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Challenging childhood, challenging children: Children's rights and sexting

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Abstract
Concern with children's online safety dominated the early days of the internet, fuelled by a fear of online predators able to utilise online technologies to manipulate their identities and groom children. Such adults strike at long held notions of childhood innocence and often commit serious offences as a result. However, a possibly unforeseen consequence of new online technologies has been the apparent capacity they afford to children themselves to reconstruct the meaning of childhood and family relationships, especially in the age of mobile (and hence less capable of parental supervision) technology. A recent example of this is the phenomenon of 'sexting', which appears to be caught between debates on the sexual rights of children and the role of the state in protecting children from themselves. What I wish to explore, however, is whether such constructions of the debate are themselves static and belong to an older age. Instead, is it possible that online technologies are altering the dynamics of relationships which created romantic notions of childhood innocence in the past, and which now enable children to actively participate in the formation of their own identity? In other words, have new online technologies enabled the creation of new identities of childhood which challenge the order of childhood? If so, does this mean that regulations based on older notions of childhood are doomed to fail, or alternatively lead to such injustices in the eyes of young people that the law's legitimacy will be open to question?

Keywords
Autonomy, childhood, law, sexting, social media, youth

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While it is no doubt true that children have for a long time engaged in various forms of sex-related play the invention of mobile telephony has taken that play to a different level. One aspect of the use of such technology in recent years has been the phenomenon of 'sexting' – the transmission by text message of one's body image in an allegedly sexual pose. Such behaviour has created a certain amount of concern (or moral panic depending on one's perspective) about such practices. There have been various warnings directed at families and children posted by law-enforcement agencies and guidance documents generated by child protection authorities about the posting of such images in social media 'always' being online and so carrying the possibility that one day they will return to haunt the young persons concerned. Even the US President has warned young people of the future consequences of posting their images online. (*Daily Telegraph*, 2009) In addition to these concerns there are often connections made between sexting and the person concerned not knowing about it or agreeing to it. Thus sexting is often discussed in the context of coercive or bullying practices.

It is however the actual or threatened prosecution of teenagers for the distribution and possession of child pornography as the result of such sexting which has sparked recent discussion of the phenomenon,[1] especially when they have been sexting their own image. The responses to this consequence of sexting appear to fall into two broad camps. On the one hand there appears to be the view that the prosecution of young people for such activity applies laws which were not intended to punish children but instead protect them. For example, the placement of such young people on sex offenders' registers means that the sexting behaviour can impact on the young person's life well beyond childhood. (Brady, 2012) The view is taken by some that the law is being heavy handed in its response through applying laws that were designed to deal with adults who prey on children, not children who commit immature acts in their childhood. (Arcabascio, 2009–2010; Day, 2010; Eraker, 2010; Leary, 2009–2010; Ryan, 2010; Weins and Hiestand, 2009; Wood, 2009–2010) In the USA in particular this often plays out in terms of the right to privacy and the constitutionality of laws which prohibit this form of sexual expression (Day, 2010; Wastler, 2010). This approach often leads to calls for a more 'balanced' approach as far as sanctions for young people who sext are concerned (Ryan, 2010). To some extent this camp also bases its thinking about teen sexting in terms of the immaturity of the child and so education and guidance are often favoured responses (Schmitz and Siry, 2011). There is also an important distinction drawn here between sexting that arises out of coercive relationships and that which comes out of consensual activity (even if that consent is not legally recognised because of the age of the participants).

The other response to sexting appears grounded in the concern that it often arises from the sexualisation of our culture and even if not strictly coerced, is often participated in by teens – especially girls – because they have absorbed this view of how they should present to the world. (Ringrose et al., 2012) In this view of sexting, the role of gender is pivotal to understanding its practice. Notions of consent are

regarded as highly problematic here as within this understanding of sexting the cultural paradigm that girls are required to operate within creates a high degree of ambiguity when determining how truly voluntary any agreement to sexual conduct actually is.

While both of these perspectives offer much in defining the issues surrounding sexting, what I seek to argue in this article is that sexting is also about who has control of the child's body (and as a consequence children's sexuality) more generally. In legal discourse the issue of the maturity of children to make decisions about their own bodies (and hence the transmission of their physical image) is the foundation upon which discussions of their legal capacity (or incapacity) to consent in sexual and health matters rests. In that sense debates about sexting are often proxy debates about the right of the child to choose their sexual preferences, explore their sexuality and make decisions about their body, including whether to change gender or abort a pregnancy.

For the most part the law has struggled with the autonomy of the child in sexual matters and has tended – even in more recent times when the child's individual rights have been stressed both formally and rhetorically – towards older views of the child's rights based on notions of paternal protection and adults acting in the child's best interests. In the face of new technologies that have made it difficult to impose the same historical constraints on the child as in the past, it should not be surprising that many adults cling to past legal constructs to seek to explain sexting. This article thus argues that these old legal paradigms are losing relevance in their present form and the law must rethink how it constructs childhood sexuality in relation to matters of consent as a result. Importantly, it must be recognised that alternative legal paradigms do exist within which a more autonomous and empowered definition of the child can develop.

