Advancing Responsible Adolescent Development

Roger J.R. Levesque
Editor

Adolescents, Rapid Social Change, and the Law

The Transforming Nature of Protection

Springer

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ISSN 2195-089X ISSN 2195-0903 (electronic)
Advancing Responsible Adolescent Development
ISBN 978-3-319-41533-8 ISBN 978-3-319-41535-2 (eBook)
DOI 10.1007/978-3-319-41535-2

Library of Congress Control Number: 2016943791

Printed on acid-free paper

This Springer imprint is published by Springer Nature
The registered company is Springer International Publishing AG Switzerland

We dedicate this book to
Howard R. "Skip" Elliott
for his commitment to supporting
youth development initiatives and advancing
youth research

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Part I
Introduction

Chapter 1
Adolescence, Rapid Social Change, and the Law

Roger J.R. Levesque

Introduction

Adolescents live in a rapidly changing world. These changes challenge not only adolescents but also the institutions that guide their development. Their socialization now must include efforts to prepare them for an unstable, unpredictable, and precarious globalized society. Yet the legal system, which guides the development of institutions and what they can do to socialize individuals, has only begun to adapt to these developments. The failure to adapt is not surprising, as law seeks stability and resists rapid change. As a result, the legal system's approach often exposes a mismatch between how the legal system treats adolescents and what is known about adolescents' experiences and needs. As it does so, the legal system makes assumptions about adolescents that remain highly debatable and disputable.

Many examples reveal the mismatch between adolescents' rights and what we know and do not know about adolescents (for our purposes, teens under 18, whom the law views as "minors" or "juveniles"). One of the most important examples is the legal system's tendency to treat adolescents as incompetent children rather than engaged individuals who need effective social structures to develop skills and competencies to navigate their changing world. Determining when and how to move away from the default assumption of incompetence has become the legal system's most important challenge in its efforts to address adolescents' needs.

Concern about adolescents' competencies reverberates throughout legal responses. Questioning adolescents' competency means, for example, that the legal system has difficulty trusting their decisions and, as a result, has difficulty moving beyond concerns about their protection and their best interests. This means that the need to protect adolescents serves as the default standard that guides the legal system's actions.

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R.J.R. Levesque (ed.), *Adolescents, Rapid Social Change, and the Law*,
Advancing Responsible Adolescent Development,
DOI 10.1007/978-3-319-41535-2_1

Solicitude for protecting adolescents may be well intentioned, but that concern can lead to adopting very different legal postures. It can mean limiting the liberties of all adolescents, such as when limiting access to potentially harmful substances (alcohol and smoking) and behaviors (driving and sexual activity). It also can mean turning the control of adolescents' liberties to the discretion of the adults who care for them, such as when protecting family life (parents can control much of their children's lives). As yet another alternative, it also can mean bestowing the control of liberties on adolescents themselves, such as in public areas (adolescents retain freedoms of speech similar to those of adults) or when serving public interests (adolescents can control their right to be tested for some diseases to help prevent their spread). Protecting adolescents can mean, then, treating them like children, like adolescents, or like adults.

A fundamental problem that can arise from the different approaches to protecting adolescents and their rights is that the different legal postures may not be protective. Having law enforcement treat adolescents like adults could lead to ignoring some important differences between adolescents and adults, such as when adolescents are expected to understand their rights and are permitted to waive them when interrogated by law enforcement. Granting parents broad control over their children also may become problematic, such as when parents reject adolescents' changing behaviors and values regarding, for example, sexuality, education, religion, and health. Similarly, providing adolescents control over only some of their rights in broad domains can become problematic, such as when they generally do not control their right to treatment to address consequences of lawful sexual activity. Protecting adolescents by limiting all of their rights in particular domains also can produce profound injustices, as adolescents often are, in fact, differently situated along economic, ethnic, gender, intellectual, and developmental lines. These challenges appear to be the inevitable outcomes of different approaches to adolescents' rights, the piecemeal approach to their development, and continued lack of agreement about who remains responsible for recognizing and protecting their rights.

Although challenges raised by different legal postures always have been present, rapid social change exacerbates them. Three domains—media, schools, and personal relationships—appear to undergo particularly dramatic changes and serve as the focus of this book. The chapters identify acute changes, examine those changes in light of existing empirical research relating to adolescents, analyze how society has responded to these developments (particularly through legal regulations), and imagine how legal responses could be different if they considered research and adolescents' needs more seriously. To better situate the domains and help readers understand the book's focus, this introduction examines how the legal system regulates adolescents and then provides a brief overview of how rapid changes challenge legal responses that still have a tendency to embrace anachronistic conceptions of adolescents' rights. It ends by highlighting the key points addressed by each chapter and what they tell us about adolescents' rights.

The Legal Regulation of Adolescents

Adolescents' legal status reveals important developments and transformations in societal understandings of children and their place in society. The rights of adolescents, who generally are deemed children in the eyes of the law, have catapulted from an obscure and essentially nonexistent concept to a globally recognized phenomenon at the forefront of modern human rights movements. Much of this transformation occurred at the very end of the last century, and it rapidly spread at an unprecedented pace.

Despite experiencing impressive developments in legal status, adolescents continue to occupy a peculiar status in law and society. Notably, all modern societies now champion a wide range of children's rights as important to recognize and foster. This recognition is reflected in the development of the *U.N. Convention on the Rights of the Child* (United Nations 1989). That treaty is remarkable for the rapidity with which countries endorsed it, the high number of countries committed to it, and the comprehensiveness of its recognized rights (see Levesque 1994a). The *Convention* also is notable, even if pervasively ignored in this regard, for championing the development of adolescents' rights (Levesque 1994b). Yet, despite these developments, children, regardless of their age, still may not actually control their own rights. They may not even do so in societies that acknowledge the need to recognize children, including adolescents, as individuals worthy of independent rights and additional protections. Perhaps more peculiarly, societies that claim to protect children's rights often create legal systems, for them but they do not really make much difference in children's lives. Adolescents, then, have gained increased recognition under law, which has meant to be more protective of their rights, but it remains to be determined how protective that recognition is in practice.

Much of the disparity between laws recognizing adolescents' important place in society and the reality of their actual rights derives from two sources. The first source of disparity is that the very belief that adolescents should have rights often defies conventional views of rights, which presume fully rational, autonomous beings deemed capable of exercising free choice. Since most adolescents, especially early adolescents, lack fully developed rational capabilities necessary to be direct recipients of many rights, the legal system necessarily deems them dependent "incompetents." To complicate matters even more, most adolescents are not really "individuals" who can stand alone; they are, in many ways, dependent, and their dependency implies relationships with others. That dependency is the second general reason that adolescents' rights are not fully respected. This dependency means that adolescents often are not like independent adults, who are the standard for determining the qualities needed for exercising rights. In addition, this dependency is problematic in that the legal system, especially the U.S. legal system, tends to frame rights as liberties from others rather than in terms of what others must provide, such as financial, emotional, social, and intellectual resources. Adolescents' potential incompetency and dependency lead to the most central debate in modern conceptions of adolescents' legal status: the proper balance

among parents' rights, their children's own rights, and a community/government's place in recognizing and fostering those rights.

Parental Rights to Their Children

Conceptions of children's rights, including adolescents' rights, operate in the shadow of a long-standing legal principle that still dominates and influences this entire area of law. That principle is quite basic: The law privileges the rights of parents to the care and custody of their children. This core principle has deep historical roots and far-reaching influence. The principle drives many jurisdictions and even shapes legal doctrines that focus on children's own rights. In Western countries, the notion of parents' rights is rooted in Roman Law. For example, Blackstone's *Commentaries* highlights that Roman law conferred on fathers nearly complete control over their children, and the courts had no role in mediating this relationship (Blackstone 1765, 2001). This principle was embodied in the concept of *patria potestas*. That doctrine granted the male head of a family full legal authority over his legitimate and adopted children, as well as further descendants in the male line, unless emancipated. This authority was quite expansive, as it included, for example, power over life and death. Not surprisingly, legal analyses describe this view as perceiving children as parental property.

The once dominant view of children essentially as parental property has faded, but the impulse continues and shapes efforts to conceptualize and develop notions of adolescents' rights. This view is not meant to be pejorative; it simply reflects the notion that parents should be responsible for their children, and if responsible, they must then have control over what happens to their children. Arguably, the related principle that parents control their children, with minimal government intervention, remains alive and well. Many countries express and follow this legal principle as they struggle to recognize adolescents' rights, with the United States remaining a steadfast and emblematic supporter of this approach. The modern expression of this legal principle is found in many iconic Supreme Court decisions establishing that the Constitution protects parents' fundamental right to the care, custody, and management of their children. In fact, the leading contemporary case that affirmed the right of parents to control the development of their children recognized the right as especially strong during the period of adolescence (see Wisconsin v. Yoder 1972).

Solicitude for parents' rights continues in several important ways within the social systems in which adolescents find themselves. These include systems that typically are government supported (child welfare, justice, educational systems) and those that are deemed private (families and religious organizations). Regardless of their private/public distinctions, however, these conceptions influence the role of the government: strong protection of parental rights includes protection from governments' efforts to intervene in families and the rights of parents. This approach, importantly, does not mean that adolescents do not have rights. Rather, it

means that the extent to which adolescents do (barring extreme cases of parental failure that warrant a government's taking over parental responsibilities) largely depends on their parents' decisions to respect them.

The profound attachment to parental rights reflects the persuasiveness of rationales for supporting them. For example, parents seem particularly well situated to determine and act in their child's best interest, at least in areas not squarely within the government's expertise and not in circumstances when parents' decisions transgress certain limits. Protections from government intervention also safeguard cultural and moral diversity in matters of childrearing. Limiting a government's intrusion in family life ensures that a government does not impose a uniform view of parenting. In democratic societies, this protection from governmental control in the name of diversity is seen as the foundation of democratic principles. Parents' rights also protect parents from interventions on impermissible grounds, such as race, or for improper reasons, such as preferring one set of parents over another purely for the material benefits available from a different family. The focus on parental responsibility also, of course, means that parents have the primary responsibility to support their children and families. This certainly reduces burdens (such as financial ones) that a government would otherwise need to carry if it took children under its charge. Finally, the weight accorded parental rights ensures that governments offer procedural protections that will provide parents with the resources to counter allegations allowing governments to intervene in their children's lives. This would seem particularly important in light of the potential for the dehumanization of parents and children found in a variety of legal systems. Overall, then, much can be said for systems that bestow on parents the right and duty to direct and control their children's upbringing.

Adolescents' Own, Independent Rights

The concept of parental rights may have a long history and retain considerable appeal, but so does the concept of adolescents having their own rights, independent of their parents. The same laws and principles that granted parents rights also placed on parents the high duty to foster their children's healthy development and prepare them for appropriate roles in society. The leading contemporary case to do so recognized that the government could control the social development of young children much more than the development of adolescents, deemed best controlled by their parents (Wisconsin v. Yoder 1972). That stance was considered reasonable because adolescents' values and life ambitions, unlike those of younger children, could be too highly influenced by their peers and government-sponsored socializing institutions (such as public schools). For adolescents, parents were deemed the most appropriate guides for their development and, as a result, the proper ones to control the rights that determine their children's future. Still, parents were charged with acting responsibly and fostering the development of effective citizens. In a real sense, parents were permitted to control the rights of their children when they could

demonstrate that they would do just as well, or better, than the government. The concept of adolescents' rights, just like the concept of parental rights, then, concerns itself with who should control the development of individuals, with the goal of ensuring effective development for functioning appropriately in society. This goal led to developing adolescents' rights in at least three ways.

