

The Right and Wrong Responses to "Sexting"

by [Mary Graw Leary](#)

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A proposed law in Vermont will not only do little to solve the problem of "sexting," but actually risks resulting in making even more children vulnerable to sexual exploitation.

The issue of so-called "sexting" has captured the attention of the media and, now, the legislatures. But the way the media has handled the complicated social issue of children sending pornographic pictures of themselves to others has brought the Vermont legislature to the verge of creating a bad law. The Vermont proposal would exempt the trading of self-produced images of child pornography from some child pornography statutes¹. The issue of self-produced child pornography (which is defined as a minor creating a picture of him or herself which meets the definition of child pornography: i.e. engaged in sexually explicit conduct) is a complex one. The Vermont legislature seems more concerned with the secondary problem of unwise prosecutions than it is with the behavior itself. However, by neglecting the main problem, the legislation risks significant damage to the children engaged in this behavior and undermines the broader battle against child pornography.

Before there can be any intelligent discussion about self-produced child pornography, there must be a common understanding of the images in question. First, images properly considered for prosecution are not "borderline" images, but must meet the definition of child pornography. For many jurisdictions, although not all, there is a fairly candid definition of child pornography referencing depictions of sexually explicit conduct that include graphic depictions of sexual activity or lascivious exhibitions of the genitals or pubic areas. Secondly, self-produced child pornography only references situations in which a minor creates the image with no encouragement or coercion from an adult. When there is such pressure, the child is clearly the victim of exploitation or enticement and any consideration of prosecuting the juvenile is misplaced. Finally we need to stop using the term "sexting." This word was created by the media to sensationalize a serious, multi-faceted problem. Furthermore, the media has used the term to over-generalize and place under one heading such diverse behaviors as one minor sending one picture to a perceived significant other, a minor taking pictures of more than just himself engaged in sexually explicit conduct and distributing them to others, a minor posting such pictures on a web site, an older teen asking (coercing) his or her girlfriend or boyfriend for such pictures, and an adult possessing such pictures. These are all very different behaviors and calling them all "sexting" brings us no closer to understanding their legal and social significance.

The proposed Vermont legislation, although no doubt well-intended, is particularly problematic and risks a number of long-term consequences. First, this legislation assumes that the children in the images are not harmed. This view ignores what the Supreme Court and the United States Congress have referenced: the unique harm of child pornography is not only the activity captured in the image, but the fact that it

is memorialized out of the control of the child subject for eternity. It is the perpetuity of the victimization which is uniquely devastating to these children. One need look no further than the tragic suicide of an Ohio teen after a former boyfriend distributed a picture of her over the Internet to see the manifestation of the harm. Consistent with research in the area of non-self-produced child pornography, these children are likely to experience depression, anxiety, low self-esteem, and other effects from the fact that these images will be circulating forever.

Second, this legislation risks creating impediments to law enforcement's ability to investigate suspected child sexual exploitation. Before the phenomenon of self-produced child pornography, there were many images in which the children appeared to be willing subjects. However, it is not until there is an investigation into the production of a particular image that we can know the actual situation. Circumstances often include sexual assault, grooming, blackmail, bullying, domestic violence, prostitution, etc. If these self-produced images are not considered child pornography, then law enforcement may be unable to investigate them. An officer cannot obtain a search warrant if he or she does not have probable cause to do so. If the image is all the officer has to start an investigation, and this legislation is passed, in Vermont the officer may not have any evidence of a child pornography crime. The officer's ability to obtain a search warrant may be compromised and society risks missing an opportunity, often the only opportunity, to investigate and rescue the child from continued molestation, blackmailing, or exploitation.

Third, this legislation provides a built-in defense for the ultimate consumer of these images: the pedophile. Once these images are on the Internet they make their way to the newsgroups, peer-to-peer file-sharing networks, and email of those who use these images to validate their own sexual proclivities for children. When caught with such an image, a defendant will claim (indeed, such a defense has [already been suggested](#)) that it was "voluntarily produced" and, therefore, does not meet the definition of child pornography. For how can something not be child pornography with the first possessor, but become child pornography five consumers down the distribution chain? *Ashcroft v. Free Speech Coalition* has been read to hold that virtual child pornography is protected speech because it does not harm children in production. The logical extension of that argument is that self-produced images are not child pornography because the children within are not "harmed in production." While such an assertion is, in my view, incorrect this defense claim is arguably strengthened by this proposed Vermont legislation when it excludes self-produced images from the crime of child pornography. Therefore, an adult possessor of such a self-produced image could be able to argue that he or she indeed possesses protected "speech."

This leads to recognition of an important collateral effect of such a position. There was a time in our nation when society refused to acknowledge the sexual abuse and exploitation of children and women. Even after we recognized this victimization, there was a view that some children and women who appeared less virtuous, were

worthy of less protection. Thankfully, we are moving away from this kind of "she's a bad kid" or "she deserved it for the way she behaves" mentality. Indeed, our child abuse and pornography laws reflect a basic understanding that children cannot consent to sexual abuse and exploitation and that they all deserve protection. All children in pornographic images are victimized when these images are viewed throughout the Internet. This kind of legislation which labels some child pornography as illegal, and others not, risks a return to an era where the law will protect some children (i.e. those who are perceived to be virtuous) but not those who we think "asked for it." This is wrong. All children have an inherent dignity and when they are sexually exploited, we should continue to treat the further exploitation as wrong. While concerns about unwise prosecution need to be addressed, this legislation's costs to the future protection of these same children is too high.

Fourth, the Vermont legislation ignores the fact that this activity floods the marketplace with exponentially more images of child sexual exploitation. The need to shut down the marketplace for child pornography was paramount to the Supreme Court in both *Osborne v. Ohio* and *New York v. Ferber*. This legislation further ignores what we know from research: these images are used to validate offenders' activities, groom children, desensitize children, and fuel offender fantasies and crimes against children. Equally insidious, this flooding of the market desensitizes us all to the ongoing commodification of children as sexual objects for the benefit of adult sexual arousal. The effect of such a flooding is to regard children as merely means to adult ends, rather than individuals with inherent dignity.

The problem of child self-exploitation is indeed a complex one. It is tempting to label it a parenting issue and remove it from a concern of the government or society as a whole. The solution is for society and its institutions (educational, social service, religious, law enforcement, legal, civic), to come together and form a considered strategy that encourages prevention and a smart response when prevention fails. If we want to prevent child pornography, we must examine the normalization of the sexual exploitation of children in the mainstream media and in our lives. No solution can ignore that the society in which we have asked our children to live is saturated with the message that their value is inherently tied to their sexualization.

What is the proper response if child pornography prevention fails? Surely it rests not with any one social institution, including the prosecutor's office. We should embrace all the tools at society's disposal, not eliminate one. While we should be careful to avoid registration of such juveniles as sexual offenders and prevent inappropriate prosecutions, the proper solution is to develop prosecutorial policy and wisely employ prosecutorial discretion. Public prosecutors should develop considered policies that establish protocols for the narrow circumstances when juvenile adjudication may be appropriate, and should exercise their discretion to do so only when necessary. However, decriminalizing such actions is dangerous and irresponsible.. Effectively legalizing a form of child exploitation will imperil the

advancements we have made in our fight against child exploitation and the very safety of the children we must protect.

¹ <http://www.legislate.vt.us/docs/2010bills/senate/S-125.pdf>. These statutes include Use of Child in a Sexual Performance; Promoting a Recording of Sexual Conduct; Possession of Child Pornography.

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