Finally, the notion that sexting is worthy of so much concern at all has to be considered and explained. The debate about how we construct children's rights in relation to sexting is not only about the control of the child's body in sexual matters but more generally with respect to how we treat children. As governments find it increasingly difficult to fund services for children and remove household inequalities that generate significant rates of child poverty, the state has shifted the focus towards regulating those aspects of life that have both populist appeal and limited budgetary consequences. Thus official concern with sexting also satisfies the need for government to show its concern with the welfare of children, while co-opting parents to police, in effect, the activity and take responsibility for the outcomes (Reece, 2006). In this sense childhood sexuality is also mediated through the wider needs of a social system that sustains social inequalities.

Sexting and new technologies

Most legal analyses of sexting begin with a few stories of how the practice has affected the lives of young people engaging in it. For example, Robert Wood begins

his discussion with the following example:

> Sexting issues come to the attention of authorities in different ways. Perhaps the most tragic case was the suicide of an eighteen-year-old Cincinnati woman, Jessica Logan. During her last year of high school, Jessica sent nude pictures of herself to a boyfriend at his request. After their relationship ended, the boyfriend sent the pictures to other high school girls, who began to harass Jessica, calling her a slut and a whore. Jessica's response to the harassment included depression and skipping school. Eventually she hanged herself in her bedroom. (Wood, 2009–2010: 152)

Wood then proceeds to cite a study conducted by the National Campaign to Prevent Teen and Unplanned Pregnancy in partnership with Cosmogirl.com which found that 22% of teen girls, 18% of teen boys and 11% of young teen (ages 11–16) girls had sent or posted nude or semi-nude photos of themselves (Wood: 2009–2010: 154). This is not to suggest that such data are accepted uncritically by him. Wood notes the lack of scientific rigour in this study's methodology and comments that 'although the study makes interesting reading and is imminently [sic] quotable by the media, it does not reflect an accurate or scientific reporting of the magnitude of the problem' (Wood: 2009–2010: 154). What this does suggest, however, is an acceptance that sexting *is* a problem because (a) it is fundamentally about children and sexual behaviour and so it can lead to harmful outcomes, and (b) it is quantifiable in a way that might suggest it is more prevalent than many adults (parents) imagine. Indeed, many of those who work in policing sexting seem to depend on a certain amount of 'shock and awe' tactics with respect to its prevalence, claiming that there are 'increasing' rates of sexting, even though the rates cited in some studies appear to be quite low (Parliament of Australia, 2011: 137–138). Even where the difficulty in quantifying its prevalence is acknowledged, this does not deter convenient inferences being drawn from the lack of data:

> It is not clear how common sexting is in Australia. Kids Helpline has found that while sexting is a topic of interest among young people that 'due to its rising social stigmatisation, young people may not willingly admit that they engage in this behaviour'. (Parliament of Australia, 2011: 137)

Most studies in fact focus heavily on the amount of sexting taking place. Jessica Ringrose and her co-authors in their overview of the research literature on sexting comment that '[o]f the sparse body of research currently available, more is quantitative than qualitative, with surveys throwing some light on how many and which children encounter 'sexting' but revealing little about the meaning of such encounters' (Ringrose et al., 2012: 11). Their summary of that literature notes various rates of sexting such as: the EU Kids Online Project finding that 12% of 11–16 year olds in the UK had seen or received sexual messages online (Ringrose et al., 2012: 11); another UK study that 'found that one in three UK teenagers had received

'sexually suggestive' messages' (Ringrose et al., 2012: 11citing Cross, Richardson, and Douglas (2009)); a 2009 Report for the Pew Institute finding that 15% of 12–17-year-old mobile phone owners had received 'sexually suggestive, nude, or near nude images of someone they knew via text messaging on their cell phone' (Ringrose et al., 2012: 11); and a 'Sex Tech', commissioned by the National Campaign to Prevent Teen and Unplanned Pregnancy in 2009, that found that as many as 48% of 13–19-year-olds reported receiving messages online or via a cell phone' (Ringrose et al., 2012: 12). It should also be noted that they do acknowledge the variance in the quantitative data as well as the problem in defining what constitutes 'sexting' (Ringrose et al., 2012: 12) which must affect responses to survey questions asking whether one has engaged in 'sexting' and therefore the actual rate of occurrence.

