

**SNAPCHAT AND SEXTING:
A SNAPSHOT OF BARING YOUR BARE ESSENTIALS**

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I. INTRODUCTION

[1] The usurpation of personal pictures posted on social media websites is not uncommon. Cheryl Smith was unknowingly made the face of a dating website.¹ A headshot of popular blogger Sara Pinnix was used “to promote an overseas Tarot card reader named Cristal.”² And eighteen-year-old Arielle Goldfinch’s pictures were used on Tagged, a website “aimed at meeting people for sexual relationships.”³

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¹ Riva Richmond, *Can You Protect Your Image While on Facebook?*, N.Y. TIMES (July 24, 2009, 7:17 PM), <http://gadgetwise.blogs.nytimes.com/2009/07/24/can-you-protect-your-image-while-on-facebook/>; Lee Mathews, *Facebook Sez, “Don’t Mind Us, We’re Just Whoring Out Your Photos”*, HUFFINGTON POST TECH (July 16, 2009, 9:00 PM), http://downloadsquad.switched.com/2009/07/16/facebook-sez-dont-mind-us-were-just-whoring-out-your-photos?icid=sphere_blogsmith_inpage_downloadsquad.

² David Griner, *Mom Blogger Shocked to See Her Photo in Ad for Spanish Psychic*, ADWEEK (Nov. 12, 2012, 9:23 AM), <http://www.adweek.com/adfreak/mom-blogger-shocked-see-her-photo-ad-spanish-psychic-145134>.

³ Chloe Johnson, *Teen’s Pictures Stolen for Site*, NEW ZEALAND HERALD (Dec. 8, 2012, 5:30 AM), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10852809.

[2] Such potential for misuse is particularly unsettling in light of the fact that three hundred million photos are uploaded to Facebook every day.⁴ Yet a careful reading of Facebook’s privacy policy dispels any notion that information a person chooses to share will not be disclosed to anybody else—even if shared with only one friend.⁵ Communications can be disseminated “by the friends with whom [users] share it, or even by Facebook at its discretion.”⁶ Indeed, Facebook recently sent its users notice of a pending class action which claims that “Facebook unlawfully used the names, profile pictures, photographs, likenesses, and identities of Facebook users in the United States to advertise or sell products and services . . . without obtaining those users’ consent.”⁷

[3] Enter Snapchat, a mobile phone application that sends self-destructing messages.⁸ The company touts: “[S]imply set the timer up to ten seconds and send. [Recipients will] have that long to view your

⁴ Casey Chan, *What Facebook Deals with Everyday: 2.7 Billion Likes, 300 Million Photos Uploaded and 500 Terabytes of Data*, GIZMODO (Aug. 22, 2012, 10:30 PM), <http://gizmodo.com/5937143/what-facebook-deals-with-everyday-27-billion-likes-300-million-photos-uploaded-and-500-terabytes-of-data>.

⁵ *Data Use Policy*, FACEBOOK (Dec. 11, 2012), http://www.facebook.com/full_data_use_policy (“[I]nformation you share on Facebook can be re-shared. This means that if you share something on Facebook, anyone who can see it can share it with others.”).

⁶ *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270, at *7 (Pa. Cnty. Ct. 2010).

⁷ Christina Warren, *Facebook Starts Sending Out Notices for Sponsored Stories Settlement*, MASHABLE (Jan. 3, 2013), <http://mashable.com/2013/01/03/facebook-settlement-email/>; Kashmir Hill, *Yes, That Legal Notice You Got From Facebook Is Real*, YAHOO FIN. (Jan. 28, 2013), <http://finance.yahoo.com/news/yes--that-legal-notice-you-got-from-facebook-is-real-190343914.html>.

⁸ *See generally* Snapchat, Inc., *Snapchat: Description*, GOOGLE PLAY (Dec. 17, 2012), <https://play.google.com/store/apps/details?id=com.snapchat.android>.

message and then it disappears forever.”⁹ And disappear it does. “[T]he company deletes any videos or photos off its servers after the content has been viewed. . . . [T]he data is completely deleted and could not be recalled even if law enforcement came looking for [it].”¹⁰ Unsurprisingly, this has led to the use of Snapchat for sexting¹¹ since its launch in September 2011.¹²

[4] This comment explores sexting between minors and its inseparable link to Snapchat. Part II provides background information on the practice and prevalence of sexting. Part III explains the Snapchat application and its various uses. Part IV discusses the implications of sexting, legal and otherwise. Part V examines how Snapchat directly conflicts with current law.¹³ Lastly, Part VI proposes possible solutions.

⁹ *Id.*

¹⁰ Meghan Kelly, *Sorry, Guys—Snapchat Videos Can be Saved (Updated)*, VENTURE BEAT (Dec. 28, 2012, 7:52 AM), <http://venturebeat.com/2012/12/28/save-snapchat-content/>.

¹¹ See Nick Bilton, *Disruptions: Indiscreet Photos, Glimpsed Then Gone*, N.Y. TIMES (May 6, 2012, 5:24 PM), <http://bits.blogs.nytimes.com/2012/05/06/disruptions-indiscreet-photos-glimpsed-then-gone/> (“All of this sexting . . . creates an opening for technology that might make the photos less likely to end up in wide circulation. This is where a free and increasingly popular iPhone app called Snapchat comes in.”); see also Kate Knibbs, *What’s So Special (and So Dangerous) About Snapchat*, DIGITAL TRENDS (Dec. 12, 2012), <http://www.digitaltrends.com/mobile/whats-so-special-and-so-dangerous-about-snapchat/> (noting Snapchat is “the greatest tool for sexting since the front-facing camera”).