One approach to ensuring adolescents' rights centers on permitting adolescents to assert rights against their parents. This approach, arguably the earliest recognized strand of children's rights, fundamentally adopts a protectionist view. Legally, the approach dates to the nineteenth century, when courts challenged the view of divine parental authority to control children. This movement partly located the authority to control children in a parent's civic duty and with the understanding that the child was a future citizen. This approach bestowed on the government the power to regulate parental authority by ensuring that such authority was exercised in the interests of children as well as the public.

The "child saving" movement illustrates the trend in protecting the development of citizens for a smoothly functioning society. That movement spread during the nineteenth century and contributed to the creation of government supported educational systems as well as systems that permitted the removal of children from their homes to save them from their families and to protect communities (see Levesque 2008a). This movement's influence continues to be felt, but the rationales that supported the movement often become entangled with other approaches conceptualizing children's rights.

A second approach to conceiving adolescents' legal rights focuses on claims against governmental actions. These include claims against unnecessary government intervention, which could involve unnecessary intervention in children's relationships with their parents. This preservationist strain of adolescents' rights reflects the view that unnecessary government intervention in families infringes on a child's right to maintain relationships with their parents.

The approach centering on protecting from government intervention retains considerable appeal to the extent that preservation reflects respect for both parents' rights and children's own rights. Although this sharing of interests is often ignored, legal systems have recognized its appeal and significance. For example, the Supreme Court, known for embracing strong parental rights models, has noted that children and parents share vital interests in preventing the erroneous termination of their relationships (see Santosky v. Kramer 1982). Yet commentators have tended to shy away from this approach, although some rightly argue that conceptions of children's rights must include more general protections against governmental actions, a claim supported by research indicating that the government may unnecessarily remove children from their homes and have them, needlessly, spend time in alternative care away from their families (Levesque 2008a).

Yet another, related approach focuses on adolescents' direct interactions with social systems in ways that the law recognizes their interactions as independent from their parents. Perhaps the clearest example of this view involves the recognition of a child's right to access social services, even without their parents' permission. Although this approach also remains buttressed by several important

rationales, the approach essentially aims to liberate children from their parents' hold over them and to limit a government's power to exert more control over them more than they would adults. The approach does recognize that not all children can act independently, a point highlighted by the approach's general claim that children's autonomy should be dictated by their evolving capacities.

The most frequently recognized examples of the third approach include medical decision-making without parental or judicial intervention and children's power to waive their own rights when they interact with law enforcement (see Levesque 2006). These proposals, however, run counter to deeply held societal perceptions of who should guide children's development. There has been some recognition that adolescents can have an independent right to specialized services (such as medical testing). But the major rationales supporting independent rights even for adolescents often are blurred, with some rationales being based on efforts to protect the public from disease and crime rather than protect children from their parents or the government itself. As a result, it remains to be seen how receptive societies will be to efforts that advocate adolescents' independent rights, for example, to freedom of thought and speech (Levesque 2007, 2008b), conscience and religion (Levesque 2002), as well as privacy (Levesque 2016) and equal treatment (Levesque 2015). Although this lack of development need not mean that the approach has no currency, it does mean that the extent to which it will succeed necessarily turns on its ability to address prevailing societal perceptions of adolescents' relative status in society, and especially within families.

Problematic Resolutions of Adolescents' Rights

The diverse views of adolescents' rights have important implications to the extent that they most likely lead to strikingly different outcomes. These outcomes can differ markedly in whether they protect adolescents. The clearest example involves arguments that adolescents are capable of knowing and exercising their rights. This may work well in some contexts and lead, for example, to what some view as enhanced protection. The important example of this would be permitting minors to obtain judicial waivers for the usual requirement of parental permission for medical procedures that parents may not wish their children to have; a judicial waiver could protect minors from parental harm and protect society from harms that would ensue from lack of access to services and from less protection (Levesque 2000).

On the other hand, arguing that specific adolescents can be capable of exercising their own rights may foster less protection. For example, the recognition that some adolescents are more like adults has led some states to permit institutions to treat them like adults for the purpose of punishing them (see Levesque 2006). The legal system has protected adolescents from extreme forms of punishment, such as the death penalty. But it has not protected youth from other extreme forms. For example, much has been written about adolescents' rights not to be imprisoned for life without the possibility of parole. But those commentaries often misconstrue the

Supreme Court's actual position on the matter (as an example of misunderstanding, see Woolard 2012). In extreme cases, such as those involving juvenile homicide, juveniles could be incarcerated for life as long as courts consider their age when making sentencing decisions; and nothing bars courts from imposing sentences that would be the equivalent of life without parole, such as fifty years (see Miller v. Alabama 2012). It is difficult to equate granting adolescents more rights in these contexts with protecting their developmental needs and abilities.

That commentaries can so pervasively misconstrue the rights of adolescents exemplifies how current conceptions of rights do not work well when we move outside of families: when focusing on potential relationships in other institutions like religious groups, justice systems, and schools, as well as communities. Existing approaches to conceptualizing adolescents' legal status do account for variations in these relationships, but the tensions that arise leave much to be desired. It is not surprising that every side of debates about the conception of adolescents' rights criticize every other side for fundamentally undervaluing the welfare of adolescents. Yet each espouses different ways of resolving the dominant practical tensions that adolescents' rights must confront.

These practical tensions have become increasingly pressing to address given rapid social change, particularly given a rise in concern about what the future holds for adolescents. Stable and predictable environments once gave confidence to those selecting particular approaches to protecting adolescents and their rights. But such stability no longer is a given, and much predictability has disappeared. Even broadly accepted assumptions about what we knew about adolescents and their challenges unravel. It is difficult to overstate the breadth and depth of those challenges. So much unknown does make it difficult to guide the development of rights, but taking a look at broad changes does reveal themes that future developments would benefit from considering.

Rapid Social Change's Challenges to the Adolescent Transition

Researchers and commentators have long known the challenges that can come with rapid social change. Toffler (1970), for example, famously coined the phrase "future shock" when discussing the effects of multiple rapid changes. The phrase suggests that rapid social change induces social paralysis. Rapid changes—such as technological changes, modes of production, wars, mass migrations, economic collapses, and terrorism—often leave substantial numbers of people with little opportunity to adapt effectively to their everyday lives. Rapid transitions shift important foundations of society, and these shifts can have important influences on everyday interactions, from educational, work, and familial to leisure and intimate relationships. As changes increase in number and valence, they affect people's social foundations. Dramatic changes cause people to lose the familiarity once

provided by stabilizing institutions, such as religions, families, national identities, and professions. These rapid changes can be difficult and even debilitating.

The challenges arising from rapid social change may be dramatic in both their nature and effects, but nuances are important to consider. Change need not inevitably harm individuals' development. Similarly, subtle social change also can induce dramatic outcomes. Change simply requires adaptation. For example, social change often means that people and resources are on the move. These movements may have a tremendous impact on individuals, even when they themselves do not physically move and even when they retain resources. Movements may include those from one country to another, from one state to another, from rural to urban (and vice versa), from one neighborhood to another, from one family to another, from one relationship to another, and even from one developmental period to another. The changes that accompany these movements can create challenges, particularly depending on what people do or do not bring with them.

The point is that social change can rock people's foundations and can have dramatic effects on individuals. But the effects need not be negative. Change requires attention. The need for attention to change is particularly pronounced for groups that have liminal places in society, such as adolescents. They also are particularly pronounced for those, like adolescents, who are expected to prepare themselves for potentially dramatic changes. Growing up in any society always brings challenges. Because rapid societal changes can exacerbate those challenges, they require particular attention. Proper attention appears particularly pressing given how much remains unknown and perhaps unknowable.

Rapid technological changes exemplify well particular challenges for adolescents. These changes increasingly reveal the need for access to communication media for success, with high competence using the media becoming a default prerequisite for success. Yet that competence is difficult to achieve for at least two reasons. First, the continuous use of technology has led to concern about addiction to it, a view that itself is perplexing given the ubiquitousness of technology and its uses. As adolescents gain competence, concerns about addiction arise as they have more and more outlets to immerse themselves in a digital "reality". Despite that concern, the mechanisms of such "addiction" and treatment options are hardly well understood (Gabriela 2015). Second, even the positive potential of technological uses can pose challenges. The advent of completely electronic schooling at the high school level and earlier (which was previously almost completely limited to post-secondary education) has seen adolescents and parents alike often challenged by the new freedoms and limitations of the digital platform (Borup 2016). Until technology's potential can be fully realized by parents, educators, and adolescents themselves, it is important to bear in mind that much remains unknown. The lack of precedent creates challenges for providing what had long been central to shaping adolescents' competency—effective education and socialization.

Relatedly, rapid changes in social media also challenge adolescents' social interactions. True, the precise nature of those challenges remains unknown. Research currently fails to establish explicit links between offline social competence and online social media interactions (Reich 2016). Even though the window for

long-term longitudinal studies has been short, no negative relationship between online and offline interactions has been established. Yet in a world where live, face-to-face interactions still comprise a majority of adult social interactions and relationships, it is sobering that adolescents might well be so immersed in social media that it may profoundly impact their future interactions. We just do not know. The very concepts of "social" and "society" are changing.

We may not know much about online versus offline effects on development, but we do know that some uses of media can be problematic. Social media interactions with peers that encourage digital "violence"—whether through multiplayer video games, anonymous fantasy writing, or even the mere making of digital pariahs—translate into risk factors for aggressive behavior in adolescents (Schick and Cierpka 2016). And the advent of social media as a method for bullying and/or sexual aggression has further complicated the roles of the legal system and the educational system in working with adolescents because existing laws and educational practices make it difficult to draw bright lines between what might be consensual sexual contact over social media and what is harassment, violence, or cyberbullying (Shariff 2014). Ultimately, changes in social media may provide adolescents with many opportunities, but the changes present an ever-growing number of potential challenges. This makes it important to remember that adolescents are acting without any precedential behavior when it comes to technological change (Khemaja and Taamallah 2016), and that adults may not be the best guides to follow.

Partly aided by the rise of digital media, rapid changes in adolescent sexual behaviors and sexual attitudes also present many potential challenges. The influence of problematic social forces on adolescents' sexual socialization begins earlier, and increasingly challenges traditional conceptions of gender, sexuality, and relationships. This occurs because parents pervasively fail to address sexuality forthrightly, and because parents themselves may not be the best role models (see Longmore et al. 2009). Complicating matters are blurred lines between what peer groups will and will not accept. Tolerance of diversity has been viewed as a positive development, but tolerance of deviance from healthy relationships and violent sexual acts can be problematic (Bersamin et al. 2007). Furthermore, increased complications can arise due to the ubiquity of social media and the spread of information.

