



'Let's Get Sexting':¹ Risk, Power, Sex and Criminalisation in the Moral Domain²

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Abstract

This article explores the criminalisation and governance of sexting among young people. While the focus is on Australian jurisdictions, the article places debates and anxieties about sexting and young people in a broader analysis around concerns about new technologies, child sexual abuse, and the risks associated with childhood sexuality. The article argues that these broader social, cultural and moral anxieties have created an environment where rational debate and policy making around teen sexting has been rendered almost impossible. Not only has the voice of young people themselves been silenced in the public, political and media discourse about sexting, but any understanding about the differing behaviours and subsequent harms that constitute teen sexting has been lost. All the while, sexting has been rendered a pleasurable if somewhat risky pastime in an adult cultural context lending weight to the argument that teen sexting is often a subterranean expression of activities that are broadly accepted. The article concludes that the current approaches to regulating teen sexting, along with the emergence of sexting as a legitimate adult activity, may have had the perverse consequence of making teen sexting an even more attractive teenage risk taking activity.

Key Words

Sexting, childhood sexuality, criminalisation and sexuality, children and technology, technology and risk.

Introduction

In recent years, across a range of jurisdictions internationally, children have been prosecuted under child pornography laws for sexting. The term 'sexting' has been used in a range of ways but it generally concerns the digital recording of naked, semi-naked, sexually suggestive or explicit images and their distribution by email, mobile phone messaging or through the Internet on social network sites, such as Facebook, MySpace and YouTube. Media reportage and public discourse about such acts gravitate from moralising statements about the inappropriateness and growth of such behaviour by minors to concern that current legal frameworks are wrongly prosecuting children under child pornography laws. With regard to the second discourse, there have been a number of reported cases of young people being added to sex offender registries, an outcome likely to have a significantly negative impact on their lives (Brady 2011; Feyerick and Steffen 2009).

This article explores the criminalisation and governance of sexting among young people and seeks to make three key points. First, we suggest that, despite a clear understanding from law makers and politicians that most sexting involving young people is not child pornography, the child pornography laws that currently govern sexting have had an increasingly punitive effect and potentially harmful consequences for young people targeted by these interventions. Second, we argue that attempts to regulate adolescent sexuality and risk taking, in an environment of anxiety over new technologies, paedophiles, and child pornography, have created a situation where alternative narratives of sexting involving young people are marginalised or rendered silent by moralising dominant discourse. Third, we suggest that the over-criminalisation of sexting by young people and attempts at its suppression have had unintended effects: they have incited sexting further into the public realm and legitimated the practice as an exciting, somewhat desirable activity for some young people. The paper concludes by considering the consequences of this disjunction for policy and practice.

Politics, regulation and law

Across Australian jurisdictions, 'sexting' involving children can be dealt with under a range of legislative provisions. In the largest of Australian jurisdictions, New South Wales (NSW), 'sexters' may be charged under the *Crimes Act 1900* (NSW). The possible charges range from the production, dissemination and possession of child abuse material (s 91H(2)), to acts of indecency (s 61N), inciting a sexual offence (s 80G), the filming of private acts (s 91K) and the filming of a person's private parts (s 91L).³ In the State of Victoria, the *Crimes Act 1958* (Vic) ss 67A - 70AC has similar provisions criminalising child pornography that could apply to sexting. Similar regimes exist throughout all the other states.⁴ On the Federal level, sexting could also fall under the *Criminal Code 1995* (Cth) in regard to the use of carriage services for child abuse and child pornography material (ss 471.16 - 471.22), the procurement of persons under 16 (s 471.24), and the sending of indecent material (s 471.26). Aside from the relatively severe sanctions available upon conviction for a child pornography offence, such offenders, including young persons, face registration requirements under sex offender registration laws (such as *Child Protection (Offender Registration) Act 2000* (NSW); *Sex Offenders Registration Act 2008* (Vic)).⁵

The first mention of sexting by young people in the Australian Federal Parliament can be found in the transcript of the parliamentary debate in early February 2010. The Liberal member for Cowen, The Honourable Luke Simpkins, notes:

... I agree that sexting is not in its original sending intentionally child pornography, yet it may be the next time it is transmitted or the time after that ... I would, however, say that it is not healthy behaviour of teenagers to win favour with their friends by sending them fully or partially naked photos, nor is it right for so-called friends to pressure other young persons to have their photo taken

and send it to others. How often have we heard of rising actresses who have gotten their big break only to be embarrassed by the emergence of compromising photos taken some years earlier? I think there is a need for some penalties in these cases in order to discourage this unhealthy behaviour. I would, however, say that, given that the intention was not originally to be child pornography, the distinction can be made.⁶

