Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 23 *Volume XXIII*
Number 3 *Volume XXIII Book 3*

Article 3

2013

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Recommended Citation

Matthew H. Birkhold, *Freud on the Court: Re-interpreting Sexting & Child Pornography Laws*, 23 Fordham Intell. Prop. Media & Ent. L.J. 897 (2013).
Available at: https://ir.lawnet.fordham.edu/iplj/vol23/iss3/3

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Cover Page Footnote

Ph.D. candidate, German, Princeton University; J.D. candidate, Columbia Law School. For helpful comments, I would like to thank Amy Adler, Alexander Birkhold, Peter Brooks, Jordan Elkind, Michael Herz, Lawrence Rosen, Kim Lane Scheppele, and Martin Stone, as well as the participants of Princeton's LAPA seminar. I am also grateful to the participants of Peter Brooks'seminar on Law, Psychoanalysis, and Ideas of Human Agency as part of the series of seminars and lectures on The Ethics of Reading and the Cultures of Professionalism.

This article is available in Fordham Intellectual Property, Media and Entertainment Law Journal: https://ir.lawnet.fordham.edu/iplj/vol23/iss3/3

Freud on the Court: Re-interpreting Sexting & Child Pornography Laws

Matthew H. Birkhold*

Although many developments in child pornography law are troubling, perhaps the most disconcerting is the growing number of cases in which children are being charged with violating child pornography laws for engaging in "sexting," or sending sexually explicit photographs via cellular phones or over the Internet. Although the law implicitly considers children the victims of child pornography and the photographer and audience as punishable perpetrators, this logic is challenged by sexting cases. Yet in many instances, children who take and send "lascivious" pictures of themselves have been charged with violating the very law designed to protect them from the harms associated with child pornography. As a result, many scholars have recently decried the law as unjust and questioned its confusing motives.

Existing scholarship has roundly criticized the situation's ostensible absurdity, but little work has been done to understand the legal motives for charging juveniles in sexting cases. This Article endeavors to better understand the motivation behind the law's perplexing stance on teenage sexting. A close analysis of recent sexting cases reveals a remarkable correlation between Freud's theory of sexuality and sexting jurisprudence. Beginning with the first Supreme Court decision on child pornography, New

* Ph.D. candidate, German, Princeton University; J.D. candidate, Columbia Law School. For helpful comments, I would like to thank Amy Adler, Alexander Birkhold, Peter Brooks, Jordan Elkind, Michael Herz, Lawrence Rosen, Kim Lane Scheppele, and Martin Stone, as well as the participants of Princeton's LAPA seminar. I am also grateful to the participants of Peter Brooks'seminar on Law, Psychoanalysis, and Ideas of Human Agency as part of the series of seminars and lectures on *The Ethics of Reading and the Cultures of Professionalism*.

York v. Ferber, *subsequent Supreme Court and District Court decisions on child pornography and sexting have been based on a strikingly Freudian logic. Perhaps fittingly, the alignment with Freud is subconscious: no court has acknowledged that its decision rests on a reading of Freud. Yet, as this article shows, Freud offers an extraordinarily accurate theoretical account of what judges have done in recent sexting cases.*

Understanding sexting cases in light of Freud does more than just explain the bewildering decisions of state and federal courts to uphold convictions against children for violating child pornography laws. In light of this unexpected finding, this article also provides a new basis from which to assess the goals of the law. As prosecutors continue to bring charges against teenagers for sexting, this article offers judges an alternate model for thinking about these difficult cases. Moreover, as more state legislatures draft new rules governing teenage sexting—in 2012 thirteen states considered resolutions aimed at sexting—this article proposes that lawmakers either abandon or correct their subconscious Freudianism in sexting cases, offering suggestions about how better to deal with teenagers who sext.

INTRODUCTION

Child pornography law is a recent invention of the Supreme Court, which first held in 1982 that states may prohibit the depiction of minors engaged in sexual conduct.[1] Since then, the law of child pornography "has been left alone to occupy its own peculiar and unpleasant realm," spawning a disturbing body of case law complicated by inconsistent state and federal regulations.[2] Although many developments in child pornography law are troubling, perhaps the most disconcerting is the growing number of cases in which children are being charged with violating child pornography statutes for engaging in "sexting."[3]

These cases have engendered a two-part debate.[4] One dispute centers on the appropriate response "to adolescents who voluntarily produce and disseminate sexually explicit images of themselves."[5] The other discussion concentrates on the constitutionality of prosecuting teens under existing child pornography laws and the potential conflicts with First Amendment jurisprudence.[6] Nevertheless, the debate about sexting has been largely ignored by legal scholars. To date, only a few articles explicitly address sexting and the reach of child pornography law.[7] While each article makes different

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1 *See* New York v. Ferber, 458 U.S. 747, 773 (1982). In *Ferber*, the first Supreme Court case to consider child pornography, the Court created an exception to the First Amendment by unanimously holding that "child pornography" constituted speech without constitutional protection. *Id.* at 753, 766. For an explanation of how *Ferber* relates to sexting, see *infra* Part II, and for more comprehensive analysis of the case and its significance, see Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 930 (2001) [hereinafter Adler, *First Amendment*] (explaining that the unanimous decision of the court in *Ferber* is "extremely rare in First Amendment cases").

2 Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 211 (2001) [hereinafter Adler, *Child Pornography*].

3 *See* Sarah Wastler, *The Harm in "Sexting"?: Analyzing the Constitutionality of Child Pornography Statutes that Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers*, 33 HARV. J.L. & GENDER 687, 687–88 (2010).

4 *See id*. at 688.

5 *Id*. at 689.

6 *See id.* at 688–89.

7 *See* Julia Halloran McLaughlin, *Crime and Punishment: Teen Sexting in Context*, 115 PENN ST. L. REV. 135, 168 (2010). Although much scholarship deals with child

recommendations about how best to improve child pornography laws to accommodate the growing practice of sexting, the assumption about the law is generally the same: the law is flawed and in need of improvement.[8] With regard to juvenile prosecutions for sexting, child pornography law has been variously described as haphazard,[9] out-dated,[10] draconian,[11] nonsensical,[12] foolish,[13] outrageous,[14] and unjust.[15]

pornography, little attention has been explicitly devoted to youth sextingJulia Halloran McLaughlin counted no more than eight articles in 2010. *Id.*

[8] *See, e.g.*, Mallory M. Briggs, *"Send Me a Picture Baby, You Know I'd Never Leak It": The Role of Miller v. Mitchell in the Ongoing Debate Concerning the Prosecution of Sexting*, 19 VILL. SPORTS & ENT. L.J. 169, 192 (2012) ("Taking a picture of oneself to disseminate may not fit into the actual meaning or intent of [child pornography statutes]."); McLaughlin, *supra* note 7, at 174 ("Child pornography law is designed to protect children from physiological, emotional, and mental health trauma associated with the creation and distribution of the material. None of these policy objectives are achieved by criminalizing non-obscene teen sexting conduct."). Though, not everyone finds the laws fully unreasonable. *See, e.g.*, Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL'Y & L. 1, 45–48 (2007) (arguing that sexting teens should be required to register as sex offenders); Megan Sherman, *Sixteen, Sexting, and a Sex Offender: How Advances in Cell Phone Technology Have Led to Teenage Sex Offenders*, 17 B.U. J. SCI. & TECH. L. 138, 156 (2011) ("Although teenagers should not be charged under the existing child pornography statutes for sexting, it does not mean that states should completely decriminalize the behavior.").

[9] Briggs, *supra* note 8, at 201 (arguing that "[p]rosecutors' unfocused and haphazard attempts to deal with the problem [of sexting] are partially due to technology's ever-changing face").

[10] *See* McLaughlin, *supra* note 7, at 137 (contending that "[t]echnology has, once again, outpaced the law").

[11] Antonio M. Haynes, *The Age of Consent: When is Sexting No Longer "Speech Integral to Criminal Conduct"?*, 97 CORNELL L. REV. 369, 373 (2012) (discussing the "increasingly draconian legislative responses" to child pornography in light of teenage sexting).

[12] Robert H. Wood, *The Failure of Sexting Criminalization: A Plea for the Exercise of Prosecutorial Restraint*, 16 MICH. TELECOMM. & TECH. L. REV. 151, 177 (2009) ("[I]t is nonsensical that teens may marry and have consensual sex at the age of sixteen in some states, but a photographic image of their sexual exploits could send them to prison. It is equally illogical that minors have the right to abortions and contraceptives, but the sexual activity surrounding those rights is illicit. Our laws should be revised to accommodate these realities.").

[13] Amanda M. Hiffa, *OMG TXT PIX PLZ: The Phenomenon of Sexting and the Constitutional Battle of Protecting Minors from their Own Devices*, 61 SYRACUSE L. REV. 499, 530 (2011) ("Criminalizing sexting is as foolish as the behavior itself.").

[14] *See* Dr. JoAnne Sweeny, *Do Sexting Prosecutions Violate Teenagers' Constitutional Rights?*, 48 SAN DIEGO L. REV. 951, 952 (2011) ("Most media reports have described

Although scholarship has roundly criticized the situation's ostensible absurdity, little work has been done to understand the legal motives for charging juveniles in sexting cases.[16] Yet meaningful solutions can be developed only by understanding the underlying motivation of judges. This Article proposes doing just that by turning to Sigmund Freud. Reinterpreting recent case law in light of Freud's theory of sexuality offers new insight into the perplexing stance on sexting taken by judges, legislators, and prosecutors across the country. This insight helps to explain the legal actions many scholars consider unreasonable by uncovering an ideological consistency undergirding the charges brought against teenagers for violating child pornography laws.

Surprisingly, evaluating these cases from a Freudian perspective reveals a remarkable correspondence between child pornography jurisprudence and Freud's diphasic understanding of sexuality. Even if Freud never thought about sexting, it is clear that the court, at least unconsciously, is thinking about Freud. This insight offers an explanation for the much-maligned decisions of state and federal courts to uphold convictions against children for violating child pornography laws and also provides a new basis from which to assess the goals of the law.

By analyzing leading U.S. District Court decisions on sexting, as well as the first appellate court decision to address the problem, *Miller v. Mitchell*,[17] this Article examines trends in the ways in which judges and prosecutors across jurisdictions deal with the thorny issue of teenage sexting. To better understand the rationale in these decisions, this study reinterprets *New York v. Ferber*,[18] the first Supreme Court case on child pornography, along with the

these situations with outrage, and that is understandable because the so-called victim of child pornography is being treated as the perpetrator.").

15 Sherman, *supra* note 8, at 156 (describing as "unjust" the prosecution and punishment of teenagers who engage in sexting).

16 *See id*. at 159 ("The prosecution of teenagers represents a clear example of what can happen when laws built on past cultural values are forced to address unanticipated social phenomena."); *see also* McLaughlin, *supra* note 7, at 154 ("In dissent, Justice Padovano objected to the majority's reliance upon § 827.071 to punish the minor defendant, since the law was actually designed to protect this defendant.").

17 598 F.3d 139 (3d Cir. 2010).

18 458 U.S. 747 (1982).

2002 Supreme Court decision in *Ashcroft v. Free Speech Coalition*, striking down as overbroad two provisions of the 1996 Child Pornography Prevention Act,[19] and the 1990 Supreme Court decision in *Osborne v. Ohio*, allowing states to outlaw the possession of child pornography.[20] After discussing representative cases, Part I of this article diagnoses as unreasonable the decisions of many federal courts to charge teenagers with violating child pornography statutes. Part II next describes Freud's theory of sexuality and Part III interprets the motives behind prominent sexting decisions, expounding the striking similarities between Freud's anxiety about psychosexual development and the concern of judges and prosecutors who charge children with violating child pornography laws. In light of this unexpected finding, this Article concludes by making recommendations about how judges and legislators should best think about teenage sexting as it relates to child pornography.

I. IS THE LAW UNREASONABLE?

Federal courts have routinely recognized the production and dissemination of child pornography as a social problem, most recently naming it "cancerous"[21] and "one of the serious scourges

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[19] *See* Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121.1(2), 110 Stat. 3009 (1996); Ashcroft v. Free Speech Coalition, 535 U.S. 234, 256–58 (2002) (discussing the overbreadth of § 2256(8)(B) and § 2256(8)(D) of the Child Pornography Prevention Act of 1996). The Act restricted child pornography on the Internet, covering both pornography using real children as well as virtual child pornography. 18 U.S.C. §§ 2251(1) & (5). Before the C.P.P.A was passed, Congress based restrictions on the distribution of child pornography as set forth in *New York v. Ferber*. *See Ashcroft*, 535 U.S. at 241 ("Before 1996, Congress defined child pornography as the type of depictions at issue in *Ferber*.").