Rapid changes in value systems and outlooks on life (most specifically, in family and school contexts) also can greatly affect developing adolescents. For example, different peer groups might motivate adolescents either to take more risks or to be more risk averse (Kramer 2000). Parents can want their adolescents either to look backward for values that inspire their behavior or to look forward for ideas and values that help them find their own way through adolescence. In either case, parenting styles can fluctuate depending on adolescents' changing attitudes and behaviors, and that fluctuation itself can become problematic (Bowker and Etkin 2014). Moreover, role models for adolescents can change very quickly, whether in reaction to larger cultural trends or to smaller social trends amplified by technology and peer groups that form younger than ever before. The ease of change makes their

challenges difficult to anticipate. These difficulties complicate efforts to guide adolescents' development and highlight the depth of adolescents' challenges.

Broad technological changes also can affect adolescents' social environments in ways that may be less obvious. Technological changes have contributed to rapid social change, in turn contributing to unprecedented levels of immigration. Changes in immigration patterns in the past decade have been found to have many potential implications for adolescents. Immigration status can have direct effects on adolescents' self-perceptions, as well as their physical and mental health. For example, first-generation immigrant adolescents, compared to any subsequent generation (second generation or later), have been found to self-identify their community and family environment as having negative impacts on their lives; yet they also tend to be more successful and less deviant (see Levesque 2015). Moreover, changes in immigration have the potential to rapidly change the ethnic and immigrant composition of public and private schools. Whether adolescents are attending schools with students who are primarily from the same ethnic background and/or of the same immigrant generational status strongly affects adolescents' sense of self, civic/moral development, and communal bonds (Callahan and Muller 2013; Levesque 2015). Because immigration continues to occur at a swift pace, its issues for adolescents likely will only continue to gain significance.

Changes relating to technology, media, education, personal relationships, and education relate to other important changes. One of the most critical related changes undoubtedly is employment. Employment opportunities reveal how rapid social change creates outcomes that are difficult to anticipate and control. Historically, "adolescence" meant the years of formative skill building needed to develop into mature young adults who were ready to be productive, employable members of society (Howieson et al. 2012). However, changes in family composition, work environments, and financial stressors can halt that development. Some adolescents may need to join their parents and even other siblings in breadwinner roles for their families. Combined with increasingly limited opportunities for adolescents to work outside of the home, or only "low-quality" employment opportunities existing for adolescents with little formal education, this can place adolescents in difficult positions because they are expected to hold employment without having a chance of gaining such employment (Bozick 2009). Adolescence can be the introduction to a lifetime of hardship and insecurity (Johnson and Mollborn 2009). But social change also challenges adolescents with abundant opportunities for formal education, and these challenges can continue beyond adolescent years. The value of formal education for economic stability and professional success has been questioned more than ever. Employment opportunities, and even entire career choices, can come and go quickly, and such potential shifts raise fundamental challenges for all adolescents.

Rapid social change may affect all social groups, but it likely affects them differently. Change likely exacerbates existing group differences. One of the most important markers of group differences has been socioeconomic status. Yet families with adolescents can easily fluctuate in and out of poverty, sometimes very rapidly and unexpectedly (Gitterman et al. 2016). Related to economic challenges that

create group differences are differences based on race and ethnicity. For example, it has long been well known that neighborhoods of primarily low-income, minority families can have much higher rates of injury and early death, cause more stress, and have more environmental toxins than safer, less violent neighborhoods of affluent and/or mixed compositions (Ellen and Glied 2015). And we now know that rural adolescents, especially minority rural adolescents, actually are in communities that fail to support them, as idealized images of rural life are challenged and replaced with sobering realities that adolescents in rural communities can exhibit more preventable harms due to drug use and violence than their peers in what would be considered unacceptably underprivileged urban communities (see Crockett et al. 2016). Yet how to address these difficulties still remains perplexing. Rapid changes in affluence, the contexts in which those changes occur, and the group characteristics of those in such situations likely will continue to raise challenges for wealthy adolescents, those who are poor, and those in between.

Protecting Adolescents' Rights During Social Change: Emerging Themes

Challenges have long emerged, no matter where one looked at how the legal system recognized and protected the rights of adolescents. Despite important steps taken to develop their rights, many challenges went either ignored or not well addressed. Rapid social change now makes some of the long-lasting challenges more pronounced. Yet increased attention and the apparent need for change have not necessarily translated into more appropriate legal developments. Challenges continue.

To highlight the development of adolescents' rights, and what could be done about them, this book focuses on three prominent social domains undergoing rapid social change—media, school, and personal relationships. Those domains serve as exemplars that help to highlight specific opportunities for reform. As with other opportunities to revisit adolescents' rights that present a broad range of possibilities, these domains reveal the need to address at least four related themes.

Adopt More Comprehensive Approaches to Rights

The domains underscore the need to consider more comprehensive views of rights. Rights, especially those in the United States, have been framed as negative rights. Negative rights ask the government to reduce its intrusions in our lives; they protect individuals from governmental actions. Yet adolescents' rights underscore the need to foster positive rights, those that require the government to take affirmative stances to protect such rights as those to health, education, and safety.

In many ways, the focus on positive rights is a radical approach to assuring rights given that the U.S. legal system has been founded on the need to limit governmental intrusions in our lives. Generally, the need for the government to take responsibility to protect individuals' interests occurs when the government takes custody of individuals or takes actions that create special relationships with them (see DeShaney v. Winnebago 1989). But the nature of the government has changed considerably since that conception. The government now does infiltrate people's lives much more, as revealed through educational, child welfare, juvenile justice systems, and criminal justice systems. In fact, the government can play important roles in how religious institutions interact with adolescents, such as through voucher programs for schools and funding social services provided by religious groups (Levesque 2014). Although these systems may not formally take custody of individuals, they do control behavior and create situations in which adolescents have little choice but to be in those systems and abide by their demands. In such instances, it becomes arguable that adolescents should retain rights against governmental intrusions, and arguable that adolescents should have rights to request and expect needed resources and opportunities. Although the leading case in this area recognized no constitutional obligations (see DeShaney v. Winnebago 1989), it did so partly on the rationale that other mechanisms existed to help support affirmative duties. These affirmative duties tend to be ignored as commentators remain transfixed on the Supreme Court's failure to find minimal constitutional support for positive rights.

A more comprehensive approach to rights means that adolescents' rights would be substantively different. The three domains explored in this book reveal the need to ask which of adolescents' liberties are worth protecting. This is an important consideration for at least two reasons. First, the domains reach very broadly and likely affect numerous rights relating to matters as diverse as privacy, health, physical security, education, expression, and economic opportunities. Second, recognizing that some rights are worth protecting, including how important the rights are, serves as the foundational step to protecting rights. The significance of this recognition cannot be overstated. It may seem like an obvious point, but the U.S. legal system still generally adopts a very narrow range of rights worth protecting. Commentators and researchers, then, need to lay a clear foundation that articulates the nature and importance of rights that belong to adolescents.

Move Beyond Competency Approaches to Protecting Rights

Considering the domains of media, school, and personal relationships reveals the need to consider rights that do not necessarily focus on individual competencies and capacities. Some rights belong to individuals regardless of their abilities. The need to protect those rights raises complex questions about how to go about protecting them: What should be protected? What standard should be used to determine the level of protection? Who should decide? How much protection is warranted? How

should adolescents be involved in those decisions? How much influence should adolescents have on the outcomes?

The long list of liberties described in the section above is again illustrative. For example, the right to privacy generally has been developed for adults, but it clearly also relates to adolescents and their healthy development (see Levesque 2016). Manifestations of the right to privacy run across the domains explored in this book. It relates to the right to engage in different types of relationships, the right to control information available to the public, and the right to make personal decisions in the context of different educational institutions. In fact, it is difficult to conceive of social contexts that do not involve these types of liberties. The need to respect these types of liberties raises many complex issues about how to determine when adolescents retain rights regardless of their cognitive and emotional abilities.

At its core, this point highlights procedural concerns—the specific ways that the legal system ensures the protection of recognized rights. Procedurally, rapid social change urges reconsideration of how best to go about protecting adolescents' liberties. Taking seriously the recognition that we are dealing with adolescents' own rights can lead to different approaches. For example, the legal system generally grants adults, particularly parents, authority to make decisions on adolescents' behalf because adolescents are assumed to be in their care and adults are assumed to care for them and have their best interests in mind. Rather than assume that adults, sometimes including parents, will act in adolescents' best interests, a system could require that decisions affecting important rights be made by adults acting as agents. Doing so would mean that they essentially would act as attorneys would with adults for the purposes of protecting their rights. Acting as "agents" of adolescents offers an innovative approach to recognizing adolescents' rights. Agents act on their "principal's" behalf and resist substituting their judgement. This makes for creating quite a different model than the one that seeks to act in adolescents' best interests.

Although the agent model makes for a particularly challenging approach to deploy, it is worth bearing in mind that the current approach, which relies on the best interests of the "child" standard, always has been seen as inherently problematic. Among its many limitations is its ability to limit adolescents' rights in ways that adults would deem unjust if applied to themselves, particularly when it is unclear why adolescents deserve less protection. These actions include unwanted institutionalization, drug treatment, and psychiatric care (see Parham v. J.R. 1979). These types of actions are permissible because of broad limitations on adolescents' rights due to assumptions that adults, including case workers working for the government, act in minors' best interests (see Levesque 2008a). The point is that current visions of adolescents' rights may be well accepted, but that does not always make them right. Accepted wisdom on how to treat adolescents is particularly suspect when dealing with rights that are highly protected for adults but not for adolescents. There are many ways to protect people's rights, even when individuals may be deemed as legally incompetent to exercise their own rights.

Challenge Cherished Legal Rationales

The next theme emerging from rapid social change results from the preceding themes that focus on the substance of rights (the actual liberties deemed worth protecting) and procedural rights (how to go about protecting the liberties deemed worth protecting). Both underscore the need to challenge highly regarded rationales used for analyzing rights. We already have seen examples of this theme, such as challenges to parental rights and the widely accepted best interests of the child standard. But this theme involves more than challenges to substantive and procedural rights. It involves confronting tradition and the complexities that emerge when rights conflict, and charting the values needed to resolve conflicts among cherished rationales for protecting adolescents' rights.

An illustrative example of the need to challenge rationales and chart ways to resolve contradictions is the vexing challenges that come to the fore when protecting adolescents' sexual relationships. Adolescents may be free to engage in sexual activity in consensual peer relationships. In those instances, they are treated as competent adults free to consent to sexual activity. Yet they may not be able to share electronic images of those activities without risking prosecution. Sharing electronic images of adolescents is problematic because, in such cases, the legal system treats adolescents like both children and adults. Like children, adolescents need protection from sharing images and from placing themselves at risk of harm. Like adults, adolescents need to avoid sharing such images of "children", and to help ensure that they do not, they can be punished for their actions that place others at risk. A system that envisions adolescents as both victims and victimizers for the same action likely will remain problematic for adolescents.

The above example helps to make the point that even cherished legal principles and ideals have difficulty accommodating adolescents' needs and realities. This means that exceptions need to be made when protecting adolescents, that what constitutes protection is not always clear. Efforts to protect adolescents from sexualized images illustrate well the problem that arises in efforts that aim to "protect" youth. In addition, the contradictions reveal that the legal system has developed and, equally importantly, that it actually can evolve. Protection can support many legal positions, some of which can conflict with widely accepted legal principles in need of reexamination.