Simpkins' initial parliamentary words here on the subject of sexting alert us to the multiple and often conflicting dimension of sexting involving young people, and attempts to suppress and regulate it. First, he clearly notes that, at least in most instances, the initial act of 'sending' the image is not child pornography: there is a 'distinction' between the criminal act of child pornography and 'unhealthy behaviour' of sexting. That is, young people sexting one another is not generally the same as the exploitation of children by adults for the purposes of some kind of sexual gratification. By assessing such behavior as 'unhealthy', Simpkins suggests it is deviant rather than criminal behaviour. Second, he highlights the capacity for images to be reproduced and distributed in the largely ungoverned and unregulated realm of cyber-space, and the subsequent future harm this might cause. That is, left unregulated, children who sext can damage their own future as well as whet the appetites and satisfy the desires of other parties further down the digital distribution track. Third, he laments that this 'unhealthy' expression of childhood sexuality requires 'penalties' to suppress it. The suggestion is that, even if this might not be an offence in the first instance or in its 'original sending', it is still morally wrong and as such should be subject to legal censure. Indeed, the perceived moral status of the act should, does, and will affect its legal status. Fourth, he argues that sexting is about power relations where the young participants either 'win favour' or have 'pressure' applied to them which leads to the initiation of the sexting activity. The suggestion here is that it is not an activity that positively empowers participants in any way; nor is it an act involving agency or choice.

Simpkins' words are, in fact, symptomatic of the schizophrenic way in which the issue of young people and sexting has been discussed in public, media and political discourse in Australia and also internationally. This discourse gravitates from moral panic about teenage sexters 'out of control' (News.com.au 2009), to paternalistic pronouncements about the need to save young people from their own misplaced, misguided and or premature sexual desires (Pech 2012), to feminist concerns about pressure being placed on young women by their boyfriends and acquaintances (Ringrose 2012). However, all of these often-competing discourses are shadowed by overblown moral concern about the 'paedophile' who, assumed to be aided by modern communication technologies, trawls cyber spaces, grooming children, and sometimes using relatively innocent digital images for their own sexual gratification. Unsurprisingly, it has been argued that any rational public discussion and analysis of sexting involving young people has been impossible due to the concern of perceived risk around Internet-facilitated child pornography (Karaian 2012).

If Simpkins' words are indicative of these themes, the subsequent parliamentary discussion makes them crystal clear. In reply to Simpkins' concerns, The Honourable Brendan O'Connor stated:

... Excluding the sending of child pornography or child abuse material by young people from the proposed offences would be inappropriate, as it might reduce protections for young people. For example, instances of young people sending sexually explicit images of themselves or other young people may in some cases be malicious or exploitative. Although the child pornography offences could potentially apply to young people, there is scope for law enforcement and prosecution agencies to take the circumstances of a particular case into account before proceeding to investigate or proceeding to prosecute.⁷

This response highlights the paternalistic and largely bi-partisan nature of the parliamentary debate. While it recognises the laws in their original intent do not cover sexting, O'Connor legally equates all forms of sexting with the worst-case scenario, the most malicious forms of sexting. This is combined with an offloading of responsibility onto police and prosecutors' discretion, which effectively absolves policy makers of any responsibility for 'collateral damage' that might follow such response.

The next mention of the possibility of the laws being applicable to sexting by young people was made in late February 2010 in the submissions to the Senate Standing Committee Legal and Constitutional Affairs Legislation, through the Committee. Submissions to the committee were called to comment on the amendment of the *Sexual Offences Against Children Bill 2010* and were accepted from various sources, including the South Australian, ACT and Victorian Police Forces. These submissions were brief expressions of agreement with the intent and purposes of the legislation and did not raise, comment on, or seem to be aware of the applicability of the laws to sexting involving young people.