¹² See, e.g., J.J. Colao, *Snapchat: The Biggest No-Revenue Mobile App Since Instagram*, FORBES (Nov. 27, 2012), <http://www.forbes.com/sites/jjcolao/2012/11/27/snapchat-the-biggest-no-revenue-mobile-app-since-instagram/>.

¹³ Snapchat touches many areas of law, including intellectual property, contract, tort, and constitutional law. The scope of this Comment is limited to Snapchat’s relationship to sexting.

II. BACKGROUND

[5] Sexting has been defined as “[t]he practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular phones . . . or over the Internet.”¹⁴ Typically, a person takes a digital photo of himself or herself and sends it via mobile phone as a text message.¹⁵ Children as young as twelve years old have engaged in the practice.¹⁶

[6] Between 2004 and 2009 the portion of teenagers¹⁷ who owned cell phones increased from forty-five to seventy-five percent.¹⁸ Of those teens, four percent admitted to having sent a sext to another person and fifteen percent said they had received a sext of someone they know.¹⁹ Those figures nearly parallel the percentage of adults who have sent and received sexts,²⁰ and have increased significantly since 2009.²¹

¹⁴ Complaint ¶ 7, *Miller v. Skumanick*, 605 F. Supp. 2d 634 (M.D. Pa. 2009) (No. 3:09cv540).

¹⁵ *See id.* ¶¶ 8-9.

¹⁶ *Sexting Occurring as Young as 5th Grade* (CBS television broadcast Aug. 1, 2012), available at <http://health.usnews.com/health-news/articles/2012/09/17/health-buzz-sexting-teens-more-likely-to-have-risky-sex>.

¹⁷ A teenager has been defined as a person between the ages of twelve and seventeen. *See* Amanda Lenhart et al., *Teens, Adults & Sexting: Data on Sending & Receipt of Sexually Suggestive Nude or Nearly Nude Images by American Adolescents & Adults*, PEW INTERNET & AM. LIFE PROJECT 1, 2 (Oct. 23, 2010), available at <http://www.pewinternet.org/Presentations/2010/Oct/Teens-Adults-and-Sexting.aspx>.

¹⁸ *Id.* at 3.

¹⁹ *Id.* at 6.

²⁰ Six percent of adults have sent a sext and fifteen percent of adults have received a sext. *Id.* at 7.

²¹ *Cf. id.* at 3.

[7] A 2012 survey of over six hundred private high school students revealed that nearly twenty percent of students had sent a sext via cell phone, and nearly twice as many had received a sext.²² Over a third of those who had sent a sext had done so “despite believing that there could be serious consequences.”²³ More than a quarter had forwarded a sext that they had received to others.²⁴

[8] The National Campaign to Prevent Teen and Unplanned Pregnancy sponsored a similar survey of 1,280 teenagers and young adults, which largely uncovered the same figures.²⁵ Nearly twenty percent of teenagers found nothing wrong with text messages containing images of full nudity, while forty percent considered being topless acceptable.²⁶ In addition, “[s]ending and posting nude or semi-nude photos or videos starts at a young age and becomes even more frequent as teens become young adults.”²⁷

²² Donald Strassburg & Valoree Dowell, *U Study Finds ‘Sexting’ More Common Among Teens Than You Might Think*, U NEWS CENTER: THE U. OF UTAH (June 14, 2012), http://unews.utah.edu/news_releases/u-study-finds-sending-sexually-explicit-photos-by-cell-phone-more-common-among-teen-than-you-might-think/.

²³ *Id.*

²⁴ *Id.*

²⁵ See COSMOGIRL.COM & THE NAT’L CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, SEX AND TECH, RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS 1-2 (2008), available at http://www.thenationalcampaign.org/sexttech/pdf/sexttech_summary.pdf [hereinafter COSMOGIRL SURVEY]. This survey defines a teenager and young adult as ages 13-19 and 20-26, respectively. *Id.* at 1.

²⁶ Glenda Cooper, *Sexting: A New Teen Cyber-Bullying ‘Epidemic’*, THE TELEGRAPH (Apr. 12, 2012), <http://www.telegraph.co.uk/technology/facebook/9199126/Sexting-a-new-teen-cyber-bullying-epidemic.html>.

²⁷ COSMOGIRL SURVEY, *supra* note 25, at 1.

[9] Sexting itself is strongly linked to sexual behavior.²⁸ According to the *Archives of Pediatrics and Adolescent Medicine*, “[a]bout 77% of girls aged 14 to 19 who had sent a sext reported having had intercourse, compared with 42% of those who hadn’t sexted. For boys, 82% of those who had sexted had had sex, while 46% of non-sexers had done so.”²⁹ Finally, girls who sext are also more likely to engage in unsafe sex.³⁰

III. SNAPCHAT

A. Application, Terms, and Loopholes

[10] Snapchat was born in the spring of 2011 in a Kappa Sigma fraternity house.³¹ Stanford alum Bobby Murphy and Stanford dropout Evan Spiegel created the picture and video messaging application as a project for a product design class.³² The company’s description of the application, which is rated for users twelve and older, is short:

Snapchat is the fastest way to share a moment with friends.
You control how long your friends can view your

²⁸ Laura McMullen, *Health Buzz: Sexting Teens More Likely to Have Risky Sex*, U.S. NEWS & WORLD REP. HEALTH (Sept. 17, 2012), <http://health.usnews.com/health-news/articles/2012/09/17/health-buzz-sexting-teens-more-likely-to-have-risky-sex>.