Address Diversity More Forthrightly

For each domain, how people can be differently situated and how those situations need to be considered when protecting their rights must be considered. What constitutes difference, and when difference matters, raises important issues about adolescents' rights and how to recognize them. This concern emerges not only in the context of long-standing concerns about diversity but also in the context of

challenges to the research that fostered reform and that research's ability to guide further developments. This is so because research itself focuses on broad group similarities and differences, and what may be significant empirically may not be significant legally.

No group difference thus far has raised more challenges than those based on racial and ethnic characteristics. Responses continue to evolve as persistent challenges continue and new ones emerge. Regrettably, lessons learned from one context may not translate well to others. Some lessons, for example, contribute to calls for treating groups similarly and including them with other groups, whereas others call for treating groups differently and excluding them from other groups. These responses create challenging situations that are not readily resolved. The lack of resolution comes from controversies about how groups are treated and the extent to which research can be trusted to guide legal responses, as well as what the research actually suggests (Levesque 2015). Importantly, controversies about groups of adolescents mirror controversies about the utility of what we know about adolescents (versus children and adults) and what should be done about what we know.

Controversies regarding what empirical evidence means and how it should be used foster important debates that highlight new challenges facing adolescents' rights: even when evidence may point in some directions, legal principles can pull legal responses in other directions. For researchers who seek to contribute to discussions of adolescents' rights, these challenges arguably are the greatest of all: how to develop useful empirical evidence, and how to develop legal rules that can respond to evidence. Developing evidence and rules can be especially tricky. Considerable uncertainty comes from empirical research identifying important nuances and exceptions, coupled by rapid social change that creates even more exceptions, and a legal system that seeks to ensure stability, consistency, fairness, and justice.

These are important challenges. But they mirror the lesson that adolescents, as a group, challenged how the legal system historically viewed them as children. Now, empirical research reveals that subgroups of adolescents may well need different accommodations. That research may suggest different ways of protecting adolescents as a group, as subgroups, or as individuals. And research's suggestions may lead to unexpected outcomes. But at the very least, it does confirm that broad group differences exist and that it would behoove legal approaches to recognize that something is afoot.

The Chapters Ahead

Rapid social change presents important challenges for adolescents' effective transition to adulthood. Those challenges emerge because adolescents are necessarily affected by their social world, and the fundamental task of adolescence is to learn to

navigate that social world. Social change requires to questioning existing conceptions of adolescents' rights.

In revisiting adolescents' rights, the point is not that current approaches need to be rejected wholesale. Rather, what is needed is a more nuanced approach that determines whether to expand rights, rethinks the potential role of adolescents' legal competency, considers whether to challenge cherished legal principles, and responds to the different needs and social circumstances of differently situated adolescents. To offer useful examples of how developing adolescents' rights means working through these nuances, the chapters examine adolescents' social situations and evaluate the effectiveness of their rights in the three broad social domains undergoing rapid social change—media, school, and personal relationships. The chapters do so with the aim of uncovering the social dynamics of the relevant issues, considering current and alternative visions of adolescents' rights, and charting reasonable ways to protect them.

The first group of chapters examines difficulties in recognizing and protecting the rights of youth in the media. Chapter 2 focuses on adolescents' right to privacy. It reveals how privacy has become a concern given easy access to viewing and distributing media content that could become permanent and outside of the control of adolescent subjects. The chapter reveals how the European Union recently has recognized that people have the right to control their own information, even after the information has become publicly available. That means that individuals essentially have a "right to be forgotten" by erasing their media trail. In the United States, these legal developments generally contradict Constitutionally protected freedoms of expression and the related right to receive ideas. This chapter considers how to balance important Constitutional freedoms and adolescents' right to be "forgotten".

Chapter 3 explores how advancing technology has given youth greater access to media than ever before, allowing media to become pervasive in their lives. Regrettably, that media is not always positive. In fact, for example, research has shown that the sexualization of the media negatively affects youth's sexual attitudes and beliefs, physical and mental health, and sexual behavior. The chapter argues that these effects support the need to protect youth differently than ever before. It notes that the legal system would seem to be a strong ally given that legal systems typically view children as in need of protection and control to avoid negative outcomes. Yet government agencies tasked with regulating the media pervasively have failed to protect children, and that failure rests on deeply cherished Constitutional rights. After reviewing the media's potentially harmful effects and the limitations of legal efforts to address them, this chapter suggests that the government must ensure that youth have greater access to media literacy education that helps them counter the harmful effects of media.

Chapter 4 examines the sexual exploitation of adolescents. It details how online offenders take advantage of the functions provided by social networking sites that allow offenders to exploit adolescents by sampling potential victims and contacting them directly. The chapter investigates both the factors associated with adolescents' vulnerability as well as typologies of offenders. That understanding leads to the

conclusion that, as each victim's experience of sexual solicitation will differ from those of other victims, it is impossible and even harmful to adopt universal legal responses to such cases. The chapter highlights the need for nuanced and flexible responses as it proposes legal reform that considers offender–victim dynamics in addition to preventive measures.

The challenges that emerge in responding to youth's "sexting" are examined in Chap. 5. The chapter reveals that nearly all responses to adolescents' sexting have been rooted in criminal law. These responses range widely, but they often involve using child pornography laws to prosecute minors for sexting. However, punishing teenagers for participating in consensual sexting acts works against the best interest of minors. Laws relating to sexual consent generally permit some form of sexual activity among adolescents, and those laws should be consistent concerning both sexual activity and sexting. More specifically, the author argues that consensual teen sexting cases should be removed from criminal justice systems, and legislatures should enact statutes decriminalizing consensual sexting between minors, and perhaps between a minor and an individual within three years of age of the minor. Doing so would ensure that victims may recover from the harms associated with exploitative sexting, while minors will not be prosecuted for engaging in voluntary sexting with other minors. Instead of criminalizing minors, schools and parents should work together to implement effective sexting education regimes.

The second group of chapters involves adolescents' educational rights. Chapter 6 begins by noting that the "school-to-prison pipeline" phenomenon has become an increasingly popular topic of research in criminology. These analyses focus on the racial biases that affect how disciplinary measures are given in public schools, and the increased probability that a student will end up in the correctional system after being disciplined. Moreover, evidence suggests that minority students are segregated into "slower" classes or special needs groups with broad consistency in public school systems. A combination of recent empirical studies from various disciplines has uncovered another disturbing and consistent trend: economically disadvantaged families are consistently segregated into poorer areas, which consequently confine them into lower quality school districts. Yet these empirical discoveries appear consistently overlooked when new reform policies are created for public schools, both in individual school districts and state wide. Initial empirical findings suggest that homogenous schooling may be a viable solution to the plight faced by minority and economically disadvantaged youth. This chapter examines these issues and charts the feasibility of fostering homogenous schooling.

Chapter 7 explores the frustrating challenges faced by efforts to protect financially disadvantaged students' educational rights. The chapter considers a variety of myths guiding social and legal responses to students and families in poverty, and how those misperceptions have been debunked by research. The chapter then considers how educators and activists are now in a better position to recommend and implement measures that would more appropriately assess and enhance student achievement than the current, widely preferred methods. The chapter ends with several recommendations for minimizing the opportunity gap between

impoverished students and their financially stable peers, culminating in an assessment of necessary legal reforms.

Chapter 8 examines some of the critical issues that emerge with the increasingly popular efforts to privatize schooling by using funds that otherwise would have gone to mainstream public schools. One of the important facts to emerge is that over 80 % of students in private schools attend religiously affiliated schools. Students attend those schools for a variety of reasons, some of which relate to their religious beliefs and others to government assistance to avoid failing schools. As a result, the chapter reveals how tension can arise from conflicts between values of the students, parents, teachers, school administrators, religious organizations, and governments supporting privatization initiatives to enhance public education. These developments reveal the need to decide what role, if any, the government should have in protecting the rights of students within the private schools they voluntarily attend and thereby benefit from public funding. To understand the nature of these issues, this chapter examines, as an example, issues that lesbian, gay, and transgender students may face when they attend Catholic schools. The chapter focuses not only on how courts historically have addressed these issues but also on why and how a new legal approach can better protect the civil rights of youth. As a result, the chapter addresses both the rights of students as well as the responsibility of the government to ensure that private institutions do not use public funds to infringe on civil rights that would otherwise have been recognized and protected.

The last group of chapters focuses on the rights of adolescents in their families and communities. Chapter 9 addresses the increasingly important phenomenon of financially successfully youth. The chapter examines how rapid social change now means that there are now more independently wealthy youth and reveals the need to protect them from financial exploitation. It demonstrates how most states have not enacted any substantial protective laws in this area. A handful of states have addressed this issue, but they have made only minor concessions to the premise that children are not entitled to their earnings. To remedy this oversight, this chapter argues that states should implement legal reforms to address the three major flaws in the current approach: the lack of ownership rights for children under the age of 18, the underinclusiveness of the current laws, and the lack of gradation in financial responsibility. The chapter also examines current research suggesting how some youth demonstrate decision-making skills comparable to adults in situations without significant emotional circumstances—situations not likely to be present when children are making financial decisions. The author argues that, by instituting laws that include all types of employment, not only high-income occupations, granting children over 16 absolute ownership rights to their earnings, and graduating the amount of access to their money, the responsibilities a minor bears by entering the workforce will more closely correspond with the benefits of being in appropriate control of their money.

Chapter 10 analyzes youth's relationship rights to their parents in the context of families with parents deployed by the military. The author notes how unprecedented levels of deployment raise exceedingly difficult issues for youth and their deployed parents. The chapter highlights how research on the impact of military life

and deployment on military children is instrumental in understanding just what is in the best interest of servicemembers' children and how their constitutional rights can best be protected. The chapter suggests that family law courts tasked with determining or modifying child custody and visitation involving servicemember parents should strike a balance between (1) supporting constitutional rights, legislative protections, and expected benefits to the servicemember's country and (2) securing the best interest of their children and their own constitutional rights. The chapter begins by providing a summary of current legal responses and procedures governing the domain of military life and child custody. It then details empirical findings relating to the impact of a "military culture" on children. The chapter concludes with detailed reform proposals and general recommendations to increase legal protections for servicemembers and their children. Among the several innovative suggestions is the proposal to consider the importance of military culture on adolescent development, and how to go about ensuring that the culture is taken seriously when determining how to protect the relationships that youth have with their parents.

Chapter 11 examines yet another prominent, but difficult to address, topic of our rapidly changing times: child trafficking. The chapter begins by noting how human trafficking has become one of the most lucrative, clandestine, and widespread crimes in modern history. It also reveals that, although human trafficking can affect people at any time of life, adolescents are particularly vulnerable. The chapter critiques current local and global legal responses, and suggests new methods to more effectively address this crime. The chapter addresses both sex trafficking and labor trafficking, as they are related but tend to affect different populations and call for different solutions. Effective changes, it is argued, must include partially decriminalizing prostitution and instating a fair-trade type of system for consumer products. Society's compelling interest in the prevention and abolishment of child trafficking, as well as in the treatment of child victims, elicits the need for special legal protections.

Conclusion

Adolescents' rights are a recent invention that continues to develop haphazardly. Surely, the legal system has carved out numerous special accommodations for adolescents' needs, competencies, and social status. That variation may be warranted and may reflect realities in adolescents' development and social lives. But these legal developments sometimes proceed on assumptions that fail to reflect reality. To complicate matters, adolescents' realities are now often difficult to discern, especially given rapid social change. These changes present unprecedented challenges, both in the nature of the challenges and in the number of adolescents they potentially affect. Yet they also present opportunities to take a close look at adolescents' rights and guide their long awaited and much needed development.