Submissions were also received from the Australian Privacy Foundation, 'the primary association dedicated to protecting the privacy rights of Australians' (Australian Privacy Foundation 2012). It argued that:

... While in some cases the behaviour aimed at in this provision may warrant an extreme response, or a very intrusive one, it is likely that the child sex offence process may also be an inappropriate and harmful legal response for a large number of such young people, and the criminal law may need to review the intent and target of child abuse material law in the light of this new development.⁸

These submissions were made in addition to submissions by the Law Council of Australia, the peak national representative body of the Australian legal profession, which also noted its concerns that the laws may be applicable to cases of sexting. It submitted that:

Given the broad definition of 'child pornography material' in the Criminal Code, the offence provisions could capture a wide variety of photographic and video material commonly captured and distributed by young persons using mobile phones and Internet-based social networking sites ...Without suggesting such behaviour is ever innocuous and victimless, let alone to be encouraged or condoned ... A person successfully prosecuted under these provisions will be labelled a child sex offender, may well have to register as such and will be faced with the intense social stigma which attaches to that label. ...⁹

The Law Council of Australia submitted protection should be granted under sections 474.19¹⁰ and 474.20.¹¹ The Committee took up the suggestions by the Law Council of Australia and amended the Bill accordingly. The General Outline statement for the amended Bill states:

These laws do not exclude the sending of child pornography or child abuse material by persons under 18 years of age ... This ensures that instances of young people sending sexually explicit images of themselves or others can be dealt with if they are malicious or exploitative. There is also a community interest in preventing the circulation of explicit images of minors. However, to ensure there are sufficient safeguards to prevent the unnecessary prosecution of young persons, the amendments will insert new provisions requiring the consent of the Attorney-General. ...¹²

The protection of the rights of children and the potential prosecution of children, although clearly matters for Parliament, are arguably among the matters least suited to police and parliamentary discretion. As a vulnerable class of persons, children and teenagers require more than arbitrary and unguided police discretion to protect their rights. Importantly, however, the intention of the legislator was clearly on 'preventing the circulation of explicit images of minors' – that is, stopping sexting altogether. Finally, as Corbett cogently observes, using child pornography laws to prosecute sexting involving young people is a clear example of 'fitting the proverbial square peg of technology into the round hole of existing laws' (Corbett 2009: 5). In the following section we will attempt to untangle some of the complexities surrounding sexting in academic literature and identify underpinning anxieties and contexts that resulted in such precarious legal response in Australia.

New problems, old anxieties?

Recent academic research and literature on sexting takes as its starting point the notion that sexting is a somewhat new activity, an activity essentially made possible by the development of new information and communication technologies. It is thus related to the suite of Internet or cyber related offending (Grabosky 2007). However, this is only true to a point and, as Garland (1997) tells us, we need to be careful about finding discontinuities everywhere. Just as there is nothing novel in the production of pornography,¹³ youthful sexual expression (or exploitation) is not a new phenomenon (Fishman 1982). Of course, technology has affected the ways in which this expression and exploitation takes place, as indeed it has affected the level of opportunity for some forms of exploitation. Nonetheless, anxiety about the risk that new technologies pose is a key component of the discourse around young people and sexting as are concerns about child sexual abuse that have grown since the early 1970s.

New technologies

The astounding growth in the use of the Internet (Internet World Stats 2012) has been followed by 'substantial qualitative changes that have transformed the nature of online interactions and activities' (Jewkes and Yar 2010: 1). While the early discussions of the development of the Internet were dominated by 'Net utopians', who believed that the cyber revolution would bring 'everything from freedom from state censorship and cultural control, through a means for the rebirth of community bonds and social solidarity' (Jewkes and Yar 2010: 2), more recent commentators have largely focused on the darker side of the cyber-world. They warn that any exponential increase in the use of online technologies is likely to be followed by a growth in electronic crimes ('e-crimes', also referred to as 'cyber-crimes', 'computer-crimes', 'high-tech crimes' and 'information-age crimes' (Brenner 2007). E-crimes, both 'computer assisted' and 'computer generated', have been defined as an ideal platform to 'inflict unprecedented harm' in both the virtual and the terrestrial worlds (Grabosky 2007: 1–2). Subsequently, the risks associated with the new technologies have dominated political agendas.

Fitting very neatly into the Beckian (1992) concept of 'new risks' by being complex in causation, unpredictable, latent, globalised, hard to detect and caused by human decision (Ungar 2001), these perceived risks have triggered unprecedented interest in the media and the state. Newspapers and media outlets circulate stories about potential 'threats' that loom in the uncertainties of cyber-space, from cyberterrorism and paedophile rings, to cyberstalking and identity theft (Aas 2007: 153). Such developments have prompted a widespread anxiety about the Internet's impact on vulnerable users (Jewkes 2007: 1).