[20] *See* 495 U.S. 103, 111 (1990).

[21] United States v. Campbell, 738 F. Supp. 2d 960, 962 (D. Neb. 2010). Although Judge Kopf readily labels all child pornography "cancerous," he cleverly distinguishes the metastatic from the more benign forms of child pornography. In *Campbell*, the court reasons that, though the material in question "*does* involve young girls between the approximate ages of 13 and 15 behaving in a libidinous manner and lasciviously exposing themselves," the images are "also *relatively* tame from a qualitative point of view." *Id.* at 963. Whether we think the court should be involved in a "careful review of the images," as here, is a question for another time. *Id.* at 962; *see also* Adler, *Child Pornography*, *supra* note 2, at 265.

of our time."[22] In the Supreme Court's estimation, child pornography is especially reviled because it "harms and debases the most defenseless of our citizens."[23] Children are thus the clear victims of child pornography, while the photographer and audience, correspondingly, are considered punishable perpetrators.[24]

This reasoning, however, is challenged by the increasingly widespread practice of "sexting,"[25] a portmanteau of "sex" and "texting" describing the transmission of sexually explicit photographs via cellular phones or over the Internet.[26] Under federal law, child pornography includes any visual depiction that involves or appears to involve a minor engaging in "sexually explicit conduct."[27] Prohibited depictions of sexual conduct encompass both explicit sex acts as well as "lascivious exhibitions,"[28] which has been broadly interpreted by the Court to include images that do not even depict nudity.[29] To be considered

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22 Free Speech Coal., Inc. v. Holder, 729 F. Supp. 2d 691, 696 (E.D. Pa. 2010).

23 United States v. Williams, 553 U.S. 285, 307 (2008).

24 *See* Sherman, *supra* note 8, at 143–44 ("All fifty states and the District of Columbia have child pornography statutes that make it illegal to possess, produce, and/or distribute child pornography.").

25 *See* Tamar Lewin, *Rethinking Sex Offender Laws for Youth Texting*, N.Y. TIMES, Mar. 20, 2010, at A1, *available at* http://www.nytimes.com/2010/03/21/us/21sexting.html?_r=0 ("One recent survey found that about one in five teenagers reported having engaged in sexting.").

26 Although sexting can also describe strictly verbal messages, for the purposes of this article "sexting" is limited to the transmission of sexually explicit images. *See* Clay Calvert, Kara Carnley Murrhee & Jackie Marie Steve, *Playing Legislative Catch-Up in 2010 with a Growing, High-Tech Phenomenon: Evolving Statutory Approaches for Addressing Teen Sexting*, 11 U. PITT. J. TECH. L. & POL'Y 1, 51 (2010).

27 18 U.S.C. § 2256(2)(A) (2006). "'Sexually explicit conduct' means actual or simulated (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person." *Id.*

28 *Id.* For a brilliant reading of the ways in which law has influenced how we look at child pornography, see Adler, *Child Pornography*, *supra* note 2.

29 *See* United States v. Horn, 187 F.3d 781, 790 (8th Cir. 1999) (concerning, in part, children wearing only swimsuit bottoms); United States v. Knox, 32 F.3d 733, 737 (3d Cir. 1994) ("All of the children wore bikini bathing suits, leotards, underwear, or other abbreviated attire while they were being filmed."). In *Knox*, the defendant possessed videos, in which the genital areas of clothed girls were closely zoomed. *Id.* at 737. Although the Supreme Court remanded the case, the Third Circuit maintained its holding

child pornography, images must instead meet some or all of six factors that constitute a "lascivious exhibition," for instance, whether the child is depicted in an unnatural pose or if the setting is sexually suggestive.[30] As a result, nearly "everything becomes child pornography in the eyes of the law,"[31] from children on the beach[32] to children dancing and gymnasts dressed in leotards.[33]

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that child pornography does not require the depicted child to be nude. *See* Adler, *Child Pornography*, *supra* note 2, at 240. For more about the *Knox* case and its aftermath, see *id.* at 239–40, 260.

[30] United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986). As Adler explains, "[t]he leading case on the meaning of 'lascivious exhibition' is *United States v. Dost*, a California district court case that announced a six-part test for analyzing pictures," known today as the "Dost Test." Adler, *First Amendment*, *supra* note 2, at 953. According to *Dost*,

> [i]n determining whether a visual depiction of a minor constitutes a 'lascivious exhibition of the genitals or pubic area' under § 2255(2)(E), the trier of fact should look to the following factors, among any others that may be relevant in the particular case: 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; 4) whether the child is fully or partially clothed, or nude; 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. Of course, a visual depiction need not involve all of these factors to be a 'lascivious exhibition of the genitals or pubic area.' The determination will have to be made based on the overall content of the visual depiction, taking into account the age of the minor.

Dost, 636 F. Supp. at 832. The six factors, however, are not meant to be exhaustive. *See* Adler, *First Amendment*, *supra* note 1, at 953 n.144. In addition to documenting jurisdictions that have adopted the *Dost* test, Adler argues that the *Dost* test "has produced a profoundly incoherent body of case law" *Id.* at 953.

[31] Adler, *Child Pornography*, *supra* note 2, at 264 ("Child pornography law constitutes children as a category that is inextricable from sex. The process by which we root out child pornography is part of the reason that we can never fully eliminate it; the circularity of the solution exacerbates the circularity of the problem. Child pornography law has a self-generating quality. As everything becomes child pornography in the eyes of the law—clothed children, coy children, children in settings where children are found—perhaps everything really does become pornographic.").

[32] In *United States v. Horn*, the United States Court of Appeals for the Eighth Circuit employed the *Dost* test to find that the images in question constituted child pornography. 187 F.3d at 789. The court explained that "[i]n the beach scenes, the girls are wearing swimsuit bottoms, but a reasonable jury could conclude that the exhibition of the pubic

Under these standards, the term "child pornography" is beleaguered by both vagueness and overbreadth, as even the most innocent family images could fall within the over-inclusive definition.[34] Consequently, when a minor takes and sends a lascivious picture of his- or herself, the sexted image easily amounts to "self-produced child pornography."[35] As a result, the child can effortlessly be charged with violating child pornography laws[36]—and, depending on the jurisdiction, the recipient can be charged with possessing child pornography.[37] In these cases, the child is simultaneously considered the victim and the perpetrator.[38] As a result, in sexting cases, prosecutors and judges must decide whether the victim should be punished.[39] In many instances, these legal actors *have* decided to punish juvenile sexters for violating child pornography laws, prompting widespread confusion over the

area was lascivious despite this minimal clothing because of the way in which the pictures are framed," noting that "[t]he 'lascivious exhibition' is not the work of the child, whose innocence is not in question, but of the producer or editor of the video. In this case, the producer or editor generated a product that meets the statutory definition of sexually explicit conduct." *Id.* at 790.

33 *See Knox*, 32 F.3d at 737 ("All of the children wore bikini bathing suits, leotards, underwear, or other abbreviated attire while they were being filmed. . . . In some sequences, the child subjects were dancing or gyrating in a fashion not natural for their age."). For further context and explanation of the videos, see also Adler, *Child Pornography*, *supra* note 2, at 260.

34 *See* Adler, *First Amendment*, *supra* note 1, at 941 (The law "presents obvious problems of vagueness and overbreadth.").

35 Leary, *supra* note 8, at 4, 4 n.8 (describing "minors who produce images of themselves in sexually explicit poses or engaged in sexual conduct and display or distribute them to others" as practicing a form of "self-exploitation").

36 *See, e.g.*, A.H. v. State, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007) (discussing child pornography charges brought against a sixteen-year-old girl and her seventeen-year-old boyfriend for taking photographs of them engaged in sexual behavior).

37 *See id.* at 235 n.1 (noting that the boyfriend was also charged with one count of possession of child pornography). Because the definition of child pornography varies from state to state, there are several ways to charge teens with violating child pornography statutes for engaging in sexting. *See* Melissa Wells et al., *Defining Child Pornography: Law Enforcement Dilemmas in Investigations of Internet Child Pornography Possession*, 8 POLICE PRAC. & RES. 269, 270 (2007).

38 *See* Leary, *supra* note 8, at 5–6 (discussing the societal dilemma in balancing the punishment necessary to combat child pornography with the possibility that "self-exploitation is an act by a minor perhaps not fully mature enough to recognize the harms caused").

39 *See id.* at 48.

law's motives and protest about the resulting "miscarriage of justice."[40]

Recent arrests in Pennsylvania, Florida, and New Jersey typify the cases fueling the debate about whether children are being unfairly charged with violating child pornography statutes for sexting.[41] Although there is currently no universal legislative response to sexting as it relates to child pornography, the cases discussed below are representative of the behavior considered punishable, as well as indicative of the common motivation for punishing the very victims the law intends to protect.[42]

The Third Circuit became the first federal appellate court to address sexting and the reach of child pornography law in *Miller v. Mitchell*.[43] In 2008, school officials at Pennsylvania's Tukahannock High School discovered nude and semi-nude images of teenage girls on students' confiscated cell phones.[44] In one image, two girls were wearing opaque bras and another photograph showed a third girl wearing a towel around her torso with her breasts exposed.[45] In the judgment of the district attorney, these images constituted child pornography.[46] Consequently, he

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40 Sherman, *supra* note 8, at 159.

41 *See* Lewin, *supra* note 25. Child pornography charges for sexting can take many forms. The examples given here are representative of the variety of acts that can be considered self-produced child pornography. Depending on the jurisdiction, charges can be brought against the teenager-sexter as the disseminator of child pornography as well as the recipient as the possessor of child pornography. In part, it depends on how the six (or more) factors of the *Dost* test are interpreted by the court. *See* United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986). However the *Dost* test compels the court to take a disturbingly close examination of such images. For a disturbing example of how the *Dost*-test compels the court to closely examine such images, see United States v. Wolf, 890 F.2d 241, 244–45 (10th Cir. 1989).

42 *See generally* Catherine Arcabascio, *Sexting and Teenagers: OMG R U Going 2 Jail???*, 16 RICH. J.L. & TECH. 10 (2010) (noting that, depending on the state, a variety of factors are relevant to charging children with violating child pornography laws, including: the age of the actors depicted; the age of the recipients; whether the image was created and sent with consent of the depicted child; the intent of the children involved; the extent of further dissemination beyond the first recipient).

43 *See* Wastler, *supra* note 3, at 689.

44 *See* Miller v. Mitchell, 598 F.3d 139, 143 (3d Cir. 2010) (citing plaintiffs' complaint, the evidentiary hearing, and the District Court's opinion).

45 *See id.* at 144.

46 *See id.* at 142 ("In 2008, the District Attorney of Wyoming County in Pennsylvania presented teens suspected of 'sexting' with a choice: either attend an education program

threatened to prosecute the girls depicted (and the teens whose phones contained the digital pictures) for distributing and possessing child pornography, a felony charge, unless the teens successfully completed a program focused on education and counseling.[47] Ultimately, the case was dropped,[48] but other juvenile-sexters have not been as lucky.[49]

In 2009, one year before the *Miller* decision, a fourteen-year-old New Jersey girl posted thirty "racy pictures" of herself on the Internet for the sake of her boyfriend.[50] Initially, the student faced up to seventeen years in prison and life-long registration as a sex offender, if convicted.[51] Eventually, the Passaic County Prosecutor's Office dropped the child pornography charges, but only on the condition of the girl's successful completion of six months of counseling.[52]

In other cases, teenage sexters are actually convicted.[53] In *A.H v. State*, for instance, a Florida appellate court upheld the conviction of a sixteen-year-old girl for violating state child

designed by the District Attorney in conjunction with two other agencies or face felony child pornography charges.").

47 *See id.* at 143. To avoid prosecution, most of the students involved agreed to participate in the five-week education program. *See* Wastler, *supra* note 3, at 689–90. Three students and their parents, however, filed suit Civil Rights Act section 1983 complaint against Skumanick, alleging that the threat of prosecution for not participating in the educational program violated their First Amendment rights to free expression and freedom from compelled expression. *Id.* The parents additionally alleged violation of their Fourteenth Amendment rights to direct their children's upbringing. *Id.*; *see* Verified Complaint paras. 59, 64–66 Miller v. Skumanick, 605 F. Supp. 2d 634 (M.D. Pa. 2009) (No. 09CV00540).

48 *See* Miller v. Skumanick, 605 F. Supp. 2d 634, 647 (M.D. Pa. 2009) (In the end, the court found a reasonable likelihood that the plaintiffs would prevail and granted a temporary restraining order prohibiting the district attorney from filing criminal charges against the plaintiffs for producing the sexted images in question.).

49 *See* Lewin, *supra* note 25.