In their work, Ringrose et al. focus mainly on the gendered nature of sexting and the manner in which girls are pressured and sexualised by a sexting culture that is driven by a broader 'sexualised' society. Their conclusions thus focus on such matters as the way in which sexting:

> operated as a form of photographic proof that the boys could 'get the girl(s)'. They were a form of popularity currency or a commodity to be collected, traded, shown to others and distributed, but could also be used to punish the girls in question via 'exposure'. (Ringrose et al., 2012: 54)

and how they also:

> explored how girls were ridiculed and judged for sending photos, and were quickly positioned as a 'sket' or slut almost unanimously by both boys and girls in the study. This sat in direct contrast to how boys were rewarded for shows of hard bodily masculinity such as posting photos of their muscles on the their torso, chest, back and abdomen (six pack). (Ringrose et al., 2012: 54)

While such conclusions raise important issues to do with the social context of sexting, such conclusions are likely to be grasped by those who see sexting as per se bad. In their review, Ringrose et al. do not take such a narrow view. For example, they state in their recommendations to schools:

> Importantly, unlike bullying, it cannot simply be generalised that all sexting is a problem. Thus any teacher must encompass within the discussion the recognition that young people are legitimately interested in their developing sexuality; thus exploring or playing with sexual ideas or relationships should not be ignored or rejected but issues of respect, consent and reciprocity in sexual relationships, including digital sexual communications should be discussed. When issues of power and coercion arise – in the form of peer or individual pressure, stereotyping or other hostilities (from either boys or girls, directed to either boys or girls) – then sexting may become problematic. (Ringrose et al., 2012: 54)

Ultimately, what is lacking in both quantitative and qualitative discussions of sexting practice is a full discussion of how such behaviour relates to different value systems. Most discussion of sexting tends to adopt a one-dimensional value approach – that is, that sexting is generally inappropriate – and that responses, legal and social, are required to reinforce this value position, even if done in a way that accepts the 'reality' of young people's technological lives. In this way the debate on sexting has been captured by 'policymakers' who tend towards a view that 'evidence' can be discovered that will support good policy outcomes. What this often ignores are the many values that operate in the field. For example, sexting is often debated in terms of a more 'sexualised' society. But what does that mean and whose values are to drive the definition of such a society?

Conceptualising sexting as a legal problem

In Ringrose et al's work there is the suggestion that there is a different way of understanding sexting based on:

> the need for grasping the importance of digital technologies in young people's lives. Mobile digital technologies are coming to permeate more and more aspects of young people's lives, with young people suggesting they would 'die' without their phones, that phones and social networks play a 'massive part' in their relationships, and are shaping most aspects of everyday lives. (Ringrose et al., 2012: 53)

Of course it is not that 'networks' are shaping young people's lives, as much as it is the young people themselves that constitute those networks. In other words, the new technologies are enabling young people to independently shape their identities in ways that challenge conventional notions of how children develop. This empowerment of children, as with all power, has potentially harmful as well as positive consequences. But the response has to be cognisant of this reality. It is one of the reasons why education campaigns on sexting can quickly fail if they are constructed by children as hectoring and directive. Children simply have the power now to switch off the message through engaging in their own networks of social construction (Australian Broadcasting Commission, 2011).

The manner in which this shift in identity formation has occurred through new media is demonstrated by Jesse Weins and Todd Hiestand's (2009) analysis of two cases involving the prosecution of teenagers for possession of child pornography arising from sexting in the USA. In the first case,[2] two teenagers (a 16-year-old female and a 17-year-old male) had taken photographs of themselves having sex and had sent them to each other. No one else saw the photographs. The 16-year-old female was prosecuted and claimed that the prosecution breached her right to privacy, but this was rejected by the court because while sexual activity may be private the taking of photographs of it was not regarded as a private matter because

> [t]he mere existence of the photographs demonstrated a lack of a reasonable expectation of privacy because the odds were good that the photographs would eventually be shown to third parties for the purpose of profit, the attempt to gain 'bragging rights,' or simply due to the ending of the immature relationship. (Weins and Hiestand, 2009: 5 citing AH *v*. State 949 So. 2d 234, at 237)

This conclusion was also reinforced by a legal analysis that relied on the need to protect children from perceived harm based on their inability to make wise choices in such matters:

> even if a reasonable expectation of privacy existed, the state had a compelling interest under the statute in making sure that these types of materials are never created because juveniles lack the maturity to make intelligent decisions that consider the possible negative repercussions, such as psychological trauma and damage to future endeavors. (Weins and Hiestand: 2009: 5 citing AH *v*. State 949 So. 2d 234, at 238–239)

The court thus justified the punishment of children engaging in sexting as a means to protect them from present (or future) harm. The apparent contradictions in such reasoning has led to some commentators arguing that laws designed to protect children from becoming victims of child pornography should not be used to punish those same children when they send sexual images of themselves to others. Instead other approaches are called for, whether through the application of judicial discretion or different types of sanctions in such cases (Arcabascio, 2009–2010; Eraker, 2010; Leary, 2009–2010; Wood, 2009–2010).