By highlighting how the legal system responds to rapid social change, this book reveals a somewhat discouraging conclusion about adolescents' rights: despite groundbreaking developments, adolescents' rights remain difficult to develop beyond archaic rules like those that give parents plenary control over their children. The significance of this difficulty is understandable, given what we now know makes for effective rights. Rights are most effective when they follow general rules that are known, consistent, instructive, and protected. Those descriptions do not characterize current conceptions of adolescents' own, independent rights. Adolescents' rights that have been recognized remain highly nuanced, often unknown, and frequently not protective of adolescents' interests.

The problem that this poses for reform efforts is that more effective adolescents' rights also will be highly nuanced, difficult to make broadly known, and as a result, a challenge to be as protective as hoped. For example, the suggested reforms emerging from each chapter highlight quite different ways to protect adolescents' rights. Some emphasize the need to treat adolescents more like children in need of protection, others urge offering a level of protection more often associated with adults, still others opt for protecting adolescents by treating them like adolescents—neither as children nor as adults. To further complicate matters, some ask for treating all adolescents the same, others ask for treating some groups differently, and still others seek individualized approaches addressing individual developmental needs; and some ask for more governmental intervention, while others rely on the opposite. This variation makes it difficult to argue that there is one, easily recognizable approach to ensuring the rights of adolescents. This needed nuance will continue to make this area of law challenging to develop effectively. The traditional rule that gave parents the power to recognize and control adolescents' rights was much easier to remember, understand, and implement. It also was much easier for the legal system to protect adolescents when it assumed that parents were doing it.

It is difficult to overstate the significance of this conclusion. Legally recognized adolescents' rights inject complexity into the law and require the legal system to make sense of what may appear inconsistent, unfair, and unprincipled when not considering the nature of adolescence. Even the Supreme Court, known for its ability to weave through complex legal doctrine and resolve contradictions, continues to voice concern about the different ways that the realities of adolescent development would have the Court develop adolescents' rights. This concern emerges in every important case affecting adolescents, including their rights related to religion, privacy, education, and involvement in the criminal justice system (see Levesque 2015, 2016). The Court's concern is unsurprising. The Court simply reflects the legal system's preference for clear, generalizable doctrine that does not get mired in minutia, nuances, and empirical controversies.

However, we need not end on a negative note. In fact, the chapters confirm one critical and optimistic conclusion. The most frequently made argument against the need to rethink the rights of adolescents has been the notion that there is really no compelling need to do so. Support for that argument comes from the pervasive belief that current approaches already work well enough for the majority of

adolescents' experiences. However, a deliberate examination of adolescents' rights, like this book exemplifies, supports a different narrative.

Any one of the topics emerging from rapid social change described in this book highlights acute problems and compelling reasons for concern about the rights of adolescents. Together, the topics reveal that no adolescent can escape the challenges posed by rapid social change, and that all adolescents will need some of the rights being proposed by the analyses developed throughout the book. It is worth recalling that social change led to the "invention" of adolescence in the early 1900s as well as to the emergence of their most important civil rights in the 1950s and 1960s. The type of social ferment that contributed to earlier developments in the social construction of adolescence appears to be returning as society faces new challenges that come with rapid social change. These challenges underscore the need to rethink what it means to be an adolescent, why adolescents should be protected, how best to achieve that protection, and in doing so, what rights adolescents deserve.

Acknowledgments I would like to acknowledge the assistance of Jordan Lenchitz who helped locate and summarized recent studies on rapid social change.

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Part II
Media

Chapter 2
Protecting Youth from Themselves in the Media: The Right to Be Forgotten

Sun Ho Kim

Introduction

Developments in telecommunication technologies and the Internet have led to the accumulation of a tremendous amount of information on the Internet. It has allowed people to easily find information on the Internet, meaning that it brought all the information to public. People have more information about themselves that are publicly available on the Internet than they probably like it to be. Some information might be considered unimportant, such as high school yearbook picture, while others could be quite important, such as a video clip of and individual engaging in sexual activity. What makes the public nature of available information potentially concerning is that, while some information and contents were posted by individuals themselves, much content is either posted or reposted by someone else, disregarding the knowledge or the approval by the concerned person.

Youth have become a group most affected by publicly available online information. Youth tend to use the Internet and online space to its maximum. They not only may use any information available online to their advantage but they also may contribute to it, meaning that they upload contents and information online. Once uploaded, information become publicly available information, which can then be searched for, viewed, downloaded, and duplicated elsewhere. Yet, youth often fail to consider such outcomes when they post information online. By the time that they regret having posted it and try to retract it, they may realize that a copy of it is still out there and there is not much they can do about it, even without their original post. Moreover, when youth find out that someone they considered close—either a friend or an ex—had uploaded some humiliating image, for example, they would easily feel a sense of betrayal that the contents were posted without their knowledge. Some youth may find it difficult to deal with the embarrassment they feel or

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R.J.R. Levesque (ed.), *Adolescents, Rapid Social Change, and the Law*,
Advancing Responsible Adolescent Development,
DOI 10.1007/978-3-319-41535-2_2

with the mockery they receive by other people, which may lead to extreme measures.

Although information available online are the same regardless of the region, the United States and European Union treat it differently. Currently, online information and contents are protected by the freedom of expression or freedom of press based on the First Amendment to the U.S. Constitution. On the other hand, the European Commission has recently proposed a regulation and a directive to enhance protection of the so-called "right to be forgotten." This protection has its roots in the right to oblivion found in French law, which allows people to request the erasure of their information that they consider are no longer relevant to themselves. Both responses to online content are meant to protect people and their rights, and they sometimes collide with each other. However, as much as it is easy to recognize and protect the freedom to express, it is also easy not to realize the pain someone experiences when certain information about them can taunt them for the rest of their lives. The vast amount of information and content on people that is posted and stored online make it time to think about opening a possibility to retract private information and contents that have been released to public and placing it back in individuals' private domain when they request it.

It seems necessary to seek some insight into what the European Commission's proposal contains and attempt to find a link that could, at least, raise a discussion about whether similar legislation could be considered in the U.S., especially for youth. There have already been some limited efforts in the U.S. to protect youth and their personal information online from exploitation by companies. Despite receiving some criticisms, these efforts provide a good starting point about protecting youth in online settings. Youth's experiences may reveal the time to expand active state intervention to protect youth from physical harm to psychological and mental harm that stem from the use and abuse of publicly available information youth wish to keep private.

Dealing with Information: Pre-Internet and Post-Internet

There is an abundance of information available on the Internet and there seems to be no limit on how much more it can accumulate. This means that anyone looking up a keyword on search engines, such as Google will find hundreds, thousands, or more results relevant to that word, scattered throughout numerous websites and servers. The same goes for a search on someone's name. For example, a Google search of the name *G. R.* (abbreviated for the privacy of individual) presents about 15,300 results. Included in the extensive search results is a video clip on YouTube that was uploaded in March, 2008 with about 43,000 views and 60 comments. This can be a good thing for *G. R.*, if he is serious about earning fame; however, he might not enjoy the 15,000 views resulting from simply typing in his name in Google. It turned out to be the latter for him. Apparently, more than 10 years ago, he had produced a video recording of himself mimicking Darth Maul using golf ball

retriever as the lightsaber. The videotape was later found by one of the schoolmates, distributed among others, and eventually ended up getting on the Internet. Consequently, he had to drop out of school and spend some time at a psychiatric ward due to cyber-bullying before he finally moved on to law school (Wei 2010).

Before there was Internet, personal information—whether it be demographic information, such as an address, contact information, and even Social Security Number or contents produced by individual, such as photos and videos—were generally within arm's reach of the individual. When disclosed to someone else for any purpose, people would trust that the intended recipient of that information would be the sole audience of the information. Even when it was to be shared with others, the actual audience was still limited to whomever the original recipient was physically able to share it with. And generally, anyone who has seen some information is likely to forget it with time—either they will forget the exact content of what they have seen or the fact that they have seen it at all. People were under the privilege of forgotten facts when they relied on their physical brain and their ability to remember (Korenhof et al. 2014).

With the Internet, actual audiences of contents revealed online is not limited to the originally intended people. People can easily repost the content or move it to another place for others to view, possibly expanding the audience to unspecified individuals. Unlike the human brain, the Internet and servers do not forget. When something is posted on a website, it gets stored on the server for the website. It will also get added to the list of results when a keyword for that content is typed into any search engines. Any time a person types in the correct keyword for the content, it will be pulled up from the server to the search engine results. Hence, once information gets posted online, it becomes "remembered-by-default" (Korenhof et al. 2014, p. 7). This process allows easy access of information to those who can search for the correct set of keywords. *G. R.* may be one of many people who have become famous over the Internet without any intention and expectation to be so. Yet, that is what happened and the nickname attached to the video has certainly helped. Without the Internet, he would have still been ridiculed and shamed by schoolmates, but it would not have expanded to the world outside of his neighborhood.

As was the case for *G. R.*, embarrassing content made public can be very detrimental—particularly to youth. Social networking is an important part of everyday life for youth today since it is the main method of communication among each other. Even when they are in close proximity to each other, youth will communicate through social network services (SNS) by posting pictures that they took or something they saw on the Internet that was interesting and sending instant messages. They are more comfortable with sharing contents on their SNS as well as looking at and responding to contents shared by their friends. They are also comfortable at switching between different mindsets when they come across any online contents—between the "what's theirs is theirs" mindset and the free-for-all mindset (James 2014). When the content contains some kind of legal or penal aspect, youth would easily pick up the what's theirs is theirs mindset. They are quickly able to recognize a possible punishment onto themselves for not properly

handling the content. The free-for-all mindset is triggered for content that are meant for entertainment purposes. There is nothing at stake for them when they use it in other ways than just viewing it. They not only switch between these mindsets for contents that they come across the Internet, but they also expect others to extend similar courtesies to them for contents that they post. The problem arises when peers think less seriously about the confidentiality of the content that a youth posted and share it with others when she or he meant it to be kept within the limited audience. When that trust is broken, especially when the content is something that is humiliating, youth are not able to consider carefully how to deal with the situation and how to avoid drastic consequences.

So, particularly with youth, the inability to have control over their own personal information and content is quite important. Just because some information is shared as an online file instead of a hard copy offline, the information should not be treated differently. Also, when one has the right to move their personal information to a public domain, they should also have the right to do the opposite—to restrict information of themselves that has been made public, including making it private again (Ambrose 2013). And youth, whose "reasoning about real-life problem is often not as advanced" (Steinberg 2005, p. 72), are bound to post something online that they would eventually regret. Hence, the right to be forgotten that is currently extensively discussed in the European Union is to grant the right to give a chance for people to remove their own disclosed information from the public and make it private again.

Youth and the Media

What Is the Media for Youth?

Youth generally tend to be more adept with technology than their older counterparts. They can quickly and easily learn to use new technology and can perform better than adults on technologically advanced tasks (Davies and Eynon 2013). Youth today grow up having media devices (i.e., computers, smartphones, software, applications, and the Internet) at hand, whereas adults usually learn how to use them only when they find the need for them. Adults who are in professions that involve frequently writing reports have learned to use a word processing software like Microsoft Word, while those who handle mostly numbers would have learned software like Microsoft Excel. In contrast, youth growing up today most likely already know how to use both softwares. Still, caution should be used when asserting that *all* youth have the innate ability to use technology just because they grew up having them available. They, too, go through some kind of a stepwise expansion on how they utilize the media based on their needs. It apparently feels almost natural for them to engage in more various online activities than it does for the adults.