In this context, the vulnerability of children has been a key focus. As Wartella and Jennings argued, '[c]omputer technology has ushered in a new era of mass media, bringing with it great promise and great concern about the effect on children's development and well-being' (2000: 31). Similar to historical debates around the emergence of other new technologies (such as telephone, television, radio, movies), these narratives are fuelled with concerns about the

impact of new media on children's morality and ethical principles, and on their exposure to illicit sexual and criminal behaviour (Wartella and Jennings: 2000). In the context of new digital technologies, they are renewed and strengthened because of the very core of the online engagement: its perceived clandestine character and potential 'global reach'. This, together with the very scale of the growth of online technologies, the threat of the online predators and unwelcome 'Others', and the vulnerability of potential victims, has resulted in 'a series of local and global moral panics' (Jewkes 2007: 5) that have purportedly warranted a quick and uncompromising response, mostly within the law and order framework.

Borderless and ostensibly 'ungovernable', cyberspace poses a real test to the state's increasing desire for regulation and security (Aas 2007). With ever-blurring boundaries and borders 'that are no longer physical or territorial lines on a map' (Pickering 2008: 177), states are struggling to deal with the apparently unavoidable -- a growing threat of cyber crime. Importantly, customary practices of criminal justice interventions, such as search, seize and arrest, are deemed inadequate for cyberspace (Fox 2001). In order to address these threats, various state and non-state actors, politicians and the media have called for more rigorous state interventions, tougher legislation, practices of self-policing when online, the expansion of Internet monitoring powers, and unconditional cooperation with law enforcement in investigating these offences (Berg 2011; Howden 2011; Jewkes and Yar 2010). Thus, the debate around crime in the age of digital technology incorporates a 'part of the problem' and a 'part of the solution' standpoint, in which searching for 'the solution' can potentially lead to 'new punitiveness' (Pratt 2000), pre-emptive justice policies, and the violation of the human rights of Internet users and those impacted by such policies.

In addition, e-crimes, especially sex crimes (child sexual abuse, paedophilia, and online sex work, when criminalised), are predominantly explained using routine activity theory in which a suitable target (usually a helpless victim), a lack of a suitable guardian (state and non-state actors, such as teachers and parents), and a motivated offender (online predator) are identified as key points in the analysis (Cox III et al. 2008). This approach has been applied in the context of online child victimisation in which remedies that focus on parents as safeguards and gatekeepers are deemed to be inadequate (Wartella and Jennings 2000). Consequently, print and online resources that 'educate' children and parents about how to safely use new technologies are ever-growing.

As Marx (1995 cited in Ferrell et al. 2008) has noted, new telecommunications techniques require new manners. Each advance in mediated communication brings an emergent new culture with a 'set of interactional codes and symbolic manners appropriate to the technology' (Ferrell et al. 2008: 106). Like the technology itself, these codes and manners do not come fully formed. Just as the language of phone texting has developed with the technological advances of the mobile phone, the technical capacities of such phones to produce and disseminate images have open up new capabilities and possibilities. Such developing technologies also bring with them 'new crimes ... and new crime cultures' (Ferrell et al. 2008: 107) that need to be researched and explained. However, the intervention in this area so far has predominantly focused on reactively managing, rather than mapping out and understanding, risk around sexting.

As we have noted, it is, of course, easy to construct these technological risks as new. But while the technology provides additional challenges for regulators, the moral arguments about the dangers to/of childhood sexuality are startlingly familiar. In other words, the Beckian model of 'new risk' might be a good theoretical starting point for understanding the tenor of contemporary public discourse but, in fact, the moral arguments, the debates, and the threats posed by sexting involving young people are nothing novel: childhood sexuality has long been a problem for regulators and legislators. We explore this continuity in the following section.

Childhood sexuality

... a new danger arises to children from corrupt communication of companions, or in the boy from an intense desire to become a man, with a false idea of what manliness means. The brain, precociously stimulated in one direction, receives fresh impulse from evil companionship and evil literature, and even hitherto innocent children often are drawn into temptation. (Kellogg 1877 cited in Egan and Hawkes 2008)

Kellogg's warning from over 160 years ago echoes closely the political statements and even some academic work on childhood sexuality today.