50 *See* Sherman, *supra* note 8, at 145; *see also* Lewin, *supra* note 25. (While it is unclear whether the "sexually explicit" photographs might be considered child pornography of the metastatic or benign variety, I have, for obvious reasons, not tried to locate the images.).

51 *See* Sherman, *supra* note 8, at 145.

52 *See N.J. Teen Won't Face Child Porn Charges for Posting Nude Photos of Self on MySpace*, FOX NEWS (June 23, 2009), http://www.foxnews.com/story/ 0,2933,528602,00.html.

53 *See* Lewin, *supra* note 25.

pornography statutes after she sexted her seventeen-year-old boyfriend in 2007.[54] A.H. and her boyfriend had engaged in consensual sexual conduct and A.H. took several pictures of the act.[55] For subsequently sending the pictures to her boyfriend, A.H. was charged with violating state child pornography laws.[56] Notably, neither teen sent the images to a third party, but because of her age, A.H. was charged with producing, directing, and promoting child pornography.[57]

Instinctually, it might seem outrageous to charge the teenagers in these cases for violating child pornography laws; after all, they do not seem like the perpetrators the law originally intended to punish.[58] Likewise, the possibility that consenting sexual partners may be required to register as sex offenders for sharing nude photographs with each other may also rightfully seem outrageous. Most scholarship on sexting and the law has registered this outrage.[59]

Applied to sexting cases, child pornography laws are described as "a blunt instrument, which has created unintended consequences,"[60] and an "ill fit" for the act of sexting.[61] These cases raise a number of critical questions concerning the constitutionality of prosecuting minors who produce and disseminate "self-produced sexually explicit images" and the best way to respond to children who engage in sexting, if these can even be considered child pornography cases.[62] Most of the criticism about sexting cases, though, comes from doubts about the harm against which child pornography laws are trying to protect.

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54 949 So. 2d 234, 239 (Fla. Dist. Ct. App. 2007).

55 *Id.* at 235.

56 *Id.* ("The State alleged that, while the photos were never shown to a third party, A.H. and J.G.W. emailed the photos to another computer from A.H.'s home.").

57 *Id.* ("A.H. and J.G.W. were each charged with one count of producing, directing or promoting a photograph or representation that they knew to include the sexual conduct of a child, in violation of section 827.071(3), Florida Statutes.").

58 *See* Arcabascio, *supra* note 42, para. 39.

59 *See* Leary, *supra* note 8, at 45–48.

60 Joanna L. Barry, *The Child as Victim and Perpetrator: Laws Punishing Juvenile "Sexting"*, 13 VAND. J. ENT. & TECH. L. 129, 140 (2010).

61 McLaughlin, *supra* note 7, at 171.

62 Wastler, *supra* note 3, at 691.

Existing scholarship mostly considers the harm in sexting as mismatched with the harm of child pornography.[63] Broadly, there are two positions on juvenile sexting as child pornography.[64] Compared with "true child pornography,"[65] sexting is seen as a "less sinister activity"[66] that does not reach the same level of exploitation or potential abuse.[67] In this view, when sexted images are not coerced, the immediate "psychological, physical, and emotional harm" to a child "that is the foundation of the child protection rationale is decidedly absent."[68] The scholars in this position believe that the law is intended to protect against child abuse stemming from the *production* of child pornography in particular.[69] So, even if there is eventual harm from the circulation of the image or later embarrassment, sexting itself does not cause the sort of harm against which the law protects because it was done

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63 *See* McLaughlin, *supra* note 7, at 137 (arguing that "[o]ur existing law is indeed a blunt instrument because it fails to distinguish between teen sexting images and true child pornography"); Wastler, *supra* note 3, at 698 (arguing that "[a]n adolescent taking nude or scantily clad photos of themselves or recording their consensual encounters does not suffer the immediate psychological, physical, and emotional harm of the kind suffered by child sexual abuse victims"). *See generally* Arcabascio, *supra* note 42, para. 33 (arguing that using child pornography statutes to punish sexting teens "goes beyond the contemplated purpose and intent of those laws").

64 *See* Wastler, *supra* note 3, at 687–88.

65 Hiffa, *supra* note 13, at 515.

66 Barry, *supra* note 60, at 140.

67 *See* Hiffa, *supra* note 13, at 515.

68 Wastler, *supra* note 3, at 698.

69 *See, e.g.*, Adler, *Child Pornography*, *supra* note 2, at 242 (arguing that among the five reasons cited for the exclusion of child pornography from constitutional protection, the main thrust of *Ferber* is that "[c]hild pornography must be prohibited because of the harm done to children in its production."); Arcabascio, *supra* note 42, para. 34 ("The purpose of child pornography statutes is to shield children from the abuse that occurs in the production of the photo."). In Arcabascio's estimation, the "critical issues always has been 'whether a child has been physically or psychologically harmed in the production of the work.'" *Id.* at para. 36 (citing New York v. Ferber, 458 U.S. 747, 761 (1982)). Pointing to the decision in *Free Speech Coalition*, Arcabascio concludes that "a charge of child pornography requires a proximate link to a crime, i.e. the child abuse in the production of the pornographic image," noting that where "no crime occurs in the taking of the picture, the distribution argument cannot stand alone and must fail." *Id*. at para. 37. This leads Arcabascio to conclude that, when done voluntarily and consensually, "the exchange of nude photography [by minors] should not be considered exploitation or child abuse," and that the children involved "should not be treated as a disseminator of child pornography and . . . should not be prosecuted as a possessor of child pornography." *Id*. at para. 39.

consensually, ostensibly avoiding any abuse related to the production of the child pornography or sexted images.[70]

Alternatively, others scholars argue that there is no harm from sexting at all.[71] If no harm is perceived, prosecuting teen sexters under child pornography laws logically seems unreasonable.[72] If child pornography laws are intended to "protect children from the physiological, emotional, and mental health trauma associated with the creation and distribution of the material,"[73] the argument goes that innocuous sexting should not be prosecuted as child

[70] Whereas some scholars fail to find any harm from voluntary, consensual sexting, even when done by minors, others consider the possibility that all pornography may be harmful if viewed by a child, not because of abuse or the inducement of bad conduct, but as moral harm. *See* Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1654 (2005) (suggesting that adults, too, are subject to harms stemming from obscene pornographic material as well).

[71] *See, e.g.*, Wastler, *supra* note 3, at 698 ("Sexting should be considered outside the scope of the child pornography exclusion because such images, like virtual child pornography, do not involve the sexual abuse of a child," explaining that a teenager who sexts "does not suffer the immediate psychological, physical, and emotional harm of the kind suffered by child sexual abuse victims."); Walster argues that "[s]exting should be considered outside the scope of the child pornography exclusion because such images, like virtual child pornography, do not involve the sexual abuse of a child," explaining that a teenager who sexts "does not suffer the immediate psychological, physical, and emotional harm of the kind suffered by child sexual abuse victims." *Id.* at 698. *See, e.g.*, Sherman, *supra* note 8, at 145 (explaining that in the case with the New Jersey girl, "technically no harm or exploitation of a minor occurred"); Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPECTUS 1, 27 (2009) ("For instance, if a fourteen year-old girl snaps a picture of herself posing naked and lying on her own bed while alone in her own bedroom, she likely is not suffering either physical abuse or emotional abuse when the image is being captured."). By describing the fourteen year-old girl as "likely" not suffering abuse and the New Jersey girl as "technically" unharmed, these scholars deny the harm stemming from sexting while concurrently opening up the possibility of such harm to exist. Instead of leaving the "technical" and the "possible" unexplored, the next part of this article, *infra*, analyzes the connection between self-produced child pornography and psychosexual harm by turning to Freud.

[72] *See* Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPECTUS 1, 46 (2009) ("For instance, if a fourteen-year-old-girl snaps a picture of herself posing naked and lying on her own bed while alone in her own bedroom, she likely is not suffering either physical abuse or emotional abuse when the image is being captured.").

[73] McLaughlin, *supra* note 7, at 174.

pornography.[74] Recognizing that juveniles are the "vulnerable class" that the laws were meant to protect from sexual abuse,[75] many detect a "profound and troubling irony" when minors are prosecuted for violating child pornography statutes for sexting.[76] Some even believe that punishing juvenile sexters with violating child pornography laws could "ultimately cause a lifetime of harm" worse than any harm derived from the sexting itself.[77] Mismatched from the harm of sexting, child pornography law is thus widely considered unreasonable when applied to cases like those in New Jersey, Pennsylvania, and Florida.

The very idea of *self*-produced child pornography rightly raises a number of questions about exactly what harm stems from child pornography. How are judges rationalizing their decisions to punish the victims the law intends to protect? Reinterpreting sexting cases in light of Sigmund Freud's 1905 *Three Essays on the Theory of Sexuality* offers a surprising explanation for the motivation to charge juvenile victims as perpetrators of self-produced child pornography: many judges fear that juvenile sexting will jeopardize the development of a normal sexual life for the children involved—including both those who send and those who receive sexted images—and, as a result, compromise society as a whole.[78] This is precisely Freud's concern.

II. FREUD'S THEORY OF SEXUALITY

A. Psychosexual Development

Freud envisioned psychosexual development as a narrow course besieged by perversion-inducing perils: "[e]very step on this long path of development can become a point of fixation . . .

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74 *See id.* at 179 (arguing that the law never intended to encompass sexting because it only intended to prohibit activities resulting in harm).

75 Barry, *supra* note 60, at 133 ("Juveniles were not the intended targets of these laws; rather, they were the vulnerable class that legislators intended to protect.").

76 Calvert, *supra* note 71, at 60.

77 Arcabascio, *supra* note 42, para. 33.

78 *See* Koppelman, *supra* note 70, at 1653–54.

can be an occasion for a dissociation of the sexual instinct . . . ."[79] Numerous factors, from an excess of parental affection to premature exposure to sexual objects, affect the path's successful navigation where even minimal straying could result in grave danger.[80] For in the end, the "play of influences which govern the evolution of infantile sexuality" result in its "outcome in perversion, neurosis or normal sexual life."[81] Recently, judges and prosecutors across jurisdictions appear to be trying to control a new influence on the path of children's' psychosexual development: sexting.

According to Freud's theory, a child's psychosexual development is diphasic, divided by a period of latency.[82] The first phase encompasses the oral, anal, and phallic stages in which an infant pursues and satisfies his or her libido.[83] In the phallic stage, children finally become aware of their own and others' bodies.[84] By undressing themselves, investigating their genitals, and similarly exploring each other, children gratify their curiosity, learning the sexual differences between male and female.[85] Freud notes that "children are essentially without shame" and "show an

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[79] SIGMUND FREUD, THREE ESSAYS ON THE THEORY OF SEXUALITY 101 (James Strachey ed. & trans., Basic Books 2000) (1905) [hereinafter THREE ESSAYS ON THE THEORY OF SEXUALITY].

[80] *See id.* at 89, 94. Parental affection, and in particular maternal affection, is described by Freud as a sexual act: the mother "regards [the child] with feelings that are derived from her own sexual life: she strokes him, kisses him, rocks him and quite clearly treats him as a substitute for a complete sexual object." *Id.* at 89. This act, however, instructs the child how to love, ensuring that the child "grow up into a strong and capable person with vigorous sexual needs and to accomplish during his life all the things that human beings are urged to do by their instincts." *Id.* Like seduction, however, timing and degree are important factors. Freud explains that "an excess of parental affection does harm by causing precocious sexual maturity and also because, by spoiling the child, it makes him incapable in later life of temporarily doing without love or of being content with a smaller amount of it." *Id.*

[81] *Id.* at 38.

[82] *See id.* at 42.

[83] *See id*. at 49–55.

[84] *See id*. at 58 ("Small children whose attention has once been drawn—as a rule by masturbation—to their own genitals usually . . . develop a lively interest in the genitals of their playmates.").

[85] *See id.* For more on the castration complex and penis envy, see *id.* at 61.

unmistakable satisfaction in exposing their bodies, with especial emphasis on the sexual parts."[86]

Between the first phase of childhood sexuality and the onset of the second phase with adolescence, sexual development enters a period of relative stability.[87] In this period, sexual feelings are dormant and no new organization of sexuality develops.[88] Freud names this the "latency period" and describes its main feature as the deferment of the reproductive functions.[89] The latency period thus represents a pause in the development of sexuality.[90] Nevertheless, the period is characterized by much activity.[91] Sexual instinctual forces are still present, but are diverted and directed into other areas, making this stage crucial not just to the child's future sexuality, but also to society as a whole.[92] Many important developments occur in the latency period due to the diversion of sexual energy, including the dissolution of the Oedipus complex,[93] the construction of mental dams,[94] and, most importantly, the formation of the super-ego.[95]

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86 *Id.* at 58.