As youth gain experience using the Internet as they age, they expand their online activities widely (Livingstone and Helsper 2007). Initially, their experiences with technology may start with playing games, receiving and/or sending an email, or, as many parents and teachers might hope, researching for schoolwork. For such activities, they will need to be connected online, yet it is not necessary to interact with another person; they only need to have access to the content that is available online. From these mostly isolated activities, they easily begin to expand their activities to those that involve interactions with people. This would include interacting with both people who are already in their social networks and new people. And furthermore, they expand the scope of their online activities to the point where they start to contribute to online content rather than simply consuming it (Davies and Eynon 2013). That is, they post their opinions and their knowledge on discussion boards and share their contents online. Jenkins et al. (2009) call this a "participatory culture," where there are

1. relatively low barriers to artistic expression and civic engagement,
2. strong support for creating and sharing creations with others,
3. some type of informal mentorship whereby what is known by the most experienced is passed along to novice,
4. members who believe that their contributions matter, and
5. members who feel some degree of social connection with one another (Jenkins et al. 2009, pp. 5–6).

Nonetheless, technologies, such as laptops, tablets, and smartphones allow youth subsumed under the participatory culture to perform many of their everyday tasks online: anything from studying and working to socializing with those within their networks and even to simply have fun (Davies and Eynon 2013). Youth are constantly connected to the Internet so that they can easily consume and/or contribute to the abundant online content and manage existing and new interpersonal relationships.

Tool for work. Soon after computers emerged and became widespread, learning to use one has been part of formal education. It is now common for students of different educational levels to do a search on the Internet and to type their work by using word processing software instead of picking up a physical book and writing by hand. And students reach levels of proficiency very quickly, knowing that their academic success is associated with these skills. Less commonly, some may need to learn software meant to perform some highly advanced tasks for certain professions. In this case, however, it is most likely that their personally owned media are not equipped with such software. So, they have no choice other than to rely on schools for access to such software and the training to use them. For the majority of youth, however, the use of media for school work (i.e., web search and producing reports), in general, may seem redundant. When schools keep focusing on teaching common media skills, it is easy for youth to feel that their school merely teaches either what they already know or what they could easily learn on their own (Davies

and Eynon 2013). When this continues, the role of media shifts toward leisure and personal use and away from work for school.

The role of technologies as tools for work (or learning) also diminishes because of the way some teachers view technologies (especially portable devices such as smartphones and tablets) being used in class. Teachers often see these devices more as a distraction from learning because of the many functions of these media that are not geared toward learning. Yet, youth, being very adept with media, are using these devices for both learning and leisure purposes, often switching constantly between the two. Davies and Eynon (2013, p. 29) call them "constructive multi-tasking" and "distractive multi-tasking," respectively. Adults tend to see more of distractive multi-tasking occur, which is why they often form a negative view of youth's use of media. However, youth view these devices as a potential for learning, just not in formal education settings. Being more actively involved in participatory cultures, youth hope that their teachers and schools will take more proactive measures in using these informal learning settings into their formal education (Davies and Eynon 2013). For example, using online forums can produce more elaborate discussions, taking discussions to online forums dedicated for classes to allow students to have more chances to say what they know and what they feel about topics. They could perform online research to find points to argue for or against while they are connected to the Internet, which could broaden the discussion further. However, as this kind of use has yet to take place in schools, the primary use of the media by youth is mostly toward engaging in participatory cultures with their friends and exploring the larger world on their own.

Tool to Stay Connected. The most common use of the media for youth is to stay connected with their friends. It is very important for youth to maintain connections with peers even when they are not in the same space as it constantly reinforces their relationship. There are multiple ways of doing this: talk on the phone, communicate by text and instant messages, and post comments and contents on SNS. Talking on the phone is the most typical use of a mobile phone, as it allows quick communication with others. However, it limits the person from performing multiple tasks at the same time and simultaneous communication with multiple others is also not possible. This may be the reason for youth who are multi-taskers to refrain from spending too much time talking on the phone. Davies and Eynon (2013) found that older youth, who are likely to be also more experienced with the media, tend to be a more constructive multi-taskers than their younger counterparts. So, talking on the phone may not be the generally preferable way for youth to communicate with friends as they get older and accumulate experience using the media.

In contrast, instant messages, such as Snapchat or Facebook message, is the alternative method of communication that resolves the limitation of phone calls (Subrahmanyam et al. 2006). An advantage of instant messages over direct phone calls is that a single person is able to engage in multiple communications with different individuals/groups varying across from gossips about celebrities to school activities. One can choose to communicate one-on-one with a friend or add other friends into the conversations to make it a group conversation. Yet, the instant

message communication is a relatively private one that is kept among the participants of the conversation. Still, there are several routes through which the private conversation can get revealed outside of the participants, as much as any communication types. However, the conversation is written in words and it may work as an evidence of what was said, whereas a phone conversation will be hearsay unless someone intentionally recorded the conversation.

Another popular way for youth to stay connected is via SNS such as Facebook, Twitter, and Instagram. Social network services are a more public, relaxed atmosphere where people can view and leave posts and/or comments. These posts can be open for view by either only those who are within the network or by the general public. And no one is expected to respond to posts immediately, as it is with instant messages. According to Davies (2012), youth simply having an account on SNS itself is a statement of their own identity, and the contents (i.e., profile, "friends list," and posts) are the narratives about how they would like others to see them as. Profile is an introduction page where youth can express who they perceive themselves as (Boyd 2007). Users can use texts (e.g., stating their personal information or a phrase they like), images, and videos to create their profiles. When they get connected to another individual as friends, they will be placed onto the "friends list" where the image selected is used to represent them on that list. The "friends list" represents the user's sociability (Boyd 2007; Davies 2012). Users who prefer to keep a tighter network with only those that they consider real friends (often, friends from real life) are likely to have their profiles visible to friends only and maintain a smaller friends list. In contrast, some users may want to widen their network with anyone who also is willing to do the same. These users can have their profiles publicly visible and accept anyone into their friends list and even actively request others to accept them. Once connected, these new "friends" have gained the authority to view and reply to posts. Any posts and contents posted in SNS are potentially vulnerable to be made public and the sense of privacy becomes weak. Even though most SNS platforms allow users the power to set their privacy settings, the contents are not entirely under the control of the users once posted. Anyone who is given the permission to view the contents can also capture, store, and share them. So it is possible for the concerns of this chapter to arise. The ability to reproduce any content into multiple copies makes users vulnerable as they do not retain the sole control over their own contents.

Tool to Explore. Another popular way for youth to use the media is to attempt to explore what is outside their daily life routines. They could always try to learn and understand about something by the means of a search—such as history, regions, current news, celebrities, or famous people, and tour attractions. They could also attempt to explore the world by meeting new people. As discussed earlier, youth use social networking for this purpose. However, there are other outlets more widely used, one of them in particular being online chat rooms. Public chat rooms are a great venue for youth to meet and make new friends and, during the process, to explore their own selves (Subrahmanyam et al. 2006). Subrahmanyam et al. (2006) found that younger youth are generally more interested in exploring their

identity whereas older youth have moved past identity issues and are more interested in sexual issues.

There are a wide variety of chat rooms that exist in the Internet. Some chat rooms are pure text chat rooms while others allow video chat, some connect only two users at a time while others place multiple users into a single room, some connect people randomly while others connect users based on their preferences, such as gender and age, and some chat rooms are free while others are available for a fee. For youth, one factor that may factor into deciding which venue to use might be the fee, preferring ones that are available free. However, these venues tend to lack supervision by the provider (Subrahmanyam et al. 2006). This may be an added benefit for some youth, especially, when their intention is to explore things of a sexual nature. And youth rarely engage in chats under parental or guardian supervision. Therefore, in the process of exploring through chat rooms, they are mostly free from supervision and vulnerable to potential harm from strangers they interact with. Unfortunately, these free yet vulnerable sites are where youth with different intentions often interact. Those who visit the site because of its lack of fee are ambushed with sexually explicit pass made by people who came for the lack of supervision, with the intention to explore sexual themes. When taking age and gender into account, more harm is likely to occur among young female youth (Subrahmanyam et al. 2006).

Issues from Using the Media

One of the most critical issues for youth, in general, is figuring out their identity and sexuality. Adolescence is a period of life, during which people are not afraid to take risks. Current technology opens up more opportunities for people to take even more risks (Staksrud 2013). For youth, more risks are involved when they go online to explore identity and sexuality than in real life. The reason for this lies in the characteristics of an online communication—it lacks visual and auditory cues, it is anonymous, and it occurs in space that can be kept exclusive to online settings (Davies and Eynon 2013; Valkenburg et al. 2005). Online communications leave out what Mehrabian (1972, pp. 1–2) refers to as "nonverbal behavior" or "implicit communication behavior." Nonverbal behaviors include facial and vocal expressions, hand gestures, posture and position, and movement and implicit aspects of verbalization (such as length of communication, smile, frown, and head nods). Instead of these nonverbal behaviors, Internet users use graphic contents to substitute the visual and audio cues and represent their condition and feelings. Without these nonverbal behaviors, a conversation is easy to be miscommunicated, resulting in misunderstandings. So, the Internet provides means in which youth get to fulfill their curiosity in ways that satisfy them, but with heightened risks.

Experiment with Identity. While people may have only one self, they can have several identities that vary depending on who they interact with at the time (Valkenburg et al. 2005). Youth today can interact and be friends with a wide range

of people, from those who grew up together in the neighborhood to those they only know by usernames or nicknames at a website. They could display one identity to their already formed peers—through instant messages and SNS—while they try something different toward slightly more distant peers and strangers—through chat rooms. And when interacting with family members at home (such as their siblings and especially with their parents), they will display yet another identity.

Identity experimentation on the Internet (i.e., on SNS and chat rooms) begins with how users construct their profiles and continues throughout interacting with others. People are prompted to construct a profile when they sign up for the website. Before meeting anyone, one would have to think how they want to be perceived by other users. In this process, an experiment of their identity has begun. Consider, a male youth who wants to meet and make new female friends online. To set up an account in a public chat room, he would put up information of himself that he is comfortable revealing to others (i.e., age, sex, location, schools attending, etc.). Then, he will consider what photo to use—for example, a full-length portrait of himself fully suited up, a picture of himself at a beach party holding a red plastic cup, or a picture of him sitting in the driver's seat of an exotic convertible car. Alternatively, he can choose to use a picture that is not of himself—such as his prized possession or something of interest. Each of these pictures can give a very different impression to audiences. Some people may find the first picture more appealing while other people will be attracted more to the second or the third picture. So, an attempt to play with identity emerges when trying to appeal to certain type of audiences.