The problem of childhood sexuality, and how to suppress and/or regulate it, emerges in the late seventeenth, early eighteenth century (Fishman 1982). While much of the discourse around the management of childhood sexuality concerned masturbation, the 'experts' guiding this regulation have changed over time. Accounts from the sixteenth century show little concern for child rearing in any guise (and sexuality by extension). However, by the eighteenth century, anti-masturbation pamphlets and pronouncements on the topic from figures as significant as Jean Jacques Rousseau proliferated (Fishman 1982). While the baton was passed to school masters and the church in the nineteenth century, by the twentieth century, the discourse was dominated by clinicians, psychiatrists and social workers who made sex education mainstream by introducing it into the public school system. The later part of the twentieth century became a period where childhood sexuality was no longer to be suppressed *per se* but managed and regulated. Parents could give over the problem of regulating childhood sexuality to a state happy to outline a set of normalising principles. As Foucault notes:

The sexualisation of children was accomplished in the form of a campaign of health of the race – precocious sexuality was presented from the eighteenth century to the end of the nineteenth century as an epidemic menace that risked compromising not only the future health of adults but the future of the entire society and species. (Foucault 1990: 146)

The key point here is that childhood sexuality has always been about something more than childhood sexuality – it has been both an instrument to manage and an indicator of the moral health of a nation. Foucault (1980) sees the 'pedagogisation of child sex' (Egan and Hawkes 2008: 359) in the later part of twentieth century as a move away from juridical power in the late eighteenth century towards the 'continuous regulatory and corrective mechanisms' (Foucault 1980: 144) of modernity. The transition enabled the emergence of bio-political power through the regulation and surveillance of individuals – beginning with children. Moreover, coinciding with the rise of a neo-liberal state logic in the early 1980s, young people began to be more generally recast as a problem (Furlong and Cartmel 1997).

In applying this theoretical framework to sexting, it is interesting to note the apparent willingness of some jurisdictions to entertain the logic that conflates 'sexting' and child pornography and the reluctance of legislators to untangle and distinguish between the two. This speaks to a broader set of questions in relation to the regulation of adolescent sexuality and its discursive construction in terms of abuse, vulnerability and risk. Brownlie (2001) identifies the profound impact that renewed public awareness of child sexual abuse since the 1980s has had on the reconceptualisation of childhood. The social construction of children has been reshaped not only by increased concern relating to victimisation but also through an enhanced awareness of children as potential perpetrators of abuse. As the origins of adult offending were increasingly traced back to abusive behaviours in childhood, a new category of the sexually 'deviant' child emerged from within 'risk' discourses and practices. This focus on risk has been

buttressed by tendencies with sex education programs and campaigns to address youth sexuality in terms of 'risk factors' for particular negative outcomes, such as pregnancy or STD infection (Shoveller and Johnson 2006). With the popularisation of pseudo-scientific claims about the 'adolescent brain', a range of 'psy' experts have called for an expansion of adult control and surveillance over children (and indeed an expansion of the category of childhood itself) on the basis that young people are biologically prone to risk-taking and poor decision making well into their twenties (Bessant 2008). There is now a group of professions and experts on childhood whose professional standing and influence is based on the characterisation of young people as unruly and lacking of true agency or selfhood, a view of children that has strong cultural antecedents in Western societies (Scott et al. 1998).

Entrenched within these 'expert' discourses of childhood are normalising conceptualisations of the 'proper' child that take, as their reference points, hegemonic values of gender, class, sexuality and ethnicity (Burman 1994). These discourses of the ideal child are frequently in conflict with the complexities and challenges of children's lives. Importantly, where children assert themselves as active social agents, they are liable to be judged and sanctioned according to the normalising judgments of these abstract ideals (Scott et al. 1998). It has been argued that, in late-modern societies, the self is viewed as a project that serves as the focus of what Foucault (1988) termed 'technologies of the self' or the practice of continual self-appraisal, maintenance and renewal. In the case of children and adolescents, parents have a particular investment in passing on particular 'technologies of the self' that result in the presentation of an appropriately governed, regulated, civilised subject who can perpetuate the cultural and class norms upheld by the family. It might be argued that anxieties over 'sexting' and teenage sexuality have less to do with the potential harms to teenagers *per se*, and more to do with concern over the development of the child into an appropriately self-regulating, self-censoring citizen.

Much sociological research has documented the social pressure for conformity among peers as well as the pleasure of experimenting with risks which underpin risk-taking behaviour (Lupton 1999). While irresponsible risks need to be avoided, risk-taking is also a key developmental process through which we can learn coping mechanisms, independence and individual responsibility (Coleman and Hendry 1999). Yet the focus of public attention (and intervention) around childhood sexuality has been on taming the risk-taking behaviour of youth. Such a focus also obscures 'risk-imposing' factors for youth (Ratcliffe et al. 1984) such as poverty, alienation, peer pressure or the corporate promotion of unhealthy products and lifestyles.