However, the argument for 'lesser' sanctions in such matters may miss the point that creates concern about child sexting in the first place. What such children are doing is not simply sending possibly pornographic images of themselves to other children, they are, in doing so, challenging what it means – or in the eyes of some adults what it *should* mean – to be a child. This is even more apparent from Weins and Hiestand's examination of the second case of *Miller* v. *Skumanick*.[3] In that case school officials discovered images of 'scantily clad, semi-nude and nude teenage girls' (Weins and Hiestand, 2009: 5). The District Attorney (Skumanick) in the case said:

> that students who possess[ed] inappropriate images of minors could be prosecuted for violating child pornography laws. Skumanick asserted that students would be charged with felonies, and if convicted would go to prison, resulting in a permanent criminal record. In addition, he warned that convicted students would likely have to register as sex offenders 'for at least ten years and have their names and pictures displayed on the state's sex-offender website.' Then, in a letter to parents, Skumanick offered to drop the charges if the students completed an education and counseling program. (Weins and Hiestand, 2009: 5–6)

James Kincaid has argued that when we are confronted by matters to do with children and their sexual activity our responses tend to be formulaic and accept

uncritically the evidence that is alleged to support claims of inappropriate conduct (Kincaid, 1998: 40). This often means that we will begin from the premise that sexting is wrong and problematic when conducted by children and that recourse to legal principles that challenge this approach are regarded as technical at best and destructive of children's innocence at worst.

But in *Miller* v. *Skumanick* the parents of the children did not accept uncritically the charges laid. They argued that there had been a breach of their constitutional rights as the images were not pornographic and so to compel attendance in a counselling programme was as a consequence wrong and interfered with their right to raise their children without undue state interference (Weins and Hiestand, 2009: 5–6). Thus unusually in discussions of sexting the content of the images was more closely examined:

> The first photograph included two thirteen-year-old girls from the waist up, wearing opaque bras. One girl was on the phone and the other was making a peace sign. At the time of the lawsuit, the photograph was roughly two years old. The other photograph was of a girl who appeared to have just come out of the shower, wearing only a towel that was wrapped to expose her breasts. The girls asserted 'that they did not disseminate the photographs to anyone else, but that another person sent those pictures "to a large group of people" without their permission. However, a media report stated that the girl depicted exposing her breasts took the picture herself and "sent the photo to her boyfriend to make him jealous"'. (Weins and Hiestand, 2009: 6 citing *Miller* v. *Skumanick*, at 639)

The trial judge issued a restraining order to prevent the prosecution based largely on other constitutional violations and so did not address whether the photographs were pornographic (Weins and Hiestand, 2009: 7). However, this does raise the point as to whether or not the images are actually sexual or pornographic is rarely debated. Richard Chalfen has observed that '[m]ost of our knowledge of sext content comes from written descriptions' (Chalfen, 2009: 262). We do need to ask whether in our rush to condemn the practice we even have a legal basis for action at all.

When the matter went to the appeals court the trial decision was affirmed and the Appeal Court made some interesting observations about the wider approach taken by the state:

> We agree that an individual District Attorney may not coerce parents into permitting him to impose on their children his ideas of morality and gender roles. An essential component of Jane Doe's right to raise her daughter—the 'responsibility to inculcate moral standards, religious beliefs, and elements of good citizenship,' Gruenke, 225 F.3d at 307—was interfered with by the District Attorney's actions. While it may have been constitutionally permissible for the District Attorney to offer this education voluntarily (that is, free of consequences for not attending), he was not free to coerce attendance by threatening prosecution. (*Miller* v. *Skumanick*, US Court of Appeal Third Circuit, 17 March 2010, at 24)

While the Courts did not address the nature of the photographs it has been recognised that the prosecution was not motivated by a concern with child pornography but went to the heart of certain views of what a child – in this case a girl child (as only the female sexters were threatened with prosecution) – should be. The American Civil Liberties Union has written up the case in these terms:

> This case has branded as the 'Sexting Case,' and headlines ask questions like 'Sexting: Child porn or child's play?' But this case has nothing to do with sex, and nothing to do with pornography. This is a case of a government official using the law to force his personal morals on others. Last February, Skumanick told a group of students and parents that he had the authority to prosecute a girl for being photographed in a bikini on a beach, because the photo was 'provocative.' In their brief to the 3rd Circuit, the DA's office asserts their opinion that no person could exchange such photographs for any other reason except sexual gratification. Their attorney reasserted this right before the court, stating that a minor's transmission of any photograph of herself containing any nudity is never protected under the First Amendment . . .
>
> Interestingly, none of the classmates who distributed the photos received letters from Skumanick. Only the girls who appeared in the photos were threatened with child porn charges. If the DA did in fact regard these photos as pornographic, why not file distribution charges against the boys? A clue may be found in their argument before the 3rd Circuit. In narrating the case, their attorney explained how, after the girls were photographed, 'high school boys did as high school boys will do, and traded the photos among themselves.'
>
> Ultimately, that's what this case comes down to: one man's view on how a young woman should conduct herself . . . (ACLU, 2010)