The Internet, in particular, allows youth to meet random people who they could potentially build a strong relationship with. When youth go online to meet new people, they may have formed an idea about who they would like to meet: someone who is similar in age or someone older/younger; someone who is opposite/same gender; someone who is from a near location or someone from a place they have never been to; and type of interest. To establish whether the other person is of interest, users commonly determine from the nicknames and/or ask for their "a/s/l (age/sex/location) chat code" (Subrahmanyam et al. 2006, p. 396). As such, these types of information that are critical in forming first impressions, which could lead to subsequent interactions, are often the self-professed ones. And youth are more likely to take a different approach toward strangers than they would toward their school friends, where there is more liability against their reputation going bad among others.

Sexual Exploration. The Internet has become the most popular venue for youth to explore sex. Smahel (2003, as cited by Subrahmanyam et al. 2006) found that the Internet was the place where five out of 15 youth had experienced their first sexual experience. There are probably many ways for youth to explore sexuality on the Internet, from something as simple as watching pornography to something that is more direct such as soliciting someone for sexual conduct.

One commonly used method to explore—as discussed earlier—is to chat with unknown people in online chat room sites. One of the most common way to imply their intention of sexual exploration, according to Subrahmanyam et al. (2006), is to use a sexualized username. Usernames can be any word or nonword and it can be

utilized to display who they are and what their interests are. Sexualized usernames can be used for different reasons from boasting about their physical attractiveness to expressing their sexual identity. As such, usernames may act as a filter—warning against users who are uncomfortable to keep away and inviting those who have similar interests.

For youth who are interested in exploring sexuality but are uncomfortable with a sexualized name tagged to themselves may rather simply make blunt sexual remarks to others for response instead. An analysis conducted on 38 chat sessions over a two-month period—in both monitored and unmonitored chat room sites—revealed that there was about one sexual remark for each minute of chat conversation (Subrahmanyam et al. 2006). In addition, the frequency of implicit sexual remarks was not that different between monitored and unmonitored chatting sites; however, explicit sexual remarks were made twice as much in unmonitored sites compared to monitored ones, along with more frequent obscene utterances and bad languages. Given that more youth tend to prefer visiting unmonitored chatting sites (for reasons discussed earlier), more youth are likely to be exposed unexpectedly to these remarks and utterances. Some may feel disgusted and leave immediately, while others may feel coerced to stay and engage in longer conversations. It is in the latter case where youth can easily be compelled to reveal more of themselves, leading up to nude images, and to fall victim to crimes such as sexual harassment.

Problems with the Media

As discussed above, the media is a great way for youth to connect with others—both previously known and unknown people. However, both types of interactions contain potential harm to the individual. In the case of the more exploratory use of media (e.g., chat rooms), one is often blind to the real intention of the person at the other end. And youth could easily become victimized by verbal abuse and cybercrime at the site. Or a conversation could lead up to an offline meeting, where they could be victims of other crimes. In the case of using the media to reinforce the relationship (e.g., SNS and instant messages), one may have said or posted something that they regret later but cannot retract. In situations involving the latter case, correcting for mistakes is not as easy as one might think.

People often tend to think that there exists certain privacy for different online communications, whether the audience is only a handful of specified people (as in instant messages) or a larger group of people (as in SNS). The expectation is that what has been said and posted stays within the group. However, the (perceived) privacy is only guaranteed as long as all the participants agree to keep them private (James 2014). Unlike a conversation between two people or an object like a picture handed to someone, online posts or comments are semi-permanent and they can be easily reproduced for distribution. Anyone can copy-save or take screenshots of an online content for multiple purposes. Digitalized images, in general, can cause problems when distributed through the Internet faster than people had imagined.

For any reason, people can and do reproduce digitalized contents. And one of many purposes is to share it with others. The moment any digital content is reproduced, the original owner loses control over the content and this may lead to some devastating consequences (e.g., "sextortion" and loss of a professional job).

Another issue with the youth's use of media is in the relationship between youth and their parents. Parents play a critical role in introducing the media to the youth (Davies and Eynon 2013). Youth today begin to be exposed to the media at home at an early age when parents use them to control their behavior. Some parents may limit the amount and the ways their children use the media while other parents will allow their children to use them as long as they are not causing trouble. The attitude of the parents likely shapes the way that youth perceive the media. Yet, no matter what orientations they have about the media, youth eventually end up being more experienced with technology and the media than their parents (Subrahmanyam and Greenfield 2008). When youth reach this level of adeptness in technology, it becomes difficult for parents to recognize and to intervene when their children are at risk during online activities.

Parents today are more aware of the environment that their children experience on the Internet but, nonetheless, they are at a disadvantage in keeping up with the fast-paced change of the media. So, even if the parents constantly try to assert control over their children's online activities, youth are more successful in averting these supervisions. A good example of averting parental supervision is in the use of acronyms. Acronyms such as "lol" (meaning, "laughing out loud') and "rofl" (meaning, "rolling on floor laughing") are now used extensively—not only by youth but also by adults. On the other hand, there are more acronyms created and used than one can fathom. Acronyms such as "iwsn," which stands for "I want sex now" and "pir," meaning "parents in room" are ones that youth currently use that they would not want their parents to know of (Wallace 2014). Youth's having ways to keep certain online activities under the radar of their parents might give them thrill and excitement, but they are putting themselves in harm's way, which could have been avoided had their parents been able to provide proper guidance.

The Right to Be Forgotten and the Right to Privacy

For the majority of audiences in the U.S., the right to be forgotten might be an unfamiliar term. What does it mean for one to have the right to be "forgotten?" As will be reviewed later, it is basically the right of individuals to hold control over their personal information on the Internet—to remove any of their own information from public's view. Then one might ask, "Is that necessary? Would it not violate the freedom of expression from the First Amendment?" However, there is also the right to privacy, which is often not emphasized as much as the freedom of expression; yet it is widely accepted by many states and courts throughout the nation. The idea of people having the right to privacy is often neglected because it has always been the default that any personal matter was a private issue and only the things needed to be

known by the public was made public by someone expressing it. And although the two—freedom of expression and the right to privacy—seem to contradict and collide with each other, they protect two different rights, both of which should be enjoyed by any person. It does not have to be that one must to be relinquished in order to protect the other. It may be simple to consider the right to be forgotten as a way of expressing the right to privacy. And it may be particularly useful in the context of the Internet and online information.

The Right to Be Forgotten in EU

The discussion of the right to be forgotten was triggered with a court case that was brought to the Court of Justice of the European Union (CJEU). It was case number C-131/12, which is discussed later. Even before that case, however, the EU already had legal grounds for individuals to ask for "controllers" [or "the natural or legal person, public authority, agency … which … *determines the purposes and means of the processing of personal data*" (Article 2 (d) of Directive 95/46)] to erase incomplete or inaccurate information they hold, under Article 12 of Directive 95/46, entitled "Right of Access" section (b). However, the 2012 CJEU decision developed a proposal for the right to erasure of personal information as its own article. This proposal requires that any company holding any personal information and that has received a request for an individual's data to be erased must comply with that request. The proposal is yet to be enacted in EU, but when (and if) it passes, it will have massive impact on not only European citizens and companies but also on any company that operates (i.e., accumulates, stores, and uses personal information) in EU. Therefore, this right is something that needs to be on par disregarding the geographic location. It cannot be acknowledged in one part of the world while it is not at another for it will confuse the companies that operate globally, people in different regions will be afforded different rights, and the companies could be deemed as violated the right.

Immediately following the results of the case, the European Commissioner for Justice announced a proposal for a regulation and a directive on privacy rights that allows one to request erasure of their personal information. This proposal is an expansion of the EU General Data Protection Act in Article 12 (b) of the Directive 95/46/EC of 1995. The root of the right to be forgotten can be found in the general right to privacy from the French law—the right to oblivion (*le droit à l'oubli*). The right to oblivion allows any person that has been convicted of a crime and has been rehabilitated to be able to "object to the publication of the facts of his conviction and incarceration" (Rosen 2012, p. 88). The right may be complex in practice, but in theory it is quite simple. It recognizes that people can change. That recognition results in the right to oblivion that allows for any past information that is not currently relevant to the individual to be erased so that it does not keep reminding them of their past.

The Right to Privacy in the U.S.

Discussion about importing the right to be forgotten into the U.S. points to its relationship against the freedom of expression (Ambrose 2013; Bennett 2012; Korenhof et al. 2014). In the U.S., freedom of expression is considered as one of the highest valued rights of citizens, with it being stated in the First Amendment to the U.S. Constitution. When people are given the power to have their information (such as "the facts of his conviction and incarceration") be removed for reasons of privacy, it is thought to go against the right to express, especially for the media or anyone who has access to such information and wants to use it to express their thoughts. Moreover, the argument is that the Constitution does not recognize any right to protect individual information or, more broadly, to protect individual privacy that is equivalent to EU's right to oblivion. Therefore, it is hard to take the right to privacy to have similar importance as the right to express on face value. However, the need for protecting individual privacy had been discussed for quite some time in the U.S., first initiated by an article published in the Harvard Law Review in the late nineteenth century.

With a straightforward title, *The right to privacy*, Warren and Brandeis (1890) raised a concern that there is a potential danger to individual and their personal information to be publicly exposed by the abuse of photographs and news publications. They saw photographs and newspapers as tools that could potentially be used to invade the privacy of individual, or using Judge Cooley's term, "the more general right of the individual to be left alone" (Warren and Brandeis 1890, p. 205). They saw the protection of any type of content made and distributed (e.g., any publication that are afforded copyright) as part of the larger protection of individuals against the world. So, their argument was that, if one is able to defend his work of expression, one should also be able to defend his own face against being made into a photo and being released by photographers and news media without his consent. Since the publication of this article, the courts around the nation had faced cases of individuals arguing for their right to privacy. With no legislation protecting such right, courts went back and forth between accepting the right or not. Eventually, state legislatures enacted statutes protecting the right to privacy (see Prosser 1960).

Four Types of Invasion of Privacy. With states enacting statutes on privacy and cases accumulating in courts, Prosser (1960) identified four kinds of invasions that comprise the protection of privacy:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

The first type of privacy invasion is intrusion. Intrusion is made against something entitled to be private. When first considered, intrusion started with physical intrusion such as trespassing into home and going through someone's bags. Soon, it

expanded beyond that to eavesdropping onto other's conversations by using wire taps and peeping through windows. So, intrusion cannot be argued for on anything public such as public space. The second invasion of privacy, public disclosure, occurs when a matter that is private in nature is disclosed to public. This restricts the disclosure to public ones and not private ones, meaning it is not a public disclosure if something is disclosed only to certain individuals or small group of people. Also, the disclosed matters must be private facts; hence, any information that is already public information—even if not necessarily accessed regularly by the general public—is not subject to the invasion of privacy by public disclosure. Next invasion of privacy involves false light in the public eye. This is when photography, name, or any information of an individual is used for false reasons. A typical example is fictitious testimonial in advertisements and the use of name and photograph in public gallery of convicted criminal. A problem that is common with false light in the public eye—also with disclosure of private matters—is that the subject of protection is objectionable by reasonable man, meaning that those who are sensitive about their privacy and self-preservation will not be protected. Finally, the last invasion of privacy involves appropriation of someone's information for the benefit of the appropriator. When certain names are used for creative works such as novels and comic strips, the fact that one's name is used there does not qualify to be considered an appropriation. There must be some indication that the name in the creation is used specifically because of that individual. Another factor to consider for appropriation is whether the author has appropriated the information for his/her own benefit.