No moment in recent Australian history has captured the problematic conception of adolescent sexuality like the debate over Bill Henson's photographic exhibition at the Roslyn Oxley 9 Gallery in Paddington NSW in 2008. Henson had long sought to document the transition from childhood to adulthood in teenagers because '... they represent a kind of breach between the dimensions that people cross through' (Henson cited in Faulkner 2011: 45). Following the use of a frontal nude photograph, *Untitled #30*, as the mailed invitation to attend the opening of Henson's 2008 exhibition, a political and legal storm erupted that highlighted the fine line between child pornography and art. More importantly, it illustrated the problematic nature of adolescent sexuality in Australian public discourse. The photograph depicted a 14-year-old girl, genitals covered with her hands, but with 'budding' breasts exposed. As the author and commentator David Marr later put it:

Without breasts or with full breasts this image would ... have caused less fuss ...
But these were budding breasts, rarely seen and almost never celebrated. In our culture budding breasts are extraordinarily private. (Marr cited in Faulkner 2011: 46)

The moral outrage about the photograph and exhibition was captured by media reportage and talkback radio. And in particular, it attracted comment from the nation's political leaders. The then Australian Prime Minister Kevin Rudd captured the mood stating:

I find [the pictures] absolutely revolting ... Kids deserve to have the innocence of their childhood protected ... For God's sake, let's just allow kids to be kids. Whatever the artistic view of the merits of that sort of stuff – frankly, I don't think there are any – just allow kids to be kids, you know. (Marr 2008: 47)

The then NSW State opposition leader, Barry O'Farrell, joined the debate by saying that '[s]exualisation of children under the guise of art is totally unacceptable. Art will always push society's boundaries but protecting children must be the priority' (Marr 2008: 11).

These quotes, again coming from both sides of the political spectrum, illustrate examples of what Karaian (2012) has called the foreclosure of alternative narratives about childhood sexuality. One such silenced narrative (but by no means the only one) in relation to sexting is the excitement involved in the act itself. Sexting is not always about exploitation, even for young women, who do report being exploited in such situations at times. As Lyng (1991) has noted, transgression can be exciting. Some acts of what he calls 'edgework' are actually about reclaiming one's life through placing oneself on the edge. It encapsulates the notion of 'losing control to take control' (Ferrell et al. 2008: 72). If we do indeed live in ontological insecure times (Giddens 1991), edgework becomes a way in which individuality and authenticity can be reclaimed, albeit within certain structural constraints: there is little doubt, for example, that online risk and vulnerability is mediated by factors such as ethnicity, class and age (Ringrose et al. 2012). To understand the motivations of sexting, we need to move from the position that men or boys are simply part of a dangerous population who manipulate and control young women – and that sexting is an extension of this. This model actually disempowers young women, making them 'ever responsible for their own victimisation' (Carmody and Carrington 2000). It also silences their particular individual experiences. As Fishman (1982: 269) notes at the beginning of his history of childhood sexuality:

As with the historical study of childhood in general, the principal subjects of such study are mute. Illiterate by virtue of age, barely audible in the bustle of daily life, usually ignored if not rejected, children have left virtually no historical sources of their own. We must rely almost entirely on adults for a written history of childhood.

Returning to the Henson exhibition, the silent subject of *Untitled #30* was constructed as in need of protection, as was public morality. These images were literally *seen* as a risk to the future of the subject of *Untitled # 30* herself, and a moral risk to the population more generally. But the debate around Henson's images and, indeed, around the issue of adolescent sexting also tells us something broader. They illustrate the limits of the self-governing child subject. Children are meant to explore their subjectivities and identities, to use the Internet and technology to do so, and to consume and engage in exciting pursuits – but they are meant to do so prudently (O'Malley 2008). That is, while children are increasingly meant to self-regulate, adopting legitimised subject positions, the limits of self-activation are laid bare in the regulatory response to sexting.

The over-criminalisation of sexting involving young people

Criminologists and sociologists have long argued that we need to understand the importance particular labels have on legislative and social responses to deviance (Becker 1963; Lemert 1969). We think sexting and, in particular, the often used phrase 'teen sexting' should be considered in these terms. Indeed, the term itself was popularised only when this activity, the

production and digital exchange of suggestive or explicit images between minors, became problematised. It is also a term loaded with moral meaning where sexual expression and childhood literally butt up against one another. Thus, it would be productive to assess sexting not as a growing activity but rather as an act of deviance constructed of growing criminalisation, and the creep of criminal law.