Of course, the case *was* about sex in the sense that the prosecution was about how female sexuality should be constructed. In many ways the approach to sexting adopted by the prosecuting authorities in *Miller* v. *Skumanick* reflects similar anxieties towards the display of the nude (female) child in matters such as the photographic exhibitions of photographer Bill Henson's images of nude prepubescent children in Australia in 2008 (Simpson, 2011) and the nude and partly nude images of Tierney Gearon's own children in the Saatchi Gallery in London in 2001 (Gurnham, 2009). Gurnham maintains that one way to read these images as indecent is that they '[seem] to undermine accepted (patriarchal) sexual dynamics of mainstream depictions of children as innocent, inert, passive creatures' (Gurnham, 2009: 114). This analysis seems particularly apt for any analysis of sexting for the technologies now available to children (and here we may also read that as 'female children') have provided them with considerable autonomy in relation to how they manage their own body images. For more conservative analysts this is where the analysis stops and the panic begins. Children with that degree of techno-autonomy

must be warned, guided, counselled, cajoled and if necessary punished in order to prevent them from engaging in such lewd, offensive and un-childlike activity in their eyes, with the notation that for 'child' we should also read 'female'.

Of course further thought about how such children use these new technologies tells us that they have empowered children to challenge the traditional – and legally embedded – notion of what it means to be a child and how they present their image to the world. The problem is not just that children between themselves engage in 'sex play' but that this confronts adults who have developed their own sexual identities around quite different notions of the child. As Gurnham argues, nude photographs of children challenge 'the viewer's own self-identity' and 'invite the *normal* viewer to adopt the role of the paedophile' (Gurnham, 2009: 128). As Kincaid observes it is the innocence of the child that becomes sexually alluring, while additionally the maintenance of childhood innocence in the face of the so-called sexualisation of the child ensures a constant concern with children's sexuality (Kincaid, 1998: 55). In this sense, sexting continually confronts adults in a similar fashion to other examples of sexual imagery of children and opens up ongoing anxieties and contradictions about children, sexuality and capacity (Doyle, 2008; Evans, 1994; Waites, 2005). Hugh Curnutt develops this point further and argues that teen sexting in effect confronts us quite literally about children's sexuality which has formed so much a part of our culture albeit usually at a much more subtle level:

> Its user-generated structure allows teens to remediate themselves in a fashion that so explicitly replicates the sexuality which the media industry has for so long implicitly manufactured that it calls attention to the way consumers enjoy these products – that is, instead of alluding to the way teenagers are eroticized by the mainstream media, as SNL and Entertainment Weekly do, teens sexting replicates this eroticization so literally that it confronts us with the reality that celebrities like Lohan are not titillating despite their age but because of it. Consequently, the ongoing pandemonium over adolescent sexting can be seen as a kind of defense mechanism. We must identify sexting as something inherently treacherous to continue enjoying the kinds of imagery that it remediates. (Curnutt, 2012: 365)

It is an interesting point that, for example, parliamentary inquiries themselves set up to inquire into such matters as sexting proceed to confront us with the reality of children's sexual practices even though the motivation for such inquiries is often to 'resolve' our responses in a way that 'protects' the childhood innocence the practice contradicts. This is on top of the ubiquity of the technology that permits the practice to occur all around us in the first place. Or is it that such inquiries simply act to reassure us that we condemn what we actually enjoy?

Sexting as techno-autonomy

The foregoing discussion suggests that sexting is not self-evidently 'wrong' and that there may well be an important distinction between coerced sexting and those

situations where a young person sends their own image to others as part of their sex play within a relationship. It is here that we come to the legal issue of capacity because so much rests at this point on the extent to which children are to be regarded as having agency in such matters. In the case of coerced sexting there can be no issue of consent, while in the latter example there clearly is an argument at least that the young person engages in the practice willingly. There may be an argument that the social and cultural pressures on girls to engage in the practice negate in effect their agreement but this suggests even more problematically no agency on the part of those girls. To construct young women as vulnerable returns us to the notion of feminine innocence that many would contest.

This tension is apparent from Ringrose et al. who found incredible resilience on the part of many young women who were subjected to this culture in their eyes, but who were nevertheless also seen as vulnerable when they described:

> the incredible ingenuity employed by girls to manage both physical sexual harassment and digital requests for photos and sexual services. While we were impressed by their coping strategies and resiliency we would like to conclude by highlighting that girls (particularly year 8) explicitly requested help around these issues, specifically the culture of 'touching up', which we argue requires urgent and immediate area to address as expressed in our following policy recommendations and areas for further research. (Ringrose et al., 2012: 54)

This is not to suggest the important need for children to be supported with their needs. But it is a construction that can also be used to deny the reality of those girls in the USA that were prosecuted (while the boys were not) for sexting images of themselves as being more in need of protection from harm than the boys.