²⁹ Maia Szalavitz, *Nearly 1 in 3 Teens Sext, Study Says. Is This Cause for Worry?*, TIME (July 2, 2012), <http://healthland.time.com/2012/07/02/nearly-1-in-3-teens-sext-study-says-is-this-cause-for-worry/>.

³⁰ *See id.* (including unprotected sex, more sexual partners, and using drugs or alcohol before sex); *see also* McMullen, *supra* note 28.

³¹ Felix Gillette, *Snapchat and the Erasable Future of Social Media*, BUS. WK. (Feb. 7, 2013), *available at* <http://www.businessweek.com/articles/2013-02-07/snapchat-and-the-erasable-future-of-social-media>.

³² Colao, *supra* note 12.

message—simply set the timer up to ten seconds and send. They'll have that long to view your message and then it disappears forever. We'll let you know if they take a screenshot! Build relationships, collect points, and view your best friends. Snapchat is instantly fun and insanely playful. Show your friends how clever you can be and enjoy the lightness of being!³³

[11] Once Snapchat is downloaded from Apple's iTunes or Google Play, a user must register a username and set a password.³⁴ Snapchat then "accesses your contacts on your cell phone to load friends to the application, or you can add other friends beyond your contact list."³⁵ After two users approve each other, they can begin messaging.³⁶

[12] Pictures and videos are sent the same way: "by taking the picture or video, setting a timer from 1-10 seconds for the content to disappear after the user opens it, and sending it to another user."³⁷ Messages can be sent to one or more persons at a time.³⁸ But with pictures, there are

³³ Snapchat Inc., *supra* note 8; *iTunes Preview: Snapchat*, APPLE, <https://itunes.apple.com/us/app/snapchat/id447188370?mt=8> (last visited Mar. 28, 2013).

³⁴ Wayne Parker, *Snapchat – A Popular App for Teens but with a Dark Side*, ABOUT.COM, <http://fatherhood.about.com/od/fathers-social-media/p/Snapchat.htm> (last visited Mar. 26, 2013).

³⁵ *Id.*

³⁶ J.J. Colao, *Snapchat Adds Video, Now Seeing 50 Million Photos a Day*, FORBES (Dec. 14, 2012), available at <http://www.forbes.com/sites/jjcolao/2012/12/14/snapchat-adds-video-now-seeing-50-million-photos-a-day/> ("The update introduces a new 'friending' process that requires users to approve each other before exchanging photos.") .

³⁷ Billy Gallagher, *Snapchat Releases Video Sharing, Is Prototyping Monetization Features (Oh, and It's Still Not for Sexting)*, TECHCRUNCH (Dec. 14, 2012), <http://techcrunch.com/2012/12/14/snapchat-does-video/>.

³⁸ Joey Creighton, *What Is Snapchat?*, INFOSPACE (Nov. 29, 2012), <http://infospace.ischool.syr.edu/2012/11/29/what-is-snapchat/>.

additional options; they can be edited with captions or doodles, saved to a user's phone, or uploaded directly to Instagram.³⁹ Snapchat also tracks who each person messages, creating a "best friends" group for those messaged most,⁴⁰ with the top three people listed in order on each user's public Snapchat profile.⁴¹

[13] What makes the application so unique, however, is what happens to messages after they are viewed. Pictures and videos sent via Snapchat are not just deleted from the recipient's phone, but also from Snapchat's network.⁴² "[T]he company deletes any videos or photos off of its servers after the content has been viewed. . . . [T]he data is completely deleted and could not be recalled even if law enforcement came looking for the information."⁴³

[14] But Snapchat does not and cannot entirely live up to this claim, giving users a false sense of security. Indeed, the company's privacy policy acknowledges as much:

Although we attempt to delete image data as soon as possible after the message is received and opened by the recipient . . . we cannot guarantee that the message contents

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Katie Notopoulos, *The Snapchat Feature That Will Ruin Your Life*, BUZZFEED (Dec. 2012), <http://www.buzzfeed.com/katienotopoulos/the-snapchat-feature-that-will-ruin-your-life>.

⁴² Kelly, *supra* note 10.

⁴³ *Id.*; see also *How Snaps Are Stored and Deleted*, SNAPCHAT (May 9, 2013, 7:23 P.M.), blog.snapchat.com ("When a snap is viewed and the timer runs out, the app notifies our servers, which in turn notify the sender that the snap has been opened. Once we've been notified that a snap has been opened by all of its recipients, it is deleted from our servers. If a snap is still unopened after 30 days, it too is deleted from our servers.").

will be deleted in every case. . . . Messages, therefore, are sent at the risk of the user.⁴⁴

[15] There are additional loopholes. For example, recipients can simply take a screenshot of the message, although this will notify the sender.⁴⁵ Alternatively, recipients can take a picture of their phone, thereby circumventing the screenshot notification. Even then, a more complicated approach exists. “Snapchat saves [videos] on the phone’s local memory, which you can then recall by installing a file browser, such as iFunBox, and plugging the phone into a computer. You then search through the file browser, copy and save the content to a computer, and you’re done.”⁴⁶

[16] Nevertheless, Snapchat has risen rapidly in popularity since its launch in September 2011.⁴⁷ By the end of December 2012, the application was being used fifty million times a day,⁴⁸ up from thirty million in November and ten million in October.⁴⁹ In 2012 alone, more

⁴⁴ *Privacy Policy*, SNAPCHAT, <http://www.snapchat.com/privacy> (last updated Feb. 20, 2013).

