images, but it would impermissibly attempt to control the private improper thoughts that may result if any such images were to find their way into the hands of a pedophile.⁹³

Even if the existence of sexting images, to the extent they are not included within the definition of child pornography, may impede future investigations and prosecutions of pedophiles, such dangers cannot justify a wholesale ban on sexting through the child pornography exception. Some argue that if such images are not considered child pornography, then an officer of the law confronted with a sexually explicit image of a child may not have probable cause to obtain a search warrant and investigate the origins of the photograph, potentially depriving society of the opportunity to rescue a child from on-going abuse and punish a perpetrator.⁹⁴ Another unsettling consequence of removing sexting images from the definition of child pornography is that once such images are adjudged to be outside the child pornography exception as a consequence of the method of production, such images may not be brought back within the framework of child pornography no matter who later possesses them or to what use they are put.⁹⁵ As a result, sexting may provide pedophiles with a defense that any images they possess were voluntarily self-produced and thus are protected speech. *Free Speech Coalition* made clear, however, that protected speech may not be banned as a means to banning unprotected speech.⁹⁶ “Protected speech does not become unprotected merely because it resembles the latter.”⁹⁷ Therefore, even if the consequences for investigators and prosecutors of child pornography

⁸⁹ *Free Speech Coal.*, 535 U.S. at 253.

⁹⁰ *See id.* at 251–54.

⁹¹ *Id.* at 251.

⁹² *Id.* at 253.

⁹³ *See id.* (“The government ‘cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts.’” (quoting *Stanley v. Georgia*, 394 U.S. 557, 566 (1969))).

⁹⁴ *See* Mary Graw Leary, *The Right and Wrong Responses to Sexting*, PUB. DISCOURSE, May 12, 2009, <http://www.thepublicdiscourse.com/2009/05/227>.

⁹⁵ *See id.*

⁹⁶ *See Free Speech Coal.*, 535 U.S. at 255.

⁹⁷ *Id.*

were severe, limiting their ability to prove conclusively that images are the result of coercion rather than self-production, this could not justify a wholesale ban on sexting through the child pornography exception.

Finally, sexting cannot be excluded from First Amendment protection on the basis of the child pornography exception because it is not clear that the expressive interest in the sexted images is necessarily equivalent to that of child pornography. Although the Supreme Court held in *Ferber* that “[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*,”⁹⁸ the Court later made clear that the judgment in *Ferber* was based on “how it was made, not on what it communicated.”⁹⁹ In fact, the idea generally communicated by sexted images—teenage sexual activity—is, as the Supreme Court has recognized, a fact of modern life and has been a popular theme in art and literature throughout time.¹⁰⁰ Any attempt to restrict the rights of minors to produce and distribute sexually explicit photographs of themselves must be weighted against the constitutional rights of minors to engage in such sexually expressive speech.¹⁰¹ Although minors are “persons” under the Constitution and are generally possessed of fundamental rights, a major question remains as to how and in what way these rights differ from the First Amendment rights of adults.¹⁰²

CONCLUSION

Finding that sexting cannot be constitutionally prohibited as a form of child pornography does not require an abandonment of all efforts to regulate such conduct. Although a prohibition on sexting would not be narrowly tailored to serve the compelling interest of preventing the sexual abuse of children, the government is free to articulate new laws and punishments designed to protect minors from the harms particular to sexting. Such laws would be constitutional if they are narrowly tailored to a compelling government purpose or if the Supreme Court recognizes a new category of unprotected speech that encompasses all pornographic images of minors regardless of their relation to child sexual abuse. Furthermore, some sexting images may also be proscribed under existing statutes, to the extent that such

⁹⁸ *New York v. Ferber*, 458 U.S. 747, 762 (1982).

⁹⁹ *Free Speech Coal.*, 535 U.S. at 251.

¹⁰⁰ *Id.* at 247.

¹⁰¹ *Calvert*, *supra* note 8, at 43.

¹⁰² *See id.* at 43–45. *Compare* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (“Students in school as well as out of school are ‘persons’ under our Constitution. They are possessed of fundamental rights which the State must respect . . .”), *with* *Ginsburg v. New York*, 390 U.S. 629, 637 (1968) (holding that it was not unconstitutional for New York to give minors “a more restricted right . . . to judge and determine for themselves what sex material they may read or see” than that given to adults).

images are obscene.¹⁰³ Although obscenity regulations will not reach all sexting images,¹⁰⁴ they would permit a ban on the most egregious, offensive, and potentially damaging images produced and circulated.

This preliminary inquiry into the problem of sexting leaves many important issues unaddressed. An appropriate response to juvenile self-production of pornographic images must balance the serious consequences of this conduct against the rights, if any, of adolescents to free sexual expression. Furthermore, it is essential that any response to the problem of sexting, whether penal or educational, should be consistent with existing legal and moral approaches to adolescent sexuality to avoid inconsistency and perverse consequences. As legislators, courts, prosecutors, parents, and educators develop responses to the problem of self-produced pornographic images, new and interesting questions must be answered. The phenomenon of sexting raises important issues such as the extent to which adolescent rights to free expression are congruent or dissimilar to the rights of adults and the extent to which the boundaries of pornography and obscenity are redefined by each generation.¹⁰⁵ Addressing the problem of child pornography as a new and unique problem will avoid constitutional difficulties, prevent the application of overly harsh penalties to juvenile misadventure, and avoid undermining the legitimacy of traditional child pornography regulation.

¹⁰³ *State v. Canal*, 773 N.W.2d 528, 532 (Iowa 2009) (upholding the conviction of an eighteen-year-old high school student for knowingly disseminating obscene material when he texted an image of his erect penis to his fourteen-year-old schoolmate).

¹⁰⁴ The Supreme Court has noted that “the apparent age of persons engaged in sexual conduct is relevant to whether a depiction offends community standards” and that “[p]ictures of what appear to be 17-year-olds engaging in sexually explicit activity do not in every case contravene community standards.” *Free Speech Coal.*, 535 U.S. at 240, 246.

¹⁰⁵ *See Rosen*, *supra* note 5 (“Each generation re-imagines the erotic. In this process, notions of the pornographic or the obscene are challenged and changed. And in the process, the generation is changed, its erotic sensibility remade, thus shifting the sexual landscape. The eroticism of today’s teens is not that of their grandparents, let alone their parents.”).