As *Miller* v. *Skumanick* also demonstrates, this reasoning around the capacity of children also rests on a view of children's incapacity to consent or to make their own decisions about their own bodies. It is argued by a number of commentators that such consent laws rest historically on the protection of female virginity as paternal property, thus being in effect an aspect of patriarchal authority (Brewer, 2005; Waites, 2005: 218). Thus when sexting is seen as a questionable activity for children the issue of gender is played out in terms of girls being subjected to male peer pressure to conform to certain role expectations for females. But when sexting is cast in terms of providing children with the ability to challenge how a child self-presents, the issue of gender appears to arise as the manner in which the law removes from the children the capacity to decide such matters for themselves. In other words the law of consent, that underpins the legal control of children sexting, rests on a notion of the child as immature. In this context, the immature child requires others to act in their best interests and so determine whether they may indulge in the practice. The problem with sexting as we have seen, is that the view that it is so inappropriate for children to engage in is thought to be so dominant, that it would be difficult to imagine a parent being seen as acting responsibly if they consented on behalf of their child to the child sexting.

No matter how much information is generated, either quantitatively or quantitatively, the answer to the question of whether sexting is good or bad for children will not become apparent in itself. The question as to whether children sexting is a social good or evil can only be determined on the basis of a value judgement in the context of the times we live in. In the context of the child that value judgement usually becomes an analysis based on whether the activity would be consistent with the best interests or the welfare of the child or not. While there is a tendency to consider that the 'best interests' of the child can be easily determined in broad terms, it might more properly be described as a smokescreen that disguises the inherent flaws in the notion. As Brennan, J said in his dissenting judgement in the High Court of Australia in *Marion's Case*[4] (where the court had to decide whether parents could consent on behalf of their intellectually disabled child to undergo a hysterectomy):

> the best interests approach does no more than identify the person whose interests are in question: it does not assist in identifying the factors which are relevant to the best interests of the child . . .
>
> . . . That is because the best interests approach offers no hierarchy of values which might guide the exercise of a discretionary power to authorize sterilization, much less any general legal principle which might direct the difficult decisions to be made in this area by parents, guardians, the medical profession and courts. It is arguable that, in a field where the law has not developed, where ethical principles remain controversial and where each case turns on its own facts, the law should not pretend to too great a precision. Better, it might be said, that authority and power be conferred on a suitable repository – whether it be parents or guardians, doctors or the court – to decide these difficult questions according to the repository's view as to the best interests of the child in the particular circumstances of the case. In that way, it can be said, the blunt instrument of legal power will be sharpened according to the exigencies of the occasion. The absence of a community consensus on ethical principles may be thought to support this approach. But it must be remembered that, in the absence of legal rules or a hierarchy of values, the best interests approach depends upon the value system of the decision-maker. Absent any rule or guideline, that approach simply creates an unexaminable discretion in the repository of the power. Who could then say that the repository of the power is right or wrong in deciding where the best interests of an intellectually disabled child might lie when there is no clear ethical consensus adopted by the community? (*Marion's Case*, per Brennan, J. paras.13–14)

Brennan quoted from Ian Kennedy also on this point:

> To decide any case by reference to the formula of the best interests of the child must be suspect . . . The best interests formula may be beloved of family lawyers but a moment's reflection will indicate that although it is said to be a test, indeed the legal test for deciding matters relating to children, it is not really a test at all.

> Instead, it is a somewhat crude conclusion of social policy. It allows lawyers and courts to persuade themselves and others that theirs is a principled approach to law. Meanwhile, they engage in what to others is clearly a form of 'ad hocery'. (Kennedy, 1991: 90–91 cited by Brennan, J in *Marion's Case*, para. 14)

Brennan proceeded to articulate an approach to such matters based heavily on the autonomy rights of the child, which would never authorise any person to decide for a child to undergo invasive surgery. But it is the more general articulation of a legal approach based on the autonomy of the child that is relevant for our current discussion, and in spite of Brennan being the sole dissenter in the case. The view that the best interests approach is essentially about values is not particularly contentious, although the extent to which a judge may consider there is a clear consensus on community values around such matters may often mean that many cases do not move far beyond fast condemnation of the act. In the case of sexting, what is argued here is that there should be more careful consideration of the autonomy rights of the child given the techno-cultural paradigm young people now live in.

What this means is that we need to move beyond traditional legal responses to sexting based on older notions of privacy rights, child protection and acting in the child's best interests and broaden our discussion to examine more carefully how we now articulate the child's interests and connect it to the techno-autonomy and identity forms they have developed and valued. Sherry Turkle provides a foundation to recasting this legal relationship with children in her discussion of intimacy and new technology for it is that connection that is permitting children to redefine themselves. As she says: '[t]raditionally the development of intimacy required privacy. Intimacy without privacy reinvents what intimacy means' (Turkle, 2011: 172). This is particularly evident in the case of sexting where what might have been regarded as private moments are now made publicly available by the participants. As Turkle comments: '[w]hat once we might have seen as a problem becomes how we do things' (Turkle, 2011: 178). As with the best interests concept, we may debate whether certain acts are consistent with a person's long-term welfare, but when the act is done within the culture and paradigm of the times is it an easy matter to determine whether it is offensive or simply remapping the boundaries of acceptability? 'Erikson said that identity play is the work of adolescence. And these days adolescents use the rich materials of online life to do that work' (Turkle, 2011: 179).