87 *See id*. at 42–44.

88 *See id*. at 43.

89 *See id.* at 44.

90 *See id.* According to Freud, this process "deserves the name 'sublimation.'" *Id.* ("It is possible further to form some idea of the mechanism of this process of sublimation. One the one hand, it would seem, the sexual impulses cannot be utilized during these years of childhood, since the reproductive functions have been deferred—a fact which constitutes the main feature of the period of latency.") *Id.*

91 *See id.* ("Thus the activity of those impulses does not cease even during this period of latency, though their energy is diverted, wholly or in great part, from their sexual use and *directed to other ends*.").

92 *See id.* ("Historians of civilization appear to be at one in assuming that powerful components are acquired for every kind of cultural achievement by this diversion of sexual instinctual forces from sexual aims and their direction to new ones . . . .").

93 *See* SIGMUND FREUD, *The Dissolution of the Oedipus Complex*, *in* 19 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 173, 173 (James Strachey ed. & trans. 1961) [hereinafter *The Dissolution of the Oedipus Complex*] ("[Oedipal] dissolution takes place; it succumbs to repression . . . and is followed by the latency period.").

94 *See* THREE ESSAYS ON THE THEORY OF SEXUALITY, *supra* note 79, at 178 (discussing the building up of mental dams, namely, disgust, shame, and morality, during the latency period).

95 *See* SIGMUND FREUD, *The Ego and the Id*, *in* 19 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 12, 34 (James Strachey ed. &

The start of the latency period marks the dissolution of the Oedipus complex, causing the child to realize that his or her desire for the parent of the opposite sex cannot be fulfilled.[96] Consequently, during "the period of latency children learn to feel for other people who help them in their helplessness and satisfy their needs a love which is on the model of . . . their relation as sucklings to their nursing mother."[97] Turning away from the oedipal wish and searching for love,[98] the child begins to identify with the parent of the same sex,[99] finally transferring the libido interest from parents to friends[100] and activities.[101] Children thus devote the energy previously put into the oedipal problem into developing themselves, including tempering their primitive drives with what Freud names "mental forces."[102]

These forces include "disgust, feelings of shame and the claims of aesthetic and moral ideals."[103] According to Freud's model, mental forces are "built up" during latency "which are later to impede the course of the sexual instinct and, like dams, restrict its flow."[104] Because these forces restrain the instinct "within the limits that are regarded as normal," Freud considers the struggle of the sexual instinct against the mental dams a necessary component of developing a healthy sexual life.[105] If the mental dams fail to

trans. 1961) [hereinafter *The Ego and the Id*] ("[T]he ego ideal [or super-ego] had the task of repressing the Oedipus complex.").

96 *See The Dissolution of the Oedipus Complex*, *supra* note 93, at 173.

97 THREE ESSAYS ON THE THEORY OF SEXUALITY, *supra* note 79, at 88–89.

98 *See id.* at 88.

99 *See The Dissolution of the Oedipus Complex*, *supra* note 93, at 175–76.

100 *See* THREE ESSAYS ON THE THEORY OF SEXUALITY, *supra* note 79, at 91, 95, 98.

101 *See id.* at 44.

102 *See id.* at 43–44 ("It is during this period of total or only partial latency that are built up the mental forces which are later to impede the course of the sexual instinct and, like dams, restrict its flow—disgust, feelings of shame and the claims of aesthetic and moral ideals. One gets an impression from civilized children that the construction of these dams is a product of education, and no doubt education has much to do with it. But in reality this development is organically determined and fixed by heredity, and it can occasionally occur without any help at all from education. Education will not be trespassing beyond its appropriate domain if it limits itself to following the lines which have already been laid down organically and to impressing them somewhat more clearly and deeply.").

103 *Id.* at 43.

104 *Id.*

105 *Id.* at 28.

adequately provide resistances, little will keep the sexual drives on the narrow path to normalcy.[106] As an example, Freud explains that "the force which opposes scopophilia [the love of looking] . . . is *shame*."[107] By feeling shame for what they are doing when they look at others, children are able to overpower the perverse force of scopophilia and remain securely on the path to healthy sexuality.[108] In this way, learned feelings in the form of mental dams act as a powerful weapon against perversions and thereby "protect" children from unhealthy sexual deviancy.[109]

Despite their importance, these perversion-prophylactics are developed only in latency.[110] For Freud it is therefore essential that the latency period lasts long enough for all of the necessary dams to be constructed and for psychosexual tasks to be accomplished before the sex drive can safely function.[111] "[B]y the postponing of sexual maturation," Freud explains, "time has been gained in which the child can erect . . . restraints on sexuality . . . ."[112] Notably, during this period, children also "take up into [themselves] the moral precepts" that are made by society.[113]

Accordingly, a principal task of the latency period is the construction of the super-ego.[114] In *The Ego and the Id*, Freud describes the super-ego as the outcome of "two highly important factors," one of which is the "interruption of libidinal development

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106 *See id.*

107 *Id.* at 23.

108 *See id.* at 23, 28.

109 *See id.* at 17 ("Those who condemn [use of the mouth as a sexual organ] . . . as being [a] perversion[], are giving way to an unmistakable feeling of *disgust*, which protects them from accepting sexual aims of the kind.").

110 *See id.* at 43–44 ("It is during this period of total or only partial latency that are built up the mental forces which are later to impede the course of the sexual instinct and, like dams, restrict its flow—disgust, feelings of shame and the claims of aesthetic and moral ideals."); *see also id.* at 28 ("Our study of the perversions has shown us that the sexual instinct has to struggle against certain mental forces which act as resistances, and of which shame and disgust are the most prominent.").

111 *See id.* at 91.

112 *Id.*

113 *Id.*

114 *See The Ego and the Id*, *supra* note 95, at 35.

by the latency period."[115] During this time, the super-ego is differentiated from the ego.[116] The super-ego, comprising the organized part of the personality structure, criticizes and prohibits one's drives, feelings, fantasies, and actions.[117] Described as "the representative . . . of every moral restriction," and "the advocate . . . striving towards perfection," the super-ego is "the higher side of human life."[118] Under this theory, civilizing constructions emerge at the cost of the infantile sexual impulses: "[h]istorians of civilization appear to be at one in assuming that powerful components are acquired for every kind of cultural achievement by this diversion of sexual instinctual forces from sexual aims and their direction to new ones."[119] In short, the latency period "appears to be one of the necessary conditions of the aptitude of men for developing a higher civilization . . . ."[120] The stakes of the latency period are consequently high. For the individual, what is learned or not learned "is of the highest importance in regard to disturbances of [the] final outcome" of sexual life.[121] And, on a larger cultural level, maintaining the latency period is essential to society as a whole.[122]

B. Seduction and the Harm of Sexual Precocity

In addition to constructing mental dams and forming the super-ego, staying on the path of normal sexual development during latency also involves avoiding harmful biological and social

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115 *Id.*

116 *See id.* at 34.

117 *See id.* ("[The super-ego] also comprises the prohibition: 'You *may not be* like this (like your father)—that is, you may not do all that he does; some things are his prerogative.'").

118 SIGMUND FREUD, *Lecture XXXI: The Dissection of the Psychical Personality*, *in* 22 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 57, 67 (James Strachey ed. & trans. 1964); *accord The Ego and the Id*, *supra* note 95, at 36 ("[W]e can say, 'and here we have that higher nature, in this ego ideal or super-ego . . . .'").

119 THREE ESSAYS ON THE THEORY OF SEXUALITY, *supra* note 79, at 44.

120 *Id* at 100.

121 *Id.* at 66.

122 *See id.* at 91. After the latency period, the second wave of sexuality sets in and determines, based on the mental dams and super-ego developed in the latency period, if the child "is to remain healthy, and the symptomatology of his neurosis, if he is to fall ill after puberty." *Id.* at 55.

pitfalls to maintain the proper "play of influences"[123] governing the evolution of infantile sexuality.[124] One such influence is "sexual precocity," which is "manifested in the interruption, abbreviation or bringing to an end of the infantile period of latency."[125] Interrupting the latency period is "a cause of disturbances" because it occasions "sexual manifestations which, owing on the one hand to the sexual inhibitions being incomplete and on the other hand to the genital system being undeveloped, are bound to be in the nature of perversions."[126] Consequently, "sexual precocity makes more difficult the later control of the sexual instinct by the higher mental agencies."[127] The source of this harmful precocity, according to Freud, is "first and foremost, seduction by other children or by adults."[128]

According to Freud, seduction can take two forms. The first kind of seduction "treats a child as a sexual object prematurely,"[129] before the requisite mental dams are in place to help restrain and divert libidinal energy to society-building and self-building tasks.[130] Seduction can also take the form of presenting a child "prematurely with a sexual object for which the infantile sexual instinct at first shows no need."[131] In either case, seduction has the same devastating effects on the child.[132]

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123 *Id.* at 38.

124 *See id.* at 106–07.

125 *Id.* at 106.

126 *Id.*

127 *Id.*

128 *Id.* at 108. For more about seduction generally, see SIGMUND FREUD, *Further Remarks on the Neuro-Psychoses of Defence*, *in* 3 STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD, 157, 168–69, 168 n.1 (James Strachey ed. & trans. 1962) (explaining that Freud might have over-stated the prominence of seduction, but still says that its harm is real).

129 THREE ESSAYS ON THE THEORY OF SEXUALITY, *supra* note 79, at 56.

130 *See id.* at 57 ("[A]n aptitude for [sexual irregularities] is innately present in their disposition. There is consequently little resistance towards carrying them out, since the mental dams against sexual excesses—shame, disgust and morality—have either not yet been constructed at all or are only in course of construction, according to the age of the child.").

131 *Id.*

132 *See id.* ("[U]nder the influence of seduction children can become polymorphously perverse, and can be led into all possible kinds of sexual irregularities.").

Freud is explicit about the negative impacts and dangers of seduction: "[e]xperience further showed that the external influences of seduction are capable of provoking interruptions of the latency period or even its cessation."[133] As a result, under the influence of seduction, children "can be led into all possible kinds of sexual irregularities."[134] This is in part because the dams guarding against unhealthy sexual excesses—shame, disgust, and morality—have not yet been constructed or are only in the process of construction, depending on the age of the child.[135] Moreover, "any such premature sexual activity diminishes a child's educability."[136] Seduction, therefore, reinforces its harmfulness, by both interrupting the important tasks of latency that inform a child how to behave and by making education more difficult.

While it is possible for internal causes to spontaneously arouse a child's sexual life, Freud repeatedly notes that "an influence [like seduction] may originate either from adults or from other children."[137] Significantly, adults are not the only dangerous actors; children can also seduce themselves and each other by prematurely treating each other as sexual objects or by prematurely presenting each other with sexual objects.[138]

Given the importance of the latency period, Freud holds sexual precocity through seduction as invariably dangerous.[139] By interrupting latency, seduction results in the development of perversions, and, if widespread, seduction could also compromise higher civilization itself.[140] To guarantee normal psychosexual development, before children are exposed to sexual objects—or are treated like sexual objects—it is therefore essential to postpone sexual maturation long enough to ensure the complete construction of mental dams and the super super-ego.[141] Besides protecting latency, this process can be additionally aided "with the assistance

133 *Id.* at 100.
134 *Id.* at 57.
135 *See id.*
136 *Id.* at 100.
137 *Id.* at 56.
138 *See id.* at 57.
139 *See id.* at 106–107.
140 *See id.* at 58.
141 *See id.* at 57.

of education."[142] Although Freud explains that this psychosexual development is "organically determined and fixed by heredity," he admits that "education has much to do with . . . the construction of these dams."[143] This is precisely what the court appears to be doing in the contested sexting cases: extending the latency period, postponing sexual maturation, and aiding in the construction of dams, by prohibiting sexting as harmful seduction.

III. COURTS' FREUDIAN PERSPECTIVE ON THE PSYCHOLOGICAL DAMAGE OF SEXTING

A. Sexting as Seduction

Subjecting the law to a Freudian analysis reveals the parallel between the anxiety of judges and prosecutors about sexting and the harm of seduction. In many cases, judges characterize children as inhabiting the latency period.[144] Accordingly, any sexual activity undertaken during this period is tantamount to sexual precocity,[145] which includes sexting. Many courts, in short, are subconsciously trying to protect children from sexting as a form of Freudian seduction.[146]

Many jurisdictions even think about children in the same terms as Freud. Juvenile sexting is regularly described as a "lapse in good judgment," highlighting the belief that teenage sexters are immature and not yet equipped to contend with sexual subjects.[147] As the decision in *A.H. v. State* clarified, the "appellant was simply too young to make an intelligent decision about engaging in sexual conduct and memorializing it. Mere production of these videos or pictures may also result in psychological trauma to the teenagers

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142 *Id.* at 98.