⁴⁵ *Id.*

⁴⁶ Kelly, *supra* note 10 (“A hole in its iPhone version . . . lets you grab video content before it’s viewed.”); *see also* Katie Notopoulos, *How Anybody Can Secretly Save Your Snapchat Videos Forever*, BUZZFEED (Dec. 27, 2012, 6:22 PM), <http://www.buzzfeed.com/katienotopoulos/how-anybody-can-secretly-save-your-snapchat-videos> (providing the exact steps on how to save Snapchat videos).

⁴⁷ Colao, *supra* note 12.

⁴⁸ *Our Biggest Update Yet: v4.0 Phantom!*, SNAPCHAT (Dec. 14, 2012: 12:54 PM), blog.snapchat.com/post/37898594536/our-biggest-update-yet-v4-0-phantom; Laurie Segall, *Snapchat’s ‘Disappearing’ Videos Don’t Actually Vanish*, CNN MONEY (Dec. 28, 2012, 3:27 PM), <http://money.cnn.com/2012/12/28/technology/security/snapchat-security-flaw/index.html>.

⁴⁹ Colao, *supra* note 12.

than five billion messages were sent through Snapchat.⁵⁰ In February 2013, the application “was the second-most popular free photo and video app for the iPhone . . . just behind YouTube and ahead of Instagram.”⁵¹ Snapchat is especially popular among individuals under twenty-five, and in December 2012 the company received eight million dollars from Benchmark Capital, the financial backer behind Instagram.⁵²

[17] The application’s success has led other companies to copy the concept.⁵³ In December 2012, for example, Facebook created the Poke app, which allows users to “send self-destructing photos, videos, and Facebook messages.”⁵⁴ Unlike Snapchat, however, Facebook “keeps data you’ve deleted for a certain amount of time on its servers.”⁵⁵ The new Facebook application has been largely unsuccessful, even being derided as “an obvious ripoff,” and appears to have launched Snapchat to new heights.⁵⁶

⁵⁰ Willard Foxton, *Revenge Porn and Snapchat: How Young Women Are Being Lured into Sharing Naked Photos and Videos With Strangers*, THE TELEGRAPH (Feb. 13, 2013), <http://blogs.telegraph.co.uk/technology/willardfoxton2/100008808/revenge-porn-and-snapchat-how-young-women-are-being-lured-into-sharing-naked-photos-and-videos-with-strangers/>.

⁵¹ Gillette, *supra* note 31.

⁵² Knibbs, *supra* note 11.

⁵³ Jared Keller, *Facebook’s Poke Is a Wild Success—for Rival Snapchat*, BUS. WK. (Dec. 28, 2012), available at <http://www.businessweek.com/articles/2012-12-28/facebooks-poke-is-a-wild-success-for-rival-snapchat>.

⁵⁴ *Id.*

⁵⁵ Meghan Kelly, *This Snapchat Video Will Destruct in 5... 4... 3... 2... Haha Took a Screenshot*, VENTUREBEAT (Dec. 14, 2012, 2:53 PM), <http://venturebeat.com/2012/12/14/snapchat-video/>.

⁵⁶ Keller, *supra* note 53.

B. Uses

[18] Snapchat is meant to bring fun and spontaneity back into the digital world. “People are living with this massive burden of managing a digital version of themselves,” co-founder Evan Spiegel explained.⁵⁷ “It’s taken all of the fun out of communicating.”⁵⁸ The application gives users a strong sense of inconsequentiality to their actions, enabling them to take “the ugliest, silliest, most compromising photos they want.”⁵⁹ But emphasis should be placed on compromising. The company’s deletion of messages from its servers has led to a widespread alternative use for Snapchat: sexting.⁶⁰

[19] Snapchat has been recognized as a sexting application since its inception.⁶¹ Because messages are ultimately deleted from the company’s servers, Snapchat has even been dubbed “the greatest tool for sexting since the front-facing camera.”⁶² *The New York Times* put it aptly: “All of this sexting . . . creates an opening for technology that might make the photos

⁵⁷ Colao, *supra* note 12.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See generally Billy Gallagher, *No, Snapchat Isn’t About Sexting, Says Co-Founder Evan Spiegel*, TECH CRUNCH (May 12, 2012), <http://techcrunch.com/2012/05/12/snapchat-not-sexting/>.

⁶¹ See, e.g., Kashmir Hill, *This Sext Message Will Self Destruct in Five Seconds*, FORBES (May 7, 2012, 12:51 PM), <http://www.forbes.com/sites/kashmirhill/2012/05/07/fantastic-theres-a-quick-erase-app-for-sending-your-nude-photos/>; Katie Heaney, *Snapchat Adding Video To Allow Longer Sexts*, BUZZFEED (Dec. 14, 2012, 12:54 PM), <http://www.buzzfeed.com/katieheaney/snapchat-adding-video-to-allow-longer-sexs>.

⁶² Knibbs, *supra* note 11.

less likely to end up in wide circulation. This is where a free and increasingly popular iPhone app called Snapchat comes in.”⁶³

[20] Spiegel is unpersuaded, saying, “I’m not convinced that the whole sexting thing is as big as the media makes it out to be. . . . I just don’t know people who do that. It doesn’t seem that fun when you can have real sex.”⁶⁴ Yet the application is rated for users twelve years of age and older due, in part, to “suggestive themes” and “mild sexual content or nudity.”⁶⁵

[21] Proof of Snapchat’s use for sexting is found in “Snapchat Sluts,” a website featuring photos of naked women that were taken using Snapchat.⁶⁶ The website was created in early December 2012 by party photographer Kirill Bichutsky and was “born from an open call for submissions posted on Bichutsky’s Twitter account.”⁶⁷ All participants submitted pictures willingly and were over eighteen.⁶⁸ The photos have

⁶³ See, e.g., Bilton, *supra* note 11.