Richard Chalfen also suggests that young people live at the intersection of four different sub-cultures. These are media culture, 'a world of multi-dimensional mediated life where images are ubiquitous and more embracing' (Chalfen, 2009: 260). The characteristics of this sub-culture are high levels of public and private surveillance, sexually explicit public imagery, and young people as media makers (Chalfen, 2009: 260). The second sub-culture is techno-culture, which is 'a world where camera phones are well embedded within everyday life *and are used to constitute identity*' (Chalfen, 2009: 260, my emphasis). The next sub-culture is one of intense visual culture with an emphasis on how people look and how they see the world, and the final is adolescent sub-culture that includes a time of sexual

awakening, curiosity, identity seeking, and the pushing of boundaries and 'seeking privacy and intimacy, living in a NOW world, with difficulties envisioning the near or distant future' (Chalfen, 2009: 260).

The point here is that these sub-cultures generate their own rationales for behavioural norms and expectations. To a certain extent the behaviour engaged in within these sub-cultures identified by Chalfen are extensions of earlier practices around visual culture between the sexes such as swapping of photos between young couples, Polaroids, and early VCR cameras (Chalfen, 2009: 259). And while it is commonplace now to state that the internet has blurred the public–private divide, one could say that sexting is making us have a discussion about the boundaries of what is public and what is private. In other words the act of sexting has a social benefit in that it pushes our boundaries. This is rarely provided as a benefit of sexting practice. Children have developed within this exhibitionistic culture (Chalfen, 2009: 260, citing Clark-Flory, 2009).

Kath Albury and Kate Crawford also develop this point in arguing against the application of child pornography laws to young people who sext as doing so 'fails to recognize the sexual agency and developing ethics of young people' (Albury and Crawford, 2012: 464). They found that young people were developing their own protocols around the use of sexting dependent on whether consent was involved. Of course, the law may not recognise young people's capacity to consent, but the point here is that their construction of sexting occurred without reference to that legal construction of their capacity. Albury and Crawford observed that any analysis of sexting:

> requires careful attention to the specific cultures and contexts in which sexting occurs, as well as to the agreement and intention of the participants. Such an approach would not trivialize incidents of bullying, harassment or abuse, and indeed we would support legal intervention in these cases. However, we also see space for responses that understand sexting as [a] mediated form of self-representation and communication that might take place in the context of flirtation, relationships or friendships. (Albury and Crawford, 2012: 464)

Their analysis of an Australian Government campaign to warn young people about the dangers of sexting focused on the way that the warning carried with it a sense that the victims of unwanted forwarding of their images were in some way responsible for the actions and humiliated as a result (Albury and Crawford, 2012: 464–465). Additionally they saw in the campaign implicit messages sent to girls about how their bodies should be seen:

> Certainly the individualizing admonishment to 'think again' offers no sense of the broader legal and political environment in which sexting might occur, or any critique of a culture that requires young women to preserve their 'reputations' by avoiding overt demonstrations of sexual knowingness and desire. Further, by trading on the propensity of teenagers to feel embarrassment about their bodies and commingling it

> with the anxiety of mobiles being ever present, the ad becomes a potent mix of technology fear and body shame. (Albury and Crawford, 2012: 465)

The embedded message here is similar to the Henson case mentioned earlier. In describing the naked images of a young girl as 'revolting' and 'offensive' in that case the politicians and other campaigners against Henson in effect sexualised the child's body as well as calling it shameful (Simpson, 2011: 292). The reality for young people may be very different and so the admonishment and recourse to the law simply results in a loss of law's legitimacy for those young people. Albury and Crawford found some young people who actually described their sexting in far more positive terms as part of their intimate relationships (Albury and Crawford, 2012: 467–468). In this sense sexting is a truly subversive activity that not only recasts sexual citizenship and identity but also reinforces new paradigms of transparency and openness (Curnutt, 2012: 354).

Alternative legal (and other) responses to sexting

The law has had a long interest in our intimate relationships but the question that sexting makes us confront is whether the law's response should be to preserve private intimacy or whether it should be accepted that the use of new technology challenges how law should define the boundaries of public and private intimacy. What is often forgotten is that the law does offer alternative ways of understanding this phenomenon based around the autonomy rights of the child. Many young people report sexting as part of flirting, seeking affirmation, testing their attractiveness and so on, which is all about establishing their identity. While this does not mean such use of technology is fraught with risks and sits within a context of gender expectations in society, there is also the importance of the child's right to have an identity, express her or himself and to play. Such rights are all contained within, for example, the *United Nations Convention on the Rights of the Child*.[5] Of course, as with sexting generally, the right to play is often romanticised and articulated in terms of the innocence of the child in the playground. But this right also connects with risk taking, the pushing of boundaries and identity formation. The *Charter for Children's Play*, for example, provides in its introduction that: 'Play allows children to experience and encounter boundaries, learning to assess and manage risk in their lives; both physical and social' (Play England, 2007).