143 *Id.* at 43–44.

144 *See* A.H. v. State, 949 So. 2d 234, 238–39 (Fla. Dist. Ct. App. 2007).

145 *See* THREE ESSAYS ON THE THEORY OF SEXUALITY, *supra* note 79, at 106.

146 Similarly, scholars have connected sexting with psychosexual development. *See, e.g.*, Barry, *supra* note 60, at 133 ("Sexting is the newest expression of teenagers' urge to examine their developing sexual identity . . . ."). But to date no legal study has connected sexting with Freud's theory to shed new light on the law's motivation in charging children with violating child pornography statutes.

147 *See, e.g.*, Hiffa, *supra* note 13, at 530.

involved."[148] Yet, the production of sexually explicit images may also later prove embarrassing for adults, causing similar psychological damage.[149] But whereas the court is unconcerned with the effects of sexting on adults, the relative youth of teenage sexters renders the same consensual behavior especially injurious.[150] Note, also, that the explicit concern is not with circulation, but with "[m]ere production."[151] The act itself, when performed by a teenager, is somehow especially dangerous due to the youth of the sexter.[152]

When discussing teenagers' poor judgment and the delayed onset of shame for sending lascivious pictures of themselves, judges effectively treat juvenile-sexters as if they are still busy navigating Freud's dangerous path of sexual development. In many sexting cases, the depicted child is later reported to feel "great amounts of shame . . . because of their involvement in the production" of the self-produced pornographic images.[153] Notably, shame is felt only *after* children who sext have willingly taken and distributed lascivious pictures of themselves.[154] More fully developed feelings of shame, therefore, might have prevented the sexting.

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148 *A.H.*, 949 So. 2d at 238–39.

149 *See id.* at 239.

150 *See id.*

151 *Id.*

152 *See id.*

153 Shannon Shafron-Perez, *Average Teenager or Sex Offender? Solutions to the Legal Dilemma Caused by Sexting*, 26 J. MARSHALL J. COMPUTER & INFO. L. 431, 448 (2009). Shafron-Perez goes on to describe how teenagers who voluntarily self-produce sexually explicit images of themselves are later "tortured by internal shame and regret" *Id.* at 449; *see also* Leary, *supra* note 8, at 11 ("Regarding the perpetuity of the crime, Congress noted that, 'where children are used in its production, child pornography permanently records the victim's abuse, and [the images'] continued existence causes the child victims . . . continuing harm by haunting those children in future years.'" (quoting Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121.1(2), 110 Stat. 3009 (1996))); Mimi Halper Silbert, *The Effects on Juveniles of Being Used for Pornography and Prostitution*, *in* PORNOGRAPHY: RESEARCH ADVANCES AND POLICY CONSIDERATIONS 215, 226 (Dolf Zillman & Jennings Bryant eds., 1989) ("The long-term impact of participating in pornography appears to be even more debilitating than the immediate effects.").

154 *See* Shafron-Perez, *supra* note 153, at 449.

Freud's theory offers an explanation for this phenomenon: as one of the mental dams governing sexuality, shame develops during latency.[155] Without this dam fully constructed, the juvenile "satisfaction in exposing their bodies, with especial emphasis on the sexual parts," as Freud described it, may win out, especially if the teenager who practices sexting is still in latency.[156]

Children's motivation for sexting also indicates occupation of the latency period between the two phases of sexual development.[157] Recent studies suggest that many teenagers engage in sexting to satisfy their desire for love and acceptance,[158] another feature of Freud's latency period.[159] After the dissolution of the Oedipus complex, children seek out new forms of love.[160] Normally, this takes the form of non-sexual activities, like pursuing hobbies,[161] *unless* children are seduced and prematurely exposed to sexual objects.[162] Described as love-seeking[163] and immature,[164] juveniles who engage in sexting are routinely characterized as if they are in a period of latency, when children should be building mental dams and constructing super-egos, and specifically when exposure to sexual subjects is particularly harmful.[165]

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155 *See* THREE ESSAYS ON THE THEORY OF SEXUALITY, *supra* note 79, at 43.

156 *Id.* at 58.

157 *See* Barry, *supra* note 60, at 133 ("Teenagers have turned to 'sexts' as [a] new form of expression of their urges to examine their developing sexual identity."); *see also* Dahlia Lithwick, *Teens, Nude Photos and the Law*, NEWSWEEK, Feb. 23, 2009, http://www.newsweek.com/2009/02/13/teens-nude-photos-and-the-law.html ("[T]he great majority of these kids . . . think they're being brash and sexy."); Wendy Koch, *Teens Caught 'Sexting' Face Porn Charges*, USA TODAY, Mar. 11, 2009, http://www.usatoday.com/tech/wireless/2009-03-11-sexting_N.htm (explaining that kids engaged in sexting often do not know that it is a crime). *See generally* THREE ESSAYS ON THE THEORY OF SEXUALITY, *supra* note 79, at 66.

158 *See* Jamie L. Williams, *Teens, Sexts, & Cyberspace: The Constitutional Implications of Current Sexting & Cyberbullying Laws*, 20 WM. & MARY BILL RTS. J. 1017, 1027–28 (2012).

159 *See* THREE ESSAYS ON THE THEORY OF SEXUALITY, *supra* note 79, at 88.

160 *See id.* at 88, 95.

161 *See id.* at 44.

162 *See id.* at 44, 100.

163 *See* Williams, *supra* note 158, at 1028–29.

164 A.H. v. State, 949 So. 2d 234, 238 (Fla. Dist. Ct. App. 2007).

165 *See* THREE ESSAYS ON THE THEORY OF SEXUALITY, *supra* note 79, at 178.

Sexting, like seduction, also takes two forms. The child who takes a lascivious picture of him- or herself is treated prematurely as a sexual object.[166] Correspondingly, the juvenile recipient of the sexted image is presented prematurely with a sexual object.[167] Analogous to Freud's theory, children are punished for both sending sexually explicit images of themselves and for possessing sexually explicit images of other children.[168] In *A.H. v. State*, for example, the sixteen year-old defendant was punished for producing and disseminating child pornography and the recipient of the sexted images, her seventeen year-old boyfriend, was charged with possession of child pornography.[169]

In addition to paralleling seduction by prematurely exposing juveniles to sex, the harm from sexting also derives from the same perpetrators as seduction in Freud's theory. In sexting cases, courts have recently recognized that children can harm other children.[170] In February 2011, the U.S. District Court for the Eastern District of Kentucky noted in *Clark v. Roccanova* that child pornography laws do not distinguish between adults and children: "there is nothing in the legislative history which would indicate Congress intended 'person' to mean an adult," further clarifying that "Congress refers only to 'persons' and does not narrow the term to adults."[171]

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166 *See* Williams, *supra* note 158, at 1028.

167 *See id.*

168 Depending on the jurisdiction, different acts, including sending and receiving are penalized differently. For example, a current bill under consideration in the Hawaiian state senate makes it an "affirmative defense . . . [if] the person took reasonable steps to destroy or eliminate the nude photograph or video of a minor." S.B. 2222, 26th Leg. (Haw. 2012).

169 *See A.H.*, 949 So. 2d at 235.

170 *See* United States v. Mento, 231 F.3d 912, 919 (4th Cir. 2000) (discussing preventative measures taken against the "use of pornographic depictions of children in the seduction or coercion of other children into sexual activity"); *see also* Osborne v. Ohio, 495 U.S. 103, 111 (1990); United States v. Knox, 32 F.3d 733, 750 (3d Cir. 1994). One kind of harm stemming from children is obvious, as in the case of Jessica Logan. *See generally* Logan v. Sycamore Cmty. Sch. Bd. of Educ., 780 F. Supp. 2d 594 (S.D. Ohio 2011) (discussing the harassment and subsequent suicide of Jessica Logan stemming from a nude sext of her from the neck down).

171 772 F. Supp. 2d 844, 847 (E.D. Ky. 2011). The opinion goes on to explain that "the legislative history of [18 U.S.C. § 2252] states that the 'Committee on Human Resources has a deep and abiding concern for the health and welfare of the *children* and the *youth of*

In *Clark v. Roccanova*, the harm of children seducing each other is readily apparent: here, a group of fourteen year-olds successfully persuaded fourteen year-old Clark to self-produce a sexually explicit video of herself.[172] After the defendants subsequently transmitted the video over the Internet, the persuasive group of teenagers were charged with violating federal child pornography laws.[173] In 2010, a similar case occurred in Wisconsin, where a nineteen year-old boy was convicted of two counts of sexual abuse of a child after he used Facebook to convince more than thirty of his male classmates to send him naked pictures of themselves, whom he subsequently blackmailed into performing sexual acts.[174] In these cases, by treating other children as sexual objects, teenagers caused considerable harm, equivalent to Freud's conception of seduction.

In the most extreme cases, the danger of children seducing each other, in a Freudian sense, is even greater, and has even resulted in the tragic suicides of the children depicted in the sexted images. For instance, in *Logan v. Sycamore County School Board of Education*, a teenage girl committed suicide after enduring months of cyberbullying for sending a nude photograph of herself to her former boyfriend, who subsequently distributed the picture.[175]

America,' and therefore 'condemns such base and sordid activities which may permanently traumatize and warp the minds of the *children* involved.'" *Id.* (quoting S. REP. NO. 95-438, at 3 (1977)). The court concludes that "[e]ncounters which produce child pornography 'cannot help but have a deep psychological, humiliating impact on these youngsters and jeopardize the possibility of healthy, affectionate relationships in the future.'" *Id.*

172 *See id.* at 846–47.

173 *See id.* at 847.

174 *See* Laurel Walker, *Stancl Gets 15 Years in Prison in Facebook Coercion Case*, MILWAUKEE WISCONSIN JOURNAL SENTINEL, Feb. 24, 2010, http://www.jsonline.com/news/waukesha/85252392.html (explaining that the New Berlin High School student then used the images to "blackmail at least seven boys, ages 15 to 17, into performing sex acts").

175 *See Logan*, 780 F. Supp. 2d at 595. After sending a nude photograph of herself to her former boyfriend's cell phone at his urging, Jessica Logan endured months of cyber bullying as the picture was quickly distributed to cell phones in several area high schools and eventually committed suicide. *Id.* For a closer examination of the case and its relation to cyber bullying, see generally Kathleen Conn, *Allegations of School District Liability for Bullying, Cyberbullying, and Teen Suicides After Sexting: Are New Legal*

But many courts are concerned with more than just the most egregious cases. Across the country, judges are fearful of even consensual and private sexual acts between children as they relate to sexting.[176] In *A.H. v. State*, for instance, the sexted image was shared only between consenting sex partners.[177] Nevertheless, the lack of circulation proved inconsequential.[178] Children, it seems, can also hurt themselves, by exposing themselves and treating themselves as sexual objects *prematurely*.[179]

Regardless of whether from an adult, another child, or the child him- or herself, the harm is the same. In *Clark v. Roccanova* the

Standards Emerging in the Courts?, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 227 (2011).

176 *See, e.g.*, A.H. v. State, 949 So. 2d 234, 237 (Fla. Dist. Ct. App. 2007). Of course, the Supreme Court has long recognized the government's compelling interest in protecting children from harm. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 766 (1982); FCC v. Pacifica Found., 438 U.S. 726, 749–50 (1978); Ginsberg v. New York, 390 U.S. 629, 640 (1968). And, as established in *Ferber*, this compelling interest has created a remarkable exception in First Amendment jurisprudence to prevent the abuse of children stemming from child pornography. *See* New York v. Ferber, 458 U.S. 747, 760–62 (1982); *see also* United States v. Mento, 231 F.3d 912, 918–19 (4th Cir. 2000) ("[T]he CPPA was designed by Congress to serve all of these interests . . . (1) to prevent the use of virtual child pornography to stimulate the sexual appetites of pedophiles and child sexual abusers; (2) to destroy the network and market for child pornography; (3) to prevent the use of pornographic depictions of children in the seduction or coercion of other children into sexual activity; (4) to solve the problem of prosecution in those cases where the government cannot call as a witness or otherwise identify the child involved to establish his/her age; (5) to prevent harm to actual children involved, where child pornography serves as a lasting record of their abuse; and (6) to prevent harm to children caused by the sexualization and eroticization of minors in child pornography.").

177 *See A.H.*, 949 So. 2d at 235.

178 *See id.* at 238–39. The dissent held a different view:

> [t]he critical point in this case is that the child intended to keep the photographs private. She did not attempt to exploit anyone or to embarrass anyone. I think her expectation of privacy in the photographs was reasonable. Certainly, an argument could be made that she was foolish to expect that, but the expectation of a sixteen year old cannot be measured by the collective wisdom of appellate judges who have no emotional connection to the event. Perhaps if the child had as much time to reflect on these events, she would have eventually concluded, as the majority did, that there were ways in which these photos might have been unintentionally disclosed. That does not make her expectation of privacy unreasonable.