⁶⁴ Gallagher, *supra* note 60 (internal citations omitted).

⁶⁵ *iTunes Preview: Snapchat*, APPLE, <https://itunes.apple.com/us/app/snapchat/id447188370?mt=8> (last visited Mar. 28, 2013).

⁶⁶ See Max Read, ‘Snapchat Sluts’ Shows Why Snapchat Isn’t the Consequence-Free Sexting App We’d All Hoped For, GAWKER (Dec. 10, 2012, 6:30PM), <http://gawker.com/5967303/snapchat-sluts-shows-why-snapchat-isnt-the-consequence-free-sexting-app-wed-all-hoped-for> (describing Snapchat as “a new way for teens to send each other nudes”); Andrew Coats, *Terms & Conditions: Snapchat’s Privacy Policy Has Too Many Secrets*, DIGITAL TRENDS (Dec. 16, 2012), <http://www.digitaltrends.com/mobile/terms-conditions-snapchat/>.

⁶⁷ ‘Snapchat Sluts’ Hit the Internet on New Website, THE INQUISITR (Dec. 11, 2012), <http://www.inquisitr.com/433154/snapchat-sluts-hit-the-internet-on-new-website/>.

⁶⁸ *Id.*

since been removed, but the website clearly demonstrates that Snapchat “is being used in ways not intended by its creators.”⁶⁹

[22] Snapchat is also used for other improper purposes, such as for “crude drawings” and “to flaunt underage drinking.”⁷⁰ In addition, “a growing number of teens [are] using Snapchat for cheating on tests.”⁷¹

IV. IMPLICATIONS OF SEXTING

A. Legal Implications

[23] In *New York v. Ferber*, the Supreme Court held that “[s]tates are entitled to greater leeway in the regulation of pornographic depictions of children.”⁷² Because the child pornography laws of most states classify a child as someone under the age of eighteen, a teenager who sexts may commit four different crimes: solicitation, production, distribution, and possession of child pornography.⁷³ In effect, such laws criminalize a large fraction of American teenagers’ behavior.

⁶⁹ *Id.*; see also *Couts*, *supra* note 66.

⁷⁰ Grace Jensen, *Snapchat Screenshots Reveal Teens Acting Like Teens*, BUZZFEED (Dec. 3, 2012, 5:02PM), <http://www.buzzfeed.com/googlegracie/snapchat-screenshots-reveal-teens-acting-like-teen-7d2i>.

⁷¹ *Snapchat: Online Photos that Self-Destruct*, YOUR TEEN FOR PARENTS (Mar. 25, 2013), <http://yourteenmag.com/2013/snapchat-teens-photos/> (“Students quickly take pictures of their test answers and snapchat it to other students in the class.”). On the extreme end, Snapchat could also be used in the commission of crimes and terrorism.

⁷² 458 U.S. 747, 756 (1982).

⁷³ Carrie L. M. Thompson, *Let’s Talk About Sext: Illinois’ Legislative Response to Sexting*, 24 DCBA BRIEF 22, 22-23 (2011); see, e.g., Child Pornography, 720 ILL. COMP. STAT. 5/11-20.1(a) (2009).

[24] The nature of sexting, however, makes “typical legal questions about the action, the actors, and the consequences difficult if not impossible to answer.”⁷⁴ Thus state legislatures, while not ignoring the problem, have been slow to make progress.⁷⁵ States have taken a variety of approaches to regulating teenagers who sext.⁷⁶ Vermont, for example, created a total exception for consensual sexting between teenagers of specific ages.⁷⁷ Vermont Senate Bill 125 amended child pornography laws to exclude persons “less than 19 years old, [when] the child is at least 13 years old, and the child knowingly and voluntarily and without threat of coercion used an electronic communication device to transmit an image of himself or herself to the person.”⁷⁸

[25] Other states established entirely new sex offender laws in response to sexting. In February 2012, South Dakota criminalized a minor’s intentional creation, transmission, possession, or distribution of “any visual depiction of a minor in any condition of nudity . . . or involved in any prohibited sexual act.”⁷⁹ With the exception of two affirmative defenses, any violation constitutes the offense of juvenile sexting, which is a class one misdemeanor.⁸⁰

⁷⁴ Thompson, *supra* note 73, at 23.

⁷⁵ Cf. 2012 Sexting Legislation, NAT’L CONF. OF ST. LEGISLATURES (Dec. 14, 2012), <http://ncsl.org/issues-research/telecom/sexting-legislation-2012.aspx>.

⁷⁶ See generally *id.*

⁷⁷ S. 125, 2009 Leg., Reg. Sess. (Vt. 2009), available at <http://www.leg.state.vt.us/docs/2010/Acts/ACT058.pdf>.

⁷⁸ *Id.*

⁷⁹ S. 183, 2012 Leg., 87th Sess. (S.D. 2012), available at <http://legis.state.sd.us/sessions/2012/Bill.aspx?File=SB183P.htm>.