To assert for children the right to sext is an uncomfortable application of the notion of the right to play. But that may be because adults until now have for the most part controlled the meaning of this right and articulated it in terms of the need for such areas as playgrounds, sports fields and at times skateparks – (though skateboarding itself is an interesting example of children's play which often confronts adults when skateboarding young people redefine urban space through this activity (Borden, 2001)). Clearly new technologies are handing to children greater power to self-define their play and themselves. The act of doing

so challenges not only adults' power to control what is to be regarded as good for children, it also creates spaces within which alternative formulations of who controls the child's body can be expressed.

To date most of the discussion surrounding reform of sexting laws has been to change the law to decriminalise consensual sexting between children so as to at least remove the stigma of having such children registered as sex offenders. But clearly such a reform of the law says nothing about the underpinning legal position with respect to the control of the child's body. Such reform does not challenge the view that sexting is inherently inappropriate or that children cannot consent to such activity as they do not fully understand the long-term implications of the behaviour. The problem is that any law reform that takes on these latter positions will also undermine adult authority more generally over children. To recognise the right of the child to control the transmission of their own image would undermine attempts by parents and others in authority to control the child's body with respect to health care, abortion and even possibly incarceration.

Sexting cannot therefore be discussed outside the autonomy rights of children. To grant a judge discretion not to punish a child engaging in sexting because they acted naively or are too immature to understand what they are doing does not reform the law, it reinforces the notion that children are to be protected in their innocence. But this is an innocence that has also led to them being not believed or listened to when terrible things have been done to them in the past under the guise of their 'best interests'. Sexting also represents a focus on the needs of children that distracts from other ways in which the child's body is controlled by adults. In Australia it is often forgotten that increasing rates of incarceration of indigenous children (Australian Institute of Health and Welfare, 2012), the placing of children in immigration detention and children in poverty are also about the treatment of children's bodies. To grant to children a small slice of formal control over their bodies would also provide them with the nub of a principle that could evolve into challenges to a host of actions taken against them which are demonstrably inconsistent with their health and welfare. While the sexual rights of the child are directly related to the practice of sexting they are but one aspect of children's rights over their bodies.

This does not lead us to a simple 'right to sext' although that might be a first step in a more considered approach to sexting. Empowered in this way children would have to be included in a discussion of how this practice should be regulated and what protocols should exist in relation to it. Adults should be able to offer guidance and advice, but for the benefit of the child, not as an aspect of their power as not all self-representation engaged in by children must be constructed by adults (Albury and Crawford, 2012: 471). Kath Albury, Nina Funnell and Estelle Noonan speak to the notion that the proper development of children's agency comes about from collective action and that sexting may well represent a whole generation recasting the terms of their sexual citizenship (Albury et al., 2010: 10, citing Egan and Hawkes, 2010).

But perhaps we should also not overstate this threat that children sexting is said to represent. Best sums up the manner in which threats to children can be a distraction from deeper social concerns:

> No doubt every age has its anxieties, but claims about threats to children seem to have emerged in relatively stressful times . . .
>
> Focusing on threats to children offered an outlet for some of the anxiety people felt about an uncertain future; it specified the fears and thereby made them more manageable. And defining threats to children in terms of child molesters, kidnappers, and other deviant adults made those fears more manageable still: if society could bring just a few villains under control, the threats would disappear, and the future could be secured. Deviants often serve as scapegoats in times of social crisis, and particularly for those who perceived themselves as vulnerable in an uncertain future, the deviants who menaced children offered a sort of relief. They could represent not only the dangers faced by children, but all the uncertainties of the future. (Best, 1990: 180–181)

Thus while sexting has a lot to do with the expression of sexual identity by children, it also represents fast-moving technology in a world racked with various crises. In this sense the anxieties surrounding sexting are not just about those to do with children and sexuality. Campaigns to control and protect the child from sexting are also performed on the larger stage of social concerns and perform the function of suggesting that the future may be within our power to control. This may well explain why so many debates about sexting proceed from the acceptance of the clear 'problem' in need of a solution. If only sexuality was susceptible to solutions.

Notes

1. For example, the Australian Parliament's Joint Select Committee on Cyber-Safety received a submission that 32 Victorian teenagers had been charged with such offences as the result of sexting (Parliament of Australia, 2011: para.4.70).
2. *AH* v. *State* 949 So. 2d 234 (Fla. Dist. Ct. App. 2007) cited in Weins and Hiestand (2009).
3. 605 F. Supp. 2d 634 (M.D. Pa. 2009), cited in Weins and Hiestand, 2009, 5).
4. *Department of Health & Community Services* v. *JWB & SMB* ('Marion's Case') [1992] HCA 15; (1992) 175 CLR 218.
5. See UNCROC, art.8 (right to identity); art.13 (right to freedom of expression); art. 31 (right to play).

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