Id. at 240–41 (Padovano, J., dissenting).

179 *See id.* at 237–38.

court was explicit about this point, holding that "[n]othing in the record indicates that a child would be less traumatized if that pornography is created or transmitted by a child rather than an adult."[180] Like the reasoning in *Clark*, noting that "[n]othing in the jurisprudence indicates that such harm could be done only by adult perpetrators,"[181] the dicta in *A.H. v. State* reads like a passage out of Freud, who attributes the harms of sexual precocity to "seduction by other children or by adults."[182]

Even the ways in which courts and state legislatures are choosing to punish teenage sexting resemble Freud's 1905 theory of sexuality, further substantiating the notion that sexting is injurious seduction. Both judicial and legislative responses to sexting suggest that teenagers who engage in sexting need additional sex education, indicating that the children involved have more to learn before they are ready to be exposed to sexual objects or are treated as sexual objects.[183] In *A.H. v State* the trial court found that "[p]rosecution [under child pornography statutes] enables the State to prevent future illegal, exploitative acts by supervising and providing any necessary counseling to the child."[184]

This objective was made even clearer in *Miller v. Skumanick*.[185] Here, the district attorney "promised that the charges would be dropped if the child successfully completed a six- to nine-month program focused on education and

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[180] 772 F. Supp. 2d 844, 847 (E.D. Ky. 2011) (interpreting the legislative history of the Protection of Children Against Sexual Exploitation Act of 1997, Pub. L. No. 95-225, 92 Stat. 7 (1978)).

[181] *Id.*

[182] THREE ESSAYS ON THE THEORY OF SEXUALITY, *supra* note 79, at 108.

[183] *See, e.g.*, *A.H.*, 949 So. 2d at 238–39 (stating that the "[a]ppellant was simply too young to make an intelligent decision about engaging in sexual conduct and memorializing it" and that even the production of the images can result in psychological trauma for the children involved); *see also* Assemb. 1560, 214th Leg., 2010 Sess. (N.J. 2010) (proposing a law that would require school districts to annually disseminate information, including a description of the practice and its legal, psychological, and sociological implications, to students and parents or guardians on the dangers of distributing sexually explicit images through electronic means).

[184] *A.H.*, 949 So. 2d at 236.

[185] 605 F. Supp. 2d 634 (M.D. Pa. 2009).

counseling."[186] The proposed course, called a "re-education program" was "designed to teach the girls to 'gain an understanding of how their actions were wrong,' [and] 'gain an understanding of what it means to be a girl in today's society, both advantages and disadvantages.'"[187] The program even included homework, including assignments about why sexting is "wrong."[188] Although the teenagers won their case in *Mitchell*,[189] successfully arguing that threatening prosecution to force students into the education program violated their Fourteenth Amendment substantive due process rights,[190] many states today have developed similar counseling programs as the preferred punishment for sexting.[191] Currently, bills under consideration in

[186] *Id.* at 638.

[187] *Id.*

[188] *Id.*

[189] Miller v. Mitchell, 598 F.3d 139 (3d Cir. 2010). Whereas *Miller v. Skumanick* was the case name in the District Court, *Miller v. Mitchell* was the name of the case when heard by the Court of Appeals.

[190] *See id.* at 150–51. The students and parents in *Skumanick* filed suit Civil Rights Act section 1983 complaint against Skumanick, alleging that the threat of prosecution for not participating in the educational program violated their First Amendment rights to free expression and freedom from compelled expression. *See* Verified Complaint at para. 62–65, Miller v. Skumanick, 605 F. Supp. 2d 634 (2009) (No. 09CV00540). The parents additionally alleged violation of their Fourteenth Amendment rights to direct their children's upbringing. *See id.* at para. 66.

[191] *See, e.g.*, Assemb. B. 321, Cal. Leg., 2011–12 Sess. (Cal. 2011) (punishing teenage sexting with counseling); H.B. 4483, 80th Leg., 2nd Sess. (W. Va. 2012) (aiming to create an "educational diversion program"). In fact, in 2012, thirteen states considered legislation aimed at sexting, many of the bills and resolutions aimed at creating educational counseling programs, and four states—Hawaii, New York, Pennsylvania and South Dakota—passed such bills. *See 2012 Sexting Legislation*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/issues-research/telecom/sexting-legislation-2012.aspx (last visited Feb. 14, 2013). The legislative response, on the state level, has had an upward trend. Each year, more states consider resolutions addressing juvenile sexting. In 2009, twelve states considered legislation addressing sexting. *See 2009 "Sexting" Legislation*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/issues-research/telecom/sexting-legislation-2009.aspx (last visited November 16, 2012). The following year, no fewer than sixteen states considered bills dealing with sexting. *See 2010 Legislation Related to "Sexting"*, http://www.ncsl.org/issues-research/telecom/sexting-legislation-2010.aspx (last visited November 16, 2012). In 2011, twenty-one states introduced legislation addressing sexting. *See 2011 Legislation Related to "Sexting"*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/issues-research/telecom/sexting-legislation-2011.aspx (last visited November 16, 2012). For an overview of the variety of legislative responses, see Lewin,

the New York, South Carolina, and Texas legislatures would create educational programs for juveniles convicted of sexting.[192]

If legislatures and judges across the country believe that children who engage in sexting need additional education, these legal actors must correspondingly believe that juveniles are not fully educated about sexuality; that they do not have the proper maturity to deal with sexting and therefore cannot exercise good judgment.[193] In light of the uniformity of the response across legal domains, the law seems to believe that teenagers could easily stray from the narrow path of normal sexual development by sexting, and, as Freud says, "be led into all possible kinds of sexual irregularities."[194] This belief reinforces the notion that children are not yet through latency, but have additional mental dams to construct, such as shame.

The latest punishment for sexting may even be supported by Freud. After all, Freud suggested postponing sexual maturation to

supra note 25 and Jan Hoffman, *States Struggle With Minors' Sexting*, N.Y. TIMES, Mar. 26, 2011, http://www.nytimes.com/2011/03/27/us/ 27sextinglaw.html. For a description of the various legislative responses, including education programs, see Elizabeth C. Eraker, *Stemming Sexting: Sensible Legal Approaches to Teenagers' Exchange of Self-Produced Pornography*, 25 BERKELEY TECH. L.J. 555, 573–82 (2010); Audra L. Price, *Digital Lovers: Keeping Romeo and Juliet Safe from Sexting and Out of the Courthourse*, 20 TEMP. POL. & CIV. RTS. L. REV. 355, 365–67 (2011); Jacob J. Szymialis, *Sexting: A Response to Prosecuting Those Growing up with a Growing Trend*, 44 IND. L. REV. 301, 318–22 (2010).

192 *See* H. 3130, S.C. Gen. Assemb., 119th Sess. (S.C. 2012) (creating the offense of sexting and levying a civil fine and providing for an education program for a person convicted of committing the offense); Assemb. B. 8131, 2011–12 Reg. Sess. (2011) (directing the attorney general to establish a juvenile sexting and cyberbullying education demonstration program); S.B. 407, Leg. Sess. 82(R) (Tex. 2011) (creating education programs centered on the prevention of sexting).

193 The recent legislative reaction to sexting corroborates this belief. Many states suggest some type of education program for teenagers who are discovered sending sexually explicit images of themselves. *See* Szymialis, *supra* note 191, at 319–22. Similarly, most existing legal scholarship on sexting proposes educational programs as a better response to sexting than prosecuting minors for violating child pornography statutes. *See id.*; Eraker, *supra* note 191, at 573. In this way, legal scholarship, too, seems to reflexively follow Freudian thinking. Like the courts, these recommendations also suggest that sexting by minors is somehow wrong and premature, further underscoring the notion that sexting is tantamount to some sort of pernicious seduction. *See* Szymialis, *supra* note 191, at 319–20; Eraker, *supra* note 191, at 573–82.

194 THREE ESSAYS ON THE THEORY OF SEXUALITY, *supra* note 79, at 57.

ensure the complete construction of mental dams.[195] And Freud hinted that this task that might be accomplished "with the assistance of education."[196] Although Freud described psychosexual development as an organic process, he explicitly allowed for the possibility of educative support as a crucial aspect of normal sexual development.[197] By punishing sexting and ordering counseling programs in an attempt to instill "proper" sexual mores, courts implicitly classify teenagers as occupying the latency period, and implicitly classify sexting as harmful seduction.[198]

B. The Harm of Sexting as Seduction

The most surprising parallel between sexting cases and Freud's conception of seduction is the underlying anxiety about the resulting harm. In both cases, the fear is not immediate abuse. Freud never discussed the direct harm stemming from seduction. Instead, Freud was worried about the long-term sexual development of children.[199] By interrupting the latency period, seduction results in sexual perversion, compromises the construction of the super-ego, and ultimately risks damaging civilization itself.[200] In sexting cases, judges also typically ignore the possibility of immediate harm; after all, sexting is *self*-produced child pornography, so there is little immediate abuse to think of.

Focused primarily on immediate harm, scholars have thus roundly criticized the decisions of state and federal judges to punish children for violating child pornography statutes.[201] But

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195 *See id.* at 43.

196 *Id.* at 98.

197 *See id.* at 43–44.

198 *See* A.H. v. State, 949 So. 2d 234, 238 (Fla. Dist. Ct. App. 2007) (noting the appellant was too young to make appropriate decisions).

199 *See* THREE ESSAYS ON THE THEORY OF SEXUALITY, *supra* note 79, at 97–98.

200 *See The Ego and the Id*, *supra* note 95, at 35 ("[The super-ego] represents the most important characteristics of the development both of the individual and of the species . . . ."); THREE ESSAYS ON THE THEORY OF SEXUALITY, *supra* note 79, at 45.

201 *See, e.g.*, McLaughlin, *supra* note 7, at 174 (suggesting punishing teenagers under child pornography statutes is "unduly heavy"); Wastler, *supra* note 3, at 702 ("Addressing the problem of child pornography as a new and unique problem will avoid constitutional difficulties, prevent the application of overly harsh penalties to juvenile

across the United States, judges are worried about a different kind of harm. In the estimation of many courts, the harm from sexting, like seduction, is long term and initially unobservable.[202] Just as Freud detailed the lasting psychological damage done by premature exposure to sexual objects, judges are worried about long-term psychosexual damage related to sexting.[203] This concern has been widely ignored in scholarship on child pornography and sexting.

A careful analysis of recent sexting decisions reveals that the court is concerned with a broader notion of child abuse than just that stemming from the production of images that constitute child pornography.[204] That is, the harm that child pornography laws are intended to protect against includes more than just *immediate* abuse.[205] After briefly considering *New York v. Ferber*,[206] the first Supreme Court case to consider child pornography, this section will analyze more recent decisions of the Supreme Court and federal district courts. Considering these cases, it becomes clear that the perceived harm of child pornography, especially self-produced child pornography, transcends obvious physical and emotional harm. When scholars criticize the law's irony for punishing those it intends to protect, therefore, they deny the law's recognition that children need protection from themselves and each other. Beginning with *New York v. Ferber*, sexting decisions across jurisdictions suggest that courts are concerned with harm to

misadventure, and avoid undermining the legitimacy of traditional child pornography regulation.").

202 *See* McLaughlin, *supra* note 7, at 157 (criticizing three state cases for lacking sufficient evidence of long-term harm from sexting).

203 *See, e.g.*, *id.* at 150–58; *see also* Miller v. Mitchell, 598 F.3d 139, 152 (3d Cir. 2010) (fearing how minors are susceptible to external influences); *A.H.*, 949 So. 2d at 239 ("Mere production of these videos or pictures may also result in psychological trauma to the teenagers involved.").

204 *See, e.g.*, Clark v. Roccanova, 772 F. Supp. 2d 844, 847 (E.D. Ky. 2011) (being involved with these images can "have a deep psychological, humiliating impact") (quoting S. REP. NO. 95-438, at 6 (1977)); *A.H.*, 949 So. 2d at 239 ("Mere production of these videos or pictures may also result in psychological trauma to the teenagers involved.").

205 *See, e.g.*, *A.H.*, 949 So. 2d at 239 ("[I]f these pictures are ultimately released, future damage may be done to these minors' careers or personal lives.").

206 458 U.S. 747 (1982).

the long-term psychological well-being of the children involved in self-produced child pornography and, consequently, with harm to society as a whole.[207] This harm is essentially Freudian.