⁸⁰ *Id.* (“It is an affirmative defense to the offense of juvenile sexting that the minor has not solicited the visual depiction, that the minor does not subsequently distribute, present, transmit, post, print, disseminate, or exchange the visual depiction, and that the minor

[26] Diversionary programs are an alternative approach. New York Assembly Bill 8131 “[d]irects the attorney general to establish a 2 year juvenile sexting and cyberbullying education demonstration program in not less than 3 counties as a diversionary program for persons under 16 who have engaged in cyberbullying or sexting, in lieu of juvenile delinquency or criminal proceedings.”⁸¹

[27] Many state laws, however, do not adequately address the problem of sexting and how to punish it. Illinois’ sexting law, for example, does not punish persons who repeatedly request sexts nor does it provide persons who receive unwanted sexts with a means to stop the sender.⁸² Further, the law fails to “go far enough to punish minors who recklessly send sext images on to unintended third parties and . . . to prevent the images from being created in the first place.”⁸³

[28] In those states without sexting laws, prosecutors are left to follow the laws already in place. These laws are “mainly child pornography or obscenity laws, and some legislators have followed in turn with sex offender punishment guidelines. . . . [A] conviction . . . could result in teens being labeled sex offenders and subject to lifetime registration and reporting requirements.”⁸⁴

deletes or destroys the visual depiction upon receipt. It is an affirmative defense . . . that the visual depiction is of a single minor, created by that minor, who does not subsequently distribute, present, transmit, post, print, disseminate, or exchange the visual depiction.”).

⁸¹ See Assemb. B. No. A08131, 2011 Leg., Reg. Sess. (N.Y. 2012), available at http://assembly.state.ny.us/leg/?default_fld=&bn=A08131&term=2011&Summary=Y&Text=Y.

⁸² See Thompson, *supra* note 73, at 25.

⁸³ *Id.*

⁸⁴ *Id.* at 22-23.

[29] Section 2256(8) of the Protection of Children Against Sexual Exploitation Act of 1977, for example, provides that child pornography “is any visual depiction of sexually explicit conduct when the visual depiction is a digital image, computer image, or computer-generated image of a minor engaging in sexually explicit conduct.”⁸⁵ Although many sexts do not fall within the purview of “sexually explicit,”⁸⁶ teenagers across the United States have been charged with child pornography offenses.⁸⁷ Such teenagers may face a difficult choice: “either mount a case-by-case ‘as applied’ challenge to a prima facie valid law (and risk decades in jail) or plead guilty to a lesser charge.”⁸⁸

B. Non-Legal Implications

[30] Sexting also has non-legal implications, such as damaging careers and future job prospects.⁸⁹ “According to a recent survey by Microsoft, 75

⁸⁵ Isaac A. McBeth, *Prosecute the Cheerleader, Save the World?: Asserting Federal Jurisdiction Over Child Pornography Crimes Committed Through “Sexting”*, 44 U. RICH. L. REV. 1327, 1330 (2012).

⁸⁶ “Sexually explicit conduct includes (1) all forms of sexual intercourse (including oral or anal) where the genitals, breasts, or pubic area of any person is exhibited; (2) bestiality; (3) masturbation; (4) sadistic or masochistic abuse; and (5) lascivious exhibition of the genitals or pubic area.” *Id.*

⁸⁷ *See, e.g.*, John A. Humbach, ‘Sexting’ and the First Amendment, 37 HASTINGS CONST. L.Q. 433, 433-35 (2010) (“Two Florida teenagers took over one hundred photographs of themselves engaging in unspecified but lawful ‘sexual behavior.’ The two were subsequently charged with ‘promoting a sexual performance of a child,’ a second degree felony under Florida law In Ohio, a fifteen-year-old girl used her cell phone to send nude photos of herself and was charged with ‘illegal use of a minor in nudity-oriented material.’ . . . Factual situations like these are not isolated.”).

⁸⁸ *Id.* at 451.

⁸⁹ *See* Jeffrey Rosen, *The Web Means the Ending of Forgetting*, N.Y. TIMES (July 21, 2010), http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all&_r=0.

percent of U.S. recruiters and human-resource professionals report that their companies require them to do online research about candidates, and many use a range of sites when scrutinizing applicants—including. . . photo- and video-sharing sites.”⁹⁰ Further, “[s]eventy percent of U.S. recruiters report that they have rejected candidates because of information found online.”⁹¹

[31] More importantly, the distribution of pictures and videos depicting juveniles engaged in sexual activity is “intrinsically related to the sexual abuse of children” in two notable ways.⁹² “First, the materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of [such] material . . . is to be effectively controlled.”⁹³

[32] Sexting may also lead to bullying.⁹⁴ Eighteen-year-old Jessica Logan of Cincinnati, for example, was harassed after an ex-boyfriend forwarded nude pictures of her to other high school girls.⁹⁵ A few months later, Logan took her own life.⁹⁶

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *New York v. Ferber*, 458 U.S. 747, 759 (1982).

⁹³ *Id.*

⁹⁴ *See Cooper*, *supra* note 26.

⁹⁵ Mike Celizic, *Her Teen Committed Suicide Over ‘Sexting’*, TODAY (Mar. 6, 2009, 9:26 AM), http://today.msnbc.msn.com/id/29546030/ns/today-parenting_and_family/t/her-teen-committed-suicide-over-sexting/#.UN8jHInjn_V; Phuong Ly, *The Lowdown on Sexting*, GREATSCHOOLS, <http://www.greatschools.org/parenting/behavior-discipline/2079-sexting.gs> (last visited June 3, 2013).