Criminal law has traditionally been concerned with criminalising offences that cause a degree of harm, include a level of culpability, usually with intention or recklessness (Ashworth and Zedner 2012: 283). Husak (2009) has identified a growing problem of over-criminalisation, particularly around the periphery of criminal law including a range of *mala prohibita* offences – acts that are 'wrong because prohibited'¹⁴ – rather than being inherently wrong or evil in and of themselves. Such offences may not even result in harms but it may be seen to be in the interest of public welfare to prosecute such offences particularly, as they may cause harm in the future. In other words, these new offences seek to manage future crime. Zedner (2009) has termed this the increasing inclination an attempt to govern 'pre-crime' which, she argues, can license changes to procedural arrangements and substantive law. This can erode civil liberties and create new coercive measures imposed ahead of any wrongdoing (Zedner 2009). While child pornography legislation is not itself designed to specifically manage future crime, sex offender registers and other preventative governance to do with child sex offenders seek precisely this: both Victoria's the *Sex Offenders Registration Act 2008* and in NSW the *Child Protection (Offender Registration) Act 2000* are examples of such legal regulation. Moreover, the criminalisation of sexting itself specifically attempts to regulate the future crime that may occur as a result of the digital distribution of the images beyond the original sender and receiver. The implications of such interventions in terms of violation of civil liberties in the context of sexting are yet to be explored.

Clearly such laws are about the management of future risks; a risk-based response to crime. But only a cultural-based understanding of risk can explain this over-criminalisation. As Simon (2007) has argued in a different context, these laws are not simply about risk but equally about moral outrage. Sexting is an example of risk governance that emanates from a specific value base. This encompasses the abhorrence of child pornography, the threat of the pedophile, and the angers of unregulated childhood sexuality.

Bringing sexting into discourse

As O'Malley puts it, 'criminal behaviour is ... set at 180 degrees to contemporary crime control along an axis of risk' (2010: 53). Crime control seeks to increase risks and deter crime. In this sense, adolescent sexting is truly a 'risk taking' activity. Often, risk-taking itself can become a form of resistance, a rejection of control, even a celebration of the carnivalesque: '[a] refusal to conform with a liberal utilitarian discipline imposed by the respectable middle classes' (O'Malley 2010: 53). However, risk taking has also become more acceptable in the contemporary period where leisure industries and leisure activities, even gambling, have become governmentally sanctioned. In this sense, we are encouraged to take risks. Indeed, in the adult world, sexting is constructed as an exciting romantic activity, albeit slightly risky, where consumers are given advice on how to engage in 'sexy pre-play', as noted in the title of this article taken from a popular women's magazine (Cosmopolitan 2011). Indeed, adults can find tips on sexy texting in any number of mainstream lifestyle magazines. In this sense, sexting involving young people is simply a subterranean expression of mainstream adult values (Matza and Sykes 1961; O'Malley 2010).

As we have demonstrated in this article, there is a clear paradox in the regulation and legislation that has sought to govern and, indeed, repress adolescent sexting. The over-criminalisation of the activity has, as is obvious on the proliferating discussion about the practice in popular culture, incited the practice further into public discourse. This 'mainstreaming' allows sexting to

be considered a legitimate activity – and so it is for adults. As Fishman (1982: 278-279) notes in his history of childhood sexuality, moral concern of theologians and other moral crusaders in the nineteenth century to repress childhood masturbation may have had similar perverse or paradoxical outcomes:

Children whose hands and minds were so zealously guarded, may have searched more ardently for covert time and space to indulge their sexual impulses. The conspiracy of adults and their institutions to prohibit child sexuality may even have produced unusual examples of sexual precocity and prowess. Obsessive efforts to control behaviour often beget determined and ingenious violators.

The desire to suppress sexting involving young people has, in fact, led to a proliferation of the discourse around the practice, as it is increasingly rendered a risk-taking pleasure or leisure activity. As Foucault might put it in a different context, the attempt at suppression has resulted in the production of a new pleasurable activity with an equally pleasurable nomenclature – 'perpetual spirals of power and pleasure' (Foucault 1990: 45).