In *Ferber*, the Supreme Court based its prohibition of child pornography, in part, on the grounds that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child."[208] The motivating harm, however, was not restricted to the immediate abuse of the child involved.[209] Citing a Senate report, the Court explained that the use of children in pornography is harmful to the children's lasting psychosexual development because sexually exploited children "are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults."[210]

The court also acknowledged in *Ferber* that the production and circulation of a "permanent record"[211] of the child's participation in the pornography "may haunt him in future years, long after the original misdeed took place."[212] The concern over this memorialization was reiterated in the court's 1990 decision in *Osborne v. Ohio*, which reasoned that "[t]he pornography's continued existence causes the child victims continuing harm by haunting the children in years to come," by creating materials that "permanently record the victim's abuse."[213] The Supreme Court's consideration of the future harm of memorialization and circulation, however, has caused many scholars to ignore the other future, long-term harm recognized by the *Ferber* decision, namely, the harm to the child's ability to form future relationship and normal sexual development.

The fear of compromising long-term psychosexual development, however, is the primary justification undergirding

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207 *See, e.g.*, *Clark*, 772 F. Supp. 2d at 847; *A.H.*, 949 So. 2d at 239.

208 *Ferber*, 458 U.S. at 758.

209 *See id.* at 758 n.9.

210 *Id.*

211 *Id.* at 759.

212 *Id.* at 759 n.10 (quoting David P. Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981)).

213 495 U.S. 103, 111 (1990).

recent decisions to charge teenagers with violating child pornography laws for sexting.[214] Although *Ferber* was decided thirty years ago, the rationale is still relied upon today. In *Clark v. Roccanova* the judge straightforwardly held that sexting will "permanently traumatize and warp the minds of the *children* involved," covering both the child depicted and the child recipient.[215] Here, as in *A.H. v. State*, something about the act of sexting itself proves inherently traumatizing, especially for children.[216]

Accordingly, anxiety about memorialization and circulation is not the driving impetus when children are prosecuted for sexting, even though there are many attendant harms when child pornography is produced.[217] In addition to the harm suffered by the depicted child, other children are indirectly harmed when child pornography is produced.[218] Even self-produced and consensual child pornography in the form of sexting might be diffusively harmful.[219] As the Supreme Court noted in *Osborne v. Ohio*, "pedophiles use child pornography to seduce other children into sexual activity."[220] In *Ashcroft v. Free Speech Coalition*, the

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[214] *See, e.g.*, Clark v. Roccanova, 772 F. Supp. 2d 844, 847 (E.D. Ky. 2011); A.H. v. State, 949 So. 2d 234, 239 (Fla. Dist. Ct. App. 2007).

[215] 772 F. Supp. at 847 (quoting S. REP. NO. 95-438, at 3–4 (1977)). The court reasoned that "[e]ncounters which produce child pornography 'cannot help but have a deep psychological, humiliating impact on these youngsters and jeopardize the possibility of healthy, affectionate relationships in the future.'" *Id.* (quoting S. REP. NO. 95-438, at 6 (1977)).

[216] *See id.*; *see also A.H.*, 949 So. 2d at 239.

[217] *See* Koppelman, *supra* note 70, at 1652–54. Although there is no one position on what constitutes the harm from child pornography, there are many attendant harms. *Id.* Interestingly, perception of these harms has shifted over time. *Id.* at 1652 ("Concern about harm to minors has always been central to obscenity law, though the conception of harm has shifted over time.").

[218] *See* New York v. Ferber, 458 U.S. 747, 758 n.9 (1982) (Where the harm extends to "society as a whole," children other than the victims are also affected.) (quoting S. REP. NO. 95-438, at 5 (1977))); *see also* Osborne v. Ohio, 495 U.S. 103, 111 (1990) ("[P]edophiles use child pornography to seduce other children into sexual activity.").

[219] *See* Sherman, *supra* note 8, at 150–51 (quoting Mary Graw Leary, *The Right and Wrong Responses to "Sexting"*, DIOCESE OF MADISON (May 12, 2009), http://www.madisondiocese.org/Portals/0/Agencies/Safe_Environment/Sexting.pdf).

[220] 495 U.S. at 111. *See* 1 ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 649 (U.S. Dept. of Justice 1986) (The Attorney General's Commission on Pornography stating "[c]hild pornography is often used as part of a method of seducing

Supreme Court reasoned that virtual child pornography may "whet the appetites" of pedophiles.[221] It is possible that "sexting" would create a similar effect. Under this reasoning, a sexually explicit image of a child sent over a phone could produce drastic results if it entered into wider circulation and fell into the hands of a less innocent predator.

Nevertheless, concerns about memorialization and circulation alone cannot justify punishing teenagers for engaging in sexting. In the 2002 decision in *Ashcroft v. Free Speech Coalition*, the Supreme Court struck down as unconstitutional a statute that prohibited images of child pornography involving exclusively virtual images of children.[222] In the Court's judgment, "[v]irtual

child victims. A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having 'fun' participating in the activity."); Adler, *Child Pornography*, *supra* note 2, at 243–44 ("In *Osborne*, the Court introduced an entirely new rationale for banning child pornography: Pedophiles may use it to seduce new victims or to convince children to submit to sexual violation. Until Osborne, it was unheard of in modern First Amendment law that speech could be banned because of the possibility that someone might use it for nefarious purposes."); *see also* Child Pornography Prevention Act, 18 U.S.C.A. § 2251(10)(B) & (11)(A) (1996) (recognizing that child pornography must be prevented because it "inflames the desires of child molesters, pedophiles, and child pornographers . . . ;" and because it "encourag[es] a societal perception of children as sexual objects . . . .").

[221] Ashcroft v. Free Speech Coal., 535 U.S. 234, 263 (2002). For an interesting discussion on the appropriateness of the term "whet the appetites" used in the legal debates about child pornography, see Neil Malamuth & Mark Huppin, *Drawing the Line on Virtual Child Pornography: Bringing the Law in Line With the Research Evidence*, 31 N.Y.U. REV. L. & SOC. CHANGE 773, 781 (2007) (criticizing psychological evidence of the connection between viewing child pornography and consequent acts of child abuse).

[222] *See Ashcroft*, 535 U.S. at 256. In 2010, the U.S. District Court for the Eastern District of Pennsylvania analyzed the *Ashcroft* decision, clarifying that

> [a]s the Court emphasized in its analysis, however, the solution of banning virtual child pornography proved to be unconstitutional in part because it was not directly targeted toward the protection of real children from the harms that may occur in the production of that pornography. Unlike the CPPA, however, §§ 2257 and 2257A do not ban any form of speech based upon the harms that may flow from its content . . . nor do they reduce protected expression to unprotected expression; rather, they impose content-neutral regulations on the production of certain expression in order to prevent the sexual exploitation of children. Thus, this Court heeds the caution urged by the Supreme Court in *Ashcroft v. Free Speech Coalition*, but does not find it implicated by these statutes.

child pornography is not 'intrinsically related' to the sexual abuse of children . . . ."[223] Although virtual child pornography could lead to actual instances of abuse or "whet the appetites" of pedophiles, the link to the harm is "contingent and indirect," and therefore cannot justify prohibiting its production.[224] As a result, the dangers stemming from the circulation of sexually explicit images of children cannot be the primary concern of judges punishing children for sexting.

The Supreme Court's holding in *Ashcroft* underscores an important aspect of the harm for which a court may permissibly ban child pornography: it needs to injure an actual child, and the harm must be directly related to the child pornography.[225] While many scholars believe this decision presages the end of sexting cases, such interpretations ignore the broader notion of psychological damage against which the court is protecting.[226] Scholars who claim that child pornography laws are unreasonably narrowly construe the harm stemming from child pornography without considering the possibility that self-produced child pornography may also cause harm.[227] That the decision in *Free Speech Coalition* has not prevented lower courts from prosecuting juvenile sexters for violating child pornography laws is telling.

Although self-produced child pornography may seem harmless, especially where production and dissemination are consensual and private, a clear distinction has been made between sexting and virtual child pornography. In *A.H. v. State*, after all, the court found immaterial the fact that sexted messages were not shown to a third party. The mere act itself constitutes a hitherto undiagnosed harm to the self, best explained through this Freudian logic. As a result, even private sexting is considered intrinsically harmful, justifying the injunction that a videotape or picture showing

Free Speech Coal., Inc. v. Holder, 729 F. Supp. 2d 691, 735 (E.D. Pa. 2010).

223 *Ashcroft*, 535 U.S. at 250.

224 *See id.* at 250, 253.

225 *See id.* at 256.

226 *See* Adler, *Child Pornography*, *supra* note 2, at 242–43.

227 *See* Sherman, *supra* note 8, at 150–51.

"sexual conduct by a child . . . is never produced."[228] Unlike virtual child pornography, sexting causes harm to an actual child that is contingent and *direct*, even if initially imperceptible.[229] When children prematurely treat themselves as sexual objects and prematurely expose other children to sexual subjects via sexting, the harm is not immediate in the form of physical abuse, but is long-term and psychological.[230] As recognized by the court in *Ferber*, children featured in pornography "are unable to develop healthy affectionate relationships in later life [and] have sexual dysfunctions . . . ."[231] Later courts have since extended this rationale to include self-produced child pornography as well.[232]

Diagnosing the attendant dangers of child pornography, the Supreme Court in *Ferber* projected the harm far beyond that to the individual child him- or herself.[233] It projected that the widespread impairment of children's psychosexual development stemming from child pornography, including an inability to form healthy attachments later in life, would result in cataclysmic consequences for society.[234] This is an undeniable echo of Freud's concern that seduction, by disrupting latency, will impair children's super-ego construction which, in turn, will adversely affect all of higher civilization.

Under this reasoning, sexting is no exception to child pornography. Even if the resulting images are self-produced and consensual, sexting still exploits children as sexual objects. Sexting, consequently, constitutes a form of seduction, eliciting the same harms, with the same dual effect on the individuals involved and on larger society. Although many have overlooked the

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[228] A.H. v. State, 949 So. 2d 234, 238 (Fla. Dist. Ct. App. 2007) (finding that the state legislature has a compelling interest in preventing the production of pornographic images and videos of children).

[229] *See Ashcroft*, 535 U.S. at 250 (finding that "the causal link [between virtual child pornography production and instances of actual child abuse] is contingent and indirect").

[230] *See A.H.*, 949 So. 2d at 239.

[231] New York v. Ferber, 458 U.S. 747, 758 n.9 (1982).

[232] *See* Lewin, *supra* note 25.

[233] *See Ferber*, 458 U.S. at 758 n.9.

[234] *See id.* ("[T]he use of children as . . . subjects of pornographic materials is very harmful to both the children and the society as a whole.") (quoting S. REP. NO. 95-438, at 5 (1977)).

pernicious psychological effects of sexting and have focused instead on the lack of immediate abuse suffered by the child who willingly sends a sexually explicit image of him- or herself,[235] understanding sexting as Freudian seduction makes the harm against which the court intends to protect easier to diagnose.

The fear about sexting is thus the same fear shared by Freud over a century ago. The law's effort to prolong the latency period by requiring educational counseling amounts to a final effort to build mental dams and to delay sexual maturation until children are ready to encounter sexual objects. The law's punishment of teenagers who engage in sexting, therefore, may not be as unreasonable as it first seems.

By punishing teenage sexters for self-producing child pornography, the law is protecting the latency period from the harms related to the seduction of sexting. As a result, the law is not just promoting teenagers' normal psychosexual development and helping to construct teenage super-egos, it is also protecting society as a whole, by punishing the very victims the law was designed to protect.

CONCLUSION: DO WE WANT FREUD ON THE COURT?

Interpreting sexting cases in light of Freud's theory of sexuality offers an explanation for the confusing motives of courts that punish children for violating children pornography laws. With Freud in mind, the actions of many courts may begin to seem less "unreasonable" and "unjust." Of course, the surprising alignment with Freud, whose theory by many accounts is outdated,[236] might also provide a justifiable impetus to reevaluate the goals of the law.

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[235] *See* Wastler, *supra* note 3, at 698 (arguing that "[s]exting should be considered outside the scope of the child pornography exclusion because such images, like virtual child pornography, do not involve the sexual abuse of a child," and explaining that a teenager who sexts "does not suffer the immediate psychological, physical, and emotional harm of the kind suffered by child sexual abuse victims").

[236] *See, e.g.*, David S. Caudill, *Identifying Law's Unconscious: Disciplinary and Rhetorical Contexts*, 54 WASH. & LEE L. REV. 1075, 1089 (1997) (stating that traditional theorists have rejected Freud's theories as outdated); David S. Caudill, *Pierre Schlag's "The Problem of the Subject": Law's Need for an Analyst*, 15 CARDOZO L. REV. 707, 717 (1993) (claiming that many disregard Freud as outdated).