⁹⁶ *Id.*

V. CONFLICTS WITH THE LAW

[33] With all the risks associated with the application's improper use, Snapchat has added limited liability and indemnification clauses.⁹⁷ Its limitation of liability states, in relevant part, that the company will not be held liable for any damages resulting from "the conduct of other users of the application, even if Snapchat has been advised of the possibility of such damages. You assume total responsibility for your use of the application."⁹⁸

[34] Damages aside, Snapchat itself may be illegal because it functions as a distribution network for child pornography. The Supreme Court has held that a state's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling."⁹⁹ "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens"¹⁰⁰ Accordingly, the Court has "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights."¹⁰¹

⁹⁷ See *Terms of Use*, SNAPCHAT, www.snapchat.com/# (last updated Feb. 20, 2013) (under the "Terms" tab).

⁹⁸ *Id.*

⁹⁹ *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982).

¹⁰⁰ *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

¹⁰¹ *New York v. Ferber*, 458 U.S. 747, 757 (1982) (denying child pornography films constitutional protection); see also *FCC v. Pacifica Found.*, 438 U.S. 726, 749-50 (1978) (holding that the government's interest in the youths' well-being justified special treatment of indecent broadcasting received by both adults and children); *Prince*, 321 U.S. at 167-70 (holding valid a statute prohibiting the use of a child to distribute literature on the street despite its effect on a First Amendment activity).

[35] One concern articulated in *Ferber* applies directly to teen sexting: the creation of a “permanent record.”¹⁰² As explained in *Osbourne v. Ohio*, “pornography’s continued existence causes the child victims continuing harm by haunting the children in years to come.”¹⁰³ This “haunting” presupposes underlying sexual abuse, but abuse is not required:

[P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child’s actions are reduced to a recording, the pornography may haunt him in future years A child who has posed for a camera must go through life knowing that the recording is [or could be] circulate[ed]¹⁰⁴

[36] Similarly, “it is the fear of exposure and the tension of keeping the act secret that seems to have the most profound emotional repercussions.”¹⁰⁵ Sexting itself is also harmful to teenagers.¹⁰⁶ These harms justify the suppression of self-made pornography, even if it interferes with teenagers’ interest in expressing themselves as they wish.

[37] In practice, however, courts treat sexting differently than traditional child pornography. Between 2008 and 2009, for example:

¹⁰² 458 U.S. at 759; *see also* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249 (2002).

¹⁰³ 495 U.S. 103, 111 (1990).

¹⁰⁴ *Ferber*, 458 U.S. at 759 n.10 (quoting David P. Shouvlín, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981)).

¹⁰⁵ Ulrich C. Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J. AM. ACAD. CHILD PSYCHIATRY 289, 292 (1980)).

¹⁰⁶ *See supra* Part IV.B.

nearly 3,500 cases of sexual images produced by teens came to the attention of law enforcement agencies in the U.S. Two-thirds of these cases, however, had “aggravating” factors — such as involvement of an adult or use of the images by a teen to harass, bully or intimidate the victim. Teens were arrested in 18% of cases where there was no aggravating factor, and registration as a sex offender occurred in only 10 cases, nine of which involved actual sexual assault¹⁰⁷

Forty-five-year-old Randy T. Davis Jr., by contrast, was sentenced to almost fourteen years in federal prison for downloading traditional child pornography from the Internet.¹⁰⁸

[38] Even if sexting by minors is distinguishable from traditional child pornography,¹⁰⁹ it is still illegal under prima facie valid law.¹¹⁰ Snapchat’s self-destructing messages make users feel immune from repercussions. This has encouraged and led directly to the application’s widespread use

¹⁰⁷ Szalavitz, *supra* note 29.

¹⁰⁸ *Man Gets Nearly 14 Years for Downloading Child Porn*, JOURNAL STAR (Jan. 10, 2013, 9:30 PM), <http://www.pjstar.com/news/x1671799911/Man-gets-nearly-14-years-for-downloading-child-porn>.

¹⁰⁹ See Szalavitz, *supra* note 29 (“In an adolescent period characterized by identity development and formation, sexting should not be considered equivalent to childhood sexual assault, molestation and date rape.”). See generally, Humbach, *supra* note 87 (arguing that sexting and autopornography should not be categorically excluded from First Amendment protection).

¹¹⁰ See, e.g., Child Pornography, 720 ILL. COMP. STAT. 5/11-20.1(a) (2009); S. 125, 2009 Leg., Reg. Sess. (Vt. 2009), available at <http://www.leg.state.vt.us/docs/2010/Acts/ACT058.pdf>. As noted previously, sexting may induce four different crimes: solicitation, production, distribution, and possession of child pornography.

for sexting. Thus, Snapchat is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”¹¹¹

[39] But the application adds an additional layer of complexity. Because Snapchat deletes photos and videos from senders’ phones, recipients’ phones, and its servers,¹¹² there is no “permanent record of the children’s participation.”¹¹³ On the one hand, Snapchat functions like contraception, protecting teenagers who are going to sext regardless of the consequences.¹¹⁴ On the other hand, it is used to both distribute child pornography and destroy the evidence.

[40] Once deleted from Snapchat’s network, messages cannot be recovered, putting them beyond the reach of any subsequent investigation.¹¹⁵ Thus, short of real-time interception by law enforcement, Snapchat’s use deprives victims of recourse, even when aggravating factors are present.¹¹⁶

¹¹¹ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam)).

¹¹² Kelly, *supra* note 10.

¹¹³ *New York v. Ferber*, 458 U.S. 747, 759 (1982).

¹¹⁴ See Nicholas Carlson, *Sexting with Snapchat, Teenagers Prove They Aren’t as Dumb as We Thought*, BUS. INSIDER (Dec. 31, 2012, 8:25 AM), <http://www.businessinsider.com/sexting-with-snapchat-teenagers-prove-they-arent-as-dumb-as-we-thought-2012-12>.