Conclusion

As is obvious from the parliamentary discourse that constituted the first section of this article, 'sexting', a media invented term, has come to have strong discursive and legal currency. The breadth of diverse activities captured by the term might be broad, but with the prefix 'teen' added, these activities have become a key object of governmental, legal and moral regulation. Sexting involving young people has become framed as a problem in the regulation of child sexuality. It has, in recent years and across jurisdictions, been subject to increased regulation and criminalisation under a range of child abuse and child pornography laws. As an activity, it sits at the nexus of concerns about the risks of child sexual abuse, child pornography, paedophilia, childhood sexuality and new technologies. We have suggested that these concerns are not new but a set of moral discourses given new life within the context the risks of new technologies. Sexting is thus seen to constitute a risk to the moral health of young individuals and the population more generally; a risk that has been excessively criminalised to the point that young people can face serious criminal sanctions, relying only on the discretion of police and other legal officers to moderate such punitive and harmful interventions.

As we have demonstrated in this article, there is a clear paradox in regulation and legislation that has sought to govern and, indeed, repress adolescent sexting. The over-criminalisation of the activity has, as is obvious on the proliferating discussion about the practice in popular culture, incited the social construction of a behavioural category without a clear referent in the lives of the young people it purports to regulate – kids themselves don't use the term sexting at all. Moreover, the proliferation of 'sexting' discourse allows sexting to be considered a legitimate activity, and adults can find tips on sexy texting in any number of mainstream lifestyle magazines. However, the concerns and needs of young people in their efforts to negotiate intimacy and risk through online technology have been marginalised by a prurient focus on the potential for sexual humiliation, shaming and loss of reputation. By focusing on victimisation and vulnerability of young people, we effectively limit the capacity for agency and silence alternative experiences of the practice. By acknowledging all the complexities of young people's sexuality in twenty-first century and the disjunction between the social/moral norms that are imposed on their lives, as well as harmful consequences – both legal and social – that inadequate engagement with sexting might bring, we make a first and necessary step towards untangling this complex web of young people's sexuality, victimisation, risk and harm. Some forms of what we might call 'teen sexting' certainly do produce significant harms but many do not. However, current legislative responses to sexting involving young people may themselves produce more harm than most of the activity they seek to regulate.

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¹ 'Let's Get Sexting' is a recent Cosmopolitan campaign that 'compiled ... tantalizing tips to heat up those sexts and fire your imagination', aimed at adult sexters (Miller 2012).

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³ Alongside criminal offences, a range of civil laws such as defamation, privacy and breach of confidence may also apply to such behaviours (for a review of applicable laws see Svantesson 2011)

⁴ *Tasmania's Criminal Code Act 1924* (ss 130A-130C); *South Australia's Criminal Law Consolidation Act 1935*; *ACT's Crimes Act 1900*; *Queensland Criminal Code Act 1899*; *Western Australia's Criminal Code 1913*; *Northern Territory's Criminal Code Act 1983*

⁵ Under the *Young Offender Act 1997* (NSW), the option exists that a sexting matter be dealt under its provisions which have more appropriate diversionary sentencing options. Most importantly, the election to sentence under this Act does not require registration under the *Child Protection (Offender Registration) Act 2000* (NSW) on the Child Sex Offender Register. Sections 91H (produce/disseminate/possess child abuse material), 578C (publish indecent articles), 91K (filming a private act), and 91L (filming private parts) of the Crimes Act (NSW) are all referable to the Young Offender's Act. However, limitations exist. For example, s 61N (acts of indecency) are not referable and excluded under s 8(2)(d). Further, the *Young Offender's Act* is silent as to the position of young people who commit offences as children but are not dealt with by police until after they turn 18. Commonwealth Offences can also be dealt with under the *Young Offender's Act* so long as they adhere to the strict s 8 requirements.

⁶ Member for Cowan (NSW Liberals), Parliamentary Debate concerning *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010*, 4 February 2010 at 5:47pm.

⁷ Minister for Home Affairs and Member for Gorton (ALP) Parliamentary Debate concerning *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010*, 24 February 2010 at 9:14am

⁸ Submission to the Senate Standing Committee on Legal and Constitutional Affairs Regarding the Inquiry into the *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010*, by the Australian Privacy Foundation; dated 23 February 2010.

⁹ Submission to the Senate Standing Committee on Legal and Constitutional Affairs Regarding the Inquiry into the *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010*, by the Law Council of Australia; dated March 2010.

¹⁰ Using a carriage service for child pornography material.

¹¹ Possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service.

¹² Parliamentary General Outline for *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010*

¹³ Publication of pornography, as Coopersmith(2000) points out, has played an integral role in the proliferation of the Internet and other media technologies.

¹⁴ Drugs and firearms possessions are commonly cited examples.

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