In sexting cases, judges could be taking too seriously Freud's conception of a narrow path to sexual development and the idea that "a disposition to perversions is an original and universal disposition of the human sexual instinct . . . ."[237] Recent sexting cases demonstrate courts' robust efforts to ensure "that normal sexual behaviour is developed . . . as a result of . . . psychical inhibitions occurring in the course of maturation . . . [including] shame, disgust, pity and the structures of morality and authority erected by society."[238] But is this the conception of sexuality we want courts to promote today? Do we really want to continue interpreting child pornography laws to hew so closely to Freud's theory of sexuality?

Regardless of whether we agree with Freud, analyzing sexting cases from a Freudian perspective also offers a new position from which to criticize the law, providing an alternative response for judges confronted with children charged with violating child pornography laws. In his groundbreaking work on sexuality, Freud sought to correct the "gross error" of the widely held belief that "the sexual instinct is absent in children."[239] Some scholars argue that courts are still committing this error by continuing to ignore Freud's revolutionary findings. The problem, they claim, is that courts have denied children all sexuality, thereby explaining the overwrought anxiety in child pornography cases. But the problem is just the opposite: courts are too Freudian, and many judges are simply getting Freud wrong.

Over the last century, Freud's theories have become entrenched in the intellectual landscape and become a mainstay of popular knowledge independent of the academic debates about Freud and his work. As part of this cultural milieu, legal decision makers have been unavoidably, if unknowingly, been exposed to popular

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237 THREE ESSAYS ON THE THEORY OF SEXUALITY, *supra* note 79, at 97.

238 *Id.*

239 SIGMUND FREUD, *The Sexual Enlightenment of Children (An Open Letter to Dr. M. Fürst), in* 9 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 129, 133 (James Strachey ed. & trans. 1959) ("It is commonly believed that the sexual instinct is absent in children and only begins to emerge in them at puberty when the sexual organs mature. This is a gross error, equally serious in its effects both on knowledge and on practice; and it is so easily corrected by observation that one wonders how it could ever have been made.").

interpretations of Freudian thinking; after all, "[c]ourts are influenced . . . by popular knowledge, and judges as part of an educated elite are influenced by social science learning to the extent it penetrates their elite culture."[240]

As long as these cases continue to bear a resemblance to Freud and the resulting decisions continue to be based on a Freudian logic, judges should at least get Freud right. Moreover, as state legislatures increasingly consider resolutions that address juvenile sexting, ensuring a proper understanding of Freud is all the more important. In 2012, thirteen states considered bills aimed at sexting.[241] As this number grows, it becomes increasingly urgent that legal actors better understand the motivation underlying the decision to prosecute teenagers for sexting. In light of Freud's theory, judges hearing sexting cases and legislators devising new solutions might make three changes to current child pornography laws as they relate to sexting.

First, although the motivations underlying sexting cases chart nicely onto Freud's theory, one crucial aspect of Freud's diphasic model of psychosexual development does not map onto recent sexting jurisprudence: timing.[242] According to Freud, the "second wave [of sexual development] sets in with puberty."[243] Yet, most sexting cases involve children who have already begun puberty.[244] The students in Pennsylvania posing in their bras, the New Jersey girl who posted pictures of herself online, and the consenting sexual partners in Florida are all undeniably in adolescence and,

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[240] Richard Lempert, *"Between Cup and Lip": Social Science Influences on Law and Policy*, 10 LAW & POL'Y, 167, 188 (2008) (examining how social science research influences legal decision makers).

[241] *See 2012 Sexting Legislation*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Dec. 14, 2012), http://www.ncsl.org/issues-research/telecom/sexting-legislation-2012.aspx.

[242] *See generally* A.H. v. State, 949 So. 2d 234 (Fla. Dist. Ct. App. 2007) (A.H. was sixteen and her boyfriend was seventeen, clearly well past their latency phase, when they were charged with child pornography); THREE ESSAYS ON THE THEORY OF SEXUALITY, *supra* note 79, at 66 (the choice of a model object is diphasic in that it occurs in two waves).

[243] THREE ESSAYS ON THE THEORY OF SEXUALITY, *supra* note 79, at 66.

[244] *See* McLaughlin, *supra* note 7, at 144–45 (discussing the biological development of adolescent brains and thus tendency to engage in risky conduct, including sexting).

therefore, out of the latency period.[245] With this in mind, many jurisdictions are not protecting latency, but are attempting to prolong the period. While this may be for good reason, especially if many juveniles who engage in sexting demonstrate a lapse in sound judgment, it is fair to question the effects of treating teenagers as if they are still in latency when they have moved onto the final phase of sexual development.

Given this insight, judges hearing sexting cases might correct their unconscious Freudianism and give credence to the timing of Freud's developmental schema. If adolescents are no longer in a period of latency, courts cannot justify punishing teenager sexters for violating child pornography laws by citing concerns about future-relationship formation and long-term psychosexual harm. Psychosexual development is complete after latency and no additional dams can be constructed.[246] For that reason, the law should carve out an exception for adolescents who engage in sexting by creating a "sphere of sexual privacy for older teens" that would exempt them from being charged with violating child pornography laws.[247]

By providing a theoretical account of sexting decisions, Freud also offers a new basis from which to criticize or bolster the decisions of judges who punish the victim the law intends to protect. If juveniles who practice sexting have already moved beyond latency, they have already fully formed their super-egos.[248]

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[245] *See* Miller v. Mitchell, 598 F.3d 139, 144 (3d Cir. 2010) (discussing the Pennsylvania case of two girls posing in their bras at twelve- and thirteen-years-old); *A.H.*, 949 So. 2d at 234 (discussing the Florida case of a sixteen-year-old girl who was convicted for sharing sexuality explicit digital photos with her seventeen-year-old boyfriend); Sherman, *supra* note 8, at 145 (discussing the case of a fourteen year-old New Jersey girl who posted "racy pictures of herself on her MySpace page").

[246] *See* THREE ESSAYS ON THE THEORY OF SEXUALITY, *supra* note 79, at 43 ("It is during this period of total or only partial latency that are built up the mental forces which are later to impede the course of the sexual instinct and, like damns, restrict its flow—disgust, feelings of shame and the claims of aesthetic and moral ideals.").

[247] *See* McLaughlin, *supra* note 7, at 138.

[248] *See generally The Ego and the Id*, *supra* note 95, at 34–39 (discussing the formation of the super-ego); THREE ESSAYS ON THE THEORY OF SEXUALITY, *supra* note 79, at 42 ("[T]he sexual life of children usually emerges in a form accessible to observation round about the third or fourth year of life. It is during this period of total or only partial latency

As a result, courts cannot justifiably punish teens in an attempt to protect them from the harms of seduction. Because seduction only occurs in latency, courts cannot legitimately be worried about adolescents hurting themselves or other adolescents by exposing each other to sexual objects prematurely because it is technically not premature.

Instead, by designating teenage sexting as criminal behavior equivalent to child pornography—and justifying this designation by citing the harm to "society as a whole"[249]—judges are effectually punishing children for lacking a super-ego. But since the teenage defendants have left the latency period, the super-ego is already in place. Judges and prosecutors, therefore, are simply failing to recognize it. By punishing teenage sexting, prosecutors and judges are effectively disagreeing with the norms reflected by the emerging super-ego of teenager-sexters.

In *Civilization and Its Discontents* (1930), Freud posits the existence of a cultural super-ego, "under whose influence cultural development proceeds."[250] Although the demands of the individual super-ego normally "coincide with the precepts of the prevailing cultural super-ego," it is possible for individual super-egos to diverge.[251] Today, it is possible that teenage sexters possess an alternative set of moral constructs foreign to the older generation sitting on the bench and in the legislature. By rejecting prevailing teenage super-egos through the prosecution of sexting as child pornography, it is possible that prosecutors and judges are simply anxious about a new, emerging cultural super-ego that reflects different values about sex. If this is the case, the court might rightly be censured or extolled for enforcing the traditional cultural super-ego.[252]

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that are built up the mental forces which are later to impede the course of the sexual instinct . . . .").

[249] New York v. Ferber 458 U.S. 747, 758 n.9 (1982).

[250] 21 SIGMUND FREUD, *Civilization and its Discontents*, *in* THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 57, 141 (James Strachey ed. & trans. 1961).

[251] *Id*. at 142.

[252] Interestingly, the defendant in *United States v. Mento* made a similar argument, contending that "the government's true purpose in combating child pornography has

Given the diffusion of Freud's ideas, it is perhaps unsurprising that judges unknowingly rely on Freud's theory of sexuality in sexting cases. But even if courts are to correct their unconscious Freudianism and recognize the timing of Freud's model of psychosexual development, American courts are only thinking about *early* Freud. The *Three Essays on the Theory of Sexuality* were written in 1905, and in the decades following, Freud corrected or adjusted many of his initial theories.[253]

As a final critique, we might fairly ask whether it is reasonable for the law to enforce super-ego formation at all, even for pre-adolescent children who might still be in a period of latency. Freud's project, after all, was never normative but was strictly descriptive. If the court really is punishing sexting as child pornography in an attempt to prolong latency and dictate super-ego formation, a number of criticisms might be raised. Fourteenth Amendment substantive due process right of parents "to be free from state interference with family relations,"[254] including choices about the upbringing of children, may prevent obvious attempts by the states to force its educational program on teenagers.[255] Nevertheless, many states have now developed educational programs as an alternative punishment for teenagers who produce and disseminate sexually explicit images of themselves.[256]

impermissibly shifted from preventing tangible harm to real children, toward eradicating certain ideas that it considers inherently evil." 231 F.3d 912, 919 (4th Cir. 2000).

[253] *See, e.g.*, *The Ego and the Id*, *supra* note 95, at 31–34 (detailing an adjustment to the Oedipus complex first introduced in *Three Essays on the Theory of Sexuality*).

[254] Gruenke v. Seip, 225 F.3d 290, 303 (3d Cir. 2000).

[255] *See* Miller v. Skumanick, 605 F. Supp. 2d 634, 643 (M.D. Pa. 2009). In this case, the court cites a number of authorities establishing the right of parents to be free from state interference in family relations. *Id.* at 643–644; *see, e.g.*, Troxel v. Granville, 530 U.S. 57, 65 (2000) (holding that "the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by" the Supreme Court); *Gruenke*, 225 F.3d at 303; M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (finding that "[c]hoices about marriage, family life, and the upbringing of children are among associational rights" basic to our society . . . ."). Finally the court held that "[a]s early as 1923, the Supreme Court found that 'the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own."'" *Skumanick*, 605 F. Supp. 2d at 644 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

[256] *See 2012 Sexting Legislation*, NAT'L CONFERENCE OF STATE LEGISLATURES (Oct. 26, 2012), http://www.ncsl.org/issues-research/telecom/sexting-legislation-2012.aspx.

Even if the state may permissibly be involved in super-ego formation through educational programs about sexting, we might fairly question whether the state *should* be involved. It may be true that charging teenage sexters with violating child pornography laws "ultimately cause[s] a lifetime of harm"[257] that surpasses even the harm of sexting.[258] After publishing his *Three Essays*, Freud regularly discussed the antagonism between civilization and instinctual life, admitting that the mental dams learned during latency might ultimately prove harmful.[259] In "'Civilized' Sexual Morality and Modern Nervous Illness," Freud explained that, "we shall find that the injurious influence of civilization reduces itself in the main to the harmful suppression of the sexual life of civilized peoples (or classes) through the 'civilized' sexual morality prevalent in them."[260] Ultimately, Freud concluded that "the damage done by civilized sexual morality" may be permissible because "the cultural gain derived from such an extensive restriction of sexuality probably more than balances these sufferings, which, after all, only affect a minority in any severe form."[261] Today, as the practice of sexting continues to grow, it seems that the minority who suffer for not fitting into the majority's concept of civilized sexuality—namely, teenagers who engage in sexting—may be larger than Freud ever suspected. And the punishment they suffer may be unduly severe. If imposing prison sentences on teenagers and requiring their registration as sex offenders is the new form that this suffering takes, we should ask whether punishing sexting as child pornography is still counterbalanced by the cultural gain of "civilized sexual morality" that Freud recognized.

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257 Arcabascio, *supra* note 42, para. 33.

258 *See id.*

259 *See, e.g.*, SIGMUND FREUD, *"Civilized" Sexual Morality and Modern Nervous Illness*, *in* 9 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 177, 181 (James Strachey ed. & trans. 1959) ("It is not difficult to suppose that under the domination of a civilized sexual morality the health and efficiency of single individuals may be liable to impairment.").

260 *Id.* at 185.

261 *Id.* at 196.