¹¹⁵ Kelly, *supra* note 10.

¹¹⁶ Szalavitz, *supra* note 29. This is also true in cases involving an adult who sexually exploits a minor. For example, someone can set up a group to which persons subscribe via their Snapchat username. These users are then sent multiple, short child pornography videos.

[41] Such aggravating factors are becoming increasingly common. One reason is trends like “revenge porn,” in which males post naked pictures of their ex-girlfriends online to websites such as PinkMeth.¹¹⁷ Again, these harms greatly outweigh the benefits of freely taking “the ugliest, silliest, most compromising photos.”¹¹⁸

VI. CONCLUSION

[42] All states should create educational programs for teenagers about sexting.¹¹⁹ These programs should be taught using “gist”-based reasoning because “teens who are taught to focus on potential catastrophic, negative outcomes, rather than the odds, make fewer risky [] decisions.”¹²⁰ These outcomes should include, among other things, bullying and career implications. The curriculum can be incorporated into both Family Life Education and rehabilitation programs.

[43] In addition, applications such as Snapchat must be made less readily available to minors. Accordingly, Snapchat should be restricted to adults age eighteen and older, and the application’s content rating should be changed on Apple’s iTunes and Google Play. As to the former, Snapchat should implement a customer protection block until a user

¹¹⁷ Foxton, *supra* note 50 (“[H]osted in the US, [sites like PinkMeth] are protected by laws which state that companies cannot be prosecuted for user-generated content. Only the (usually anonymous) individual who posted the pictures can be fined. So, if the woman wanted her pictures removed from the site, she would have to work out who shared her pictures, then prosecute them. The site owners won't lift a finger—and they are making millions of dollars from young women's pain.”).

¹¹⁸ Colao, *supra* note 12.

¹¹⁹ The primary purpose of this comment is to draw attention to the legal issues Snapchat poses. This section introduces possible solutions to the sexting problem, but is not intended to be exclusive or exhaustive.

¹²⁰ Maia Szalavitz, *Why the Teen Brain Is Drawn to Risk*, TIME (Oct. 2, 2012), <http://healthland.time.com/2012/10/02/why-the-teen-brain-is-drawn-to-risk/>.

confirms that he or she is eighteen years of age or older.¹²¹ As to the latter, a changed rating will put parents on alert on the front end, decreasing the need to look through their children's phone records to unearth red flags.

[44] States should also pass legislation imposing fines on minors who use Snapchat.¹²² Authorities can uncover the age and identity of many Snapchat users simply through their usernames: “[s]ince Snapchat presents itself as private—basically offline—many people use the same username as they use for other social media accounts. . . . [A] quick Google search of [people’s] usernames pulled their Instagram and Twitter accounts right up.”¹²³ A user’s operation of the application can then be monitored in part through his or her public Snapchat profile.¹²⁴ Over time, such fines would reduce Snapchat’s network effect and use amongst minors.¹²⁵

[45] Alternatively, Snapchat could be ordered to implement nudity detection software such as Snitch¹²⁶ or PORNsweeper.¹²⁷ Such software

¹²¹ Practically speaking, a customer protection block is unlikely to have a great impact on restricting Snapchat’s use by minors.

¹²² The fines should be significant enough to act as a deterrent, but not so substantial that parents must come to their child’s assistance in paying them (i.e., minors will pay the fines using their own money).

¹²³ Notopoulos, *supra* note 41.

¹²⁴ This also eliminates the need for real-time interception and monitoring of the messages.

¹²⁵ *Network Effect*, INVESTOPEDIA, <http://www.investopedia.com/terms/n/network-effect.asp#axzz2IHv0IokI> (last visited Mar. 29, 2013) (network effect is “a phenomenon whereby a good or service becomes more valuable when more people use it”).

¹²⁶ *Snitch*, HYPERDYNE SOFTWARE, <http://www.hyperdynesoftware.com> (last visited Mar. 20, 2013).

searches files “for the color of human pigmentation in the pixels, since nude or pornographic images contain more skin pixels than other images where skin is present.”¹²⁸ This would detect most sexts, though the software may also flag “[b]aby pictures and pictures of people on vacation at the beach . . . because they contain large amounts of skin.”¹²⁹

[46] Once a message is flagged as containing nudity, Snapchat can do one of three things: delete the message, pixelate the message, or forward the message to authorities.¹³⁰ Of these three options, deletion is the most practical.¹³¹ Moreover, deletion would allow teenagers to continue to use Snapchat while simultaneously reducing its ability to be used for sexting.¹³²

[47] In conclusion, many legislatures are failing to keep pace with sexting amongst minors. The legal implications are problematic, and are only compounded by applications like Snapchat. The above steps to prevent the baring of one’s bare essentials via Snapchat are not exclusive or exhaustive. But they are steps in the right direction.

¹²⁷ *Software Blocks Nudity: Content Technologies’ Software Detects Nude Photos on E-Mails, Blocks E-Mails*, CNN MONEY (Sept. 20, 2000, 12:41 PM), http://money.cnn.com/2000/09/20/technology/porn_sweep/.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Only one of the alternatives should be implemented, and once implemented should be automatic.

¹³¹ Notifying authorities would have the most profound impact, but also carries the risk of tying up valuable executive and judicial resources. Pixilation is similar to deletion, but pixelated messages may still possess an allure similar to sexts.

¹³² The implementing of nudity detection software would interfere with adults’ right to use Snapchat for sexting, but this comment does not address that issue.