An important note to add about invasion of privacy is consenting to invasion of privacy. Consent to invasion of privacy, according to Prosser (1960), could be given in one of two ways: as a contract-based consent or as a gratuitous consent. The fact that consent is given and the specific range of that consent are fairly straightforward for contract-based consents. When the consent is agreed by contract, that consent is irrevocable, whereas consent is ineffective for any invasion that goes beyond the contract. On the contrary, nothing is quite clear for gratuitous consents. Gratuitous consent is not always given explicitly as someone saying they approve the invasion; it could be implied by behaviors or by not stating disapproval. For instance, if someone attempts to take a picture with a smartphone, seemingly posing for the picture or simply ignoring the picture-taking behavior could both mean that they approve of having their picture taken. Since gratuitous consent is often not given in writing, it is easy for individuals to revoke it before any actual invasion has been completed.

Against Freedom of Expression. When the freedom of expression and the right to privacy is concerned, it often ends up being a compromise between the two (Prosser 1960). Generally, in the U.S., the right to know and public interest is heavily weighted against privacy and personal harm. The right to express, especially for the media, is greatly protected by the First Amendment that it places a heavy burden on the states and the courts in attempting to restrict any information that is meant to be used for expression. The limited instances when restriction is made against expressing are often limited to things that are undeserving of protection—such as

obscene materials and child pornography, threatening and fighting words, incitement, and fraud (Ambrose 2013). However, the U.S. Supreme Court has put a halt on abusing Freedom of Information Act to gain information from government agencies that are otherwise difficult to acquire [e.g., *U.S. DOJ v. Reporters Comm. for Free Press* (1989)]. The Court has ruled that not all information that has been complied by the government is subject to Freedom of Information Act, because if the information was truly freely accessible, then anyone who wishes to view it would not have to invoke the Freedom of Information Act in the first place.

One factor often considered for weighing between the freedom of expression and the right to privacy is time (Ambrose 2013; Korenhof et al. 2014). When information is constantly accumulated, as Internet "records everything and forgets nothing" (Rosen 2012, p. 89), information on a subject (e.g., a person) may contradict itself at some point—often new information contradicting with old information. For instance, a person may have been a delinquent who was always in trouble with the law enforcement, but he eventually ages out to be a conforming citizen of society. He may have some arrest records or complaint formally submitted as a juvenile, while he has been volunteering to help out troubled teenagers. He is the same person, but he has changed his thoughts and behaviors over time. The problem with the accumulation of information is that someone can retrieve outdated information (as a delinquent juvenile) from somewhere to use it with malicious intent. Public figures, such as politician or celebrity, are often the victim of these types of harassment from tabloids—and sometimes haters—digging such information to discredit them. Then, it may be in the best interest of the potential victim—even possibly in the interest of the public—to allow them to request an erasure of past private information that is no longer relevant to them.

We have seen that when these harassments occur to juveniles, it sometimes can have dramatic consequences, such as its leading victims to suicide. As mentioned earlier, juveniles use SNS as one of the main tools to communicate with their friends—even with those that they meet in person at school on a regular basis. They will often post pictures, leave comments to friends' posts, and so will their friends. The content that gets posted is not always pleasant; sometimes embarrassing content will be posted for amusement among friends. However, a problem arises when this content is abused for harassment or bullying, like in the case of G.R. (see above). Then that juvenile is left on his or her own to endure embarrassing content open to anyone online. The audience of such content is not limited to friends and peers; it can and will expand to others such as university administrators and HR personnel where these people will apply for as they live their lives. When these administrators and personnel do simple searches or look up SNS to learn more about applicants, they will likely form some opinion about them that may or may not work in the best interest of the applicants. Or one could already have started a career when the embarrassing contents are discovered or revealed, similar to the local television anchor who had resigned from the position because of her wet t-shirt contest photo and video that were published and spread on the Internet (ABC 2004). For the anchor, the content was fairly new—she participated in the contest

1 year before the revelation. But should it have the same impact on someone's reputation if such even took place 10 years ago or 20, for instance, while she was a freshman in college?

Courts' Responses on Privacy Matters from the EU and U.S.

As discussed above, protecting individuals' personal information in the EU was first put into legislation in 1995 for the purpose of protecting online personal information (i.e., Data Protection Directive). However, a case that had been referred to the Courts of Justice of European Union in 2010 and ruled in 2012 had triggered the need to update the Directive to match the current digital age. Reviewing this case is important to understand what the main issue was and why it became the cornerstone for the proposed statute. The discussion then leads to an analysis of the U.S. counterpart, of how the U.S. Supreme Court decided key cases regarding informational privacy even before the digital age.

In Europe

In 2010, a resident in Spain filed a complaint against La Vanguardia Ediciones SL (La Vanguardia), a newspaper company that operates largely in Spain, and against Google Spain when he learned that a Google search with his name reveals two La Vanguardia articles from January and March 1998. In both articles, his name is mentioned in an announcement of a real-estate auction to recover social security debt. The complainant argued that such incident had occurred long ago and that it was no longer relevant, requesting the removal or concealment of those pages against La Vanguardia and the removal or conceal from search results against Google Spain. The complaint against La Vanguardia was rejected because of the necessity of the announcement when the event had taken place; however, the one against Google Spain was not rejected because "operators of search engines are subject to data protection legislation" since they act as intermediaries of information. Google Spain and Google Inc. brought actions against the decision to Spain's Audiencia Nacional (National High Court) and the High Court referred the case to Court of Justice of the European Union (CJEU). The main issues of the case were (1) whether the EU's data protection directive (Directive 95/46) applied to search engines, such as Google; (2) whether Directive 95/46 applied to companies like Google, which do not hold data processing servers in European nations; and (3) whether an individual has the right to request their personal data be removed from accessibility through a search engine.

The first issue in this case is regarding the territorial application of Directive 95/46, which is laid out in Article 4 (1) (a): "the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State." Regarding this issue, CJEU concluded that the Directive applies to any search engines that set up a branch or subsidiary within the EU's member states with the intention "to promote and sell advertising space offered by that engine and which orientates its activity towards the inhabitants of that Member State." The second issue is whether the activities by search engines is considered to be part of "processing of personal data," defined in Article 2 (b) of Directive 95/46. Article 21 (b) states that "'processing of personal data' ('processing') shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction." In regard to this issue, CJEU decided that the activities of search engine of finding, indexing, storing, and making available to its users information that are published online are considered to be "processing of personal data" of Article 2 (b). Moreover, against Google's argument that the request to remove information should be directed to websites that have the information published, CJEU concluded that search engine operators are also obligated to remove any requested information from the result list displayed from a search. The reason is that the result of a search conducted on search engine is more invasive than other websites that have such information published since anyone can retrieve information by a quick search. When a search is done using an individual's name and any information that should be erased or hidden is retrieved via that search, it is a violation of the fundamental right to privacy of that individual. Finally, the last issue is on the scope of the right to ask for removal of personal information, pertaining to Article 12 (b) of Directive 95/46. The Court stated that the information subject to the request of removal should be ones that are "inaccurate … inadequate, irrelevant, or excessive in relation to the purposes of the processing" of information. And the Court seems to say that these standards are related mostly to the age of the data. If it is old information—one that could have been true when it first came about, but has been changed since then—then, unless there is some good reason to keep such information [i.e., "historical, statistical, or scientific purpose" (*Directive 95/46 EC*, 1995 Article 6 (1) (e))], they are subject to the request of erasure.

In the U.S.

The courts in the U.S. have generally found in favor of the freedom of expression over the right to privacy. Particularly, when the information is public information, such as criminal records, the media is free to report using any information pertaining to the individuals that are involved in the case. In *Cox Broadcasting v. Cohn* (1975), the Court concluded, against the claims of the deceased rape victim's father,

that "the interests in privacy fade when the information involved already appears on the public record" (Cox Broadcasting v. Cohn 1975, pp. 494–495). The Court reinforced this decision by stating that states may not impose any type of punishment to media company for publication of accurate information about crime, which were obtained from public judicial records. The Court tended to not differ much when the information published is not public.

Smith v. Daily Mail Publishing Co. (1979). The main issue in *Daily Mail* is whether the state can punish a news media company for using personal information of juvenile offenders that has been obtained by legitimate sources. The case involves the news media reporting a murder case, in which the suspect arrested for the incident was a juvenile. They were able to acquire his name by monitoring the police band radio frequency and by asking witnesses and officers. So, when they went to publish the article, they included the name and picture of the accused juvenile offender. However, doing so is a misdemeanor offense according to the state statute, W. Va. Code §49-7-3, which states that "nor shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court." After Daily Mail was indicted in violation of W. Va. Code §49-7-3, they filed a petition arguing that they were indicted based on a statute that violated the First and Fourteenth Amendment. The West Virginia Supreme Court of Appeals held that "the statute abridged the freedom of press" (Smith v. Daily Mail Publishing Co. 1979, p. 100). When the U.S. Supreme Court granted *certiorari*, the petitioner argued that the statute is constitutional because there is an interest of the State in protecting the identity of juveniles. However, Supreme Court affirmed the W. Va. Supreme Court of Appeals saying that "if a newspaper lawfully obtains truthful information about a matter of public significance, then state officials may not constitutionally punish publication of the information absent a need to further a state interest of the highest order" (Smith v. Daily Mail Publishing Co. 1979, p. 103) and that "[t] he asserted state interest cannot justify the statute's imposition of criminal sanctions on this type of publication" (Smith v. Daily Mail Publishing Co. 1979, p. 106).

Florida Star v. B.J.F., 491 U.S. 524 (1989). The main issue in this case is whether there is an invasion of privacy when information is truthfully reported from public records. *Florida Star*, also a newspaper publisher, had a section in their paper where they loaded brief summaries of crime that occurred in the local area. One day, B.J. F. reported to the Sheriff's Department that she was robbed and sexually assaulted and the Department made a report, including her full name. A trainee reporter of the *Star*, who had access to the Department's pressroom and reports in the room, copied the report, including her full name, which was used in the section of the newspaper. This was in direct violation of the company policy and also the Florida Statute §794.03. The district court had found *Star* negligent by violating the Florida Statute while rejecting *Star*'s motion to dismiss based on the argument that Florida Statute §794.03 violated the First Amendment. The verdict was upheld in the appellate court. However, the U.S. Supreme Court reversed the verdict. They conclude that the First Amendment protects publication of information on crime

victims, given that the information is legally obtained. The Court ruled that, to punish a newspaper for violating privacy, "punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order" (Florida Star v. B.J.F. 1989, p. 541).

U.S. Department of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749 (1989). Reporters Comm. for Freedom of Press and a CBS news correspondent made a request to the FBI for criminal records on four members of organized criminals under the Freedom of Information Act. The FBI provided the records for three of the four members after their death, but not for the last member. Respondents (CBS correspondent and Reporters Comm. for Freedom of Press) argued that records of financial crime were potentially matters of public interest, whereas the FBI claimed that they had no financial crime for the fourth person, but they also did not say whether they had nonfinancial crime records. The district court found that criminal records compiled by FBI is subject to protection against releasing to the public and that the disclosure of such information is considered an invasion of privacy. The court of appeals reversed the decisions of the district court, saying that criminal history records are public records that should be made available to the public. Yet, the Supreme Court reversed the court of appeals decisions. The Court states that, just because the government has compiled any information, it does not make government-held information to be subject to public access. If the information compiled by the government agencies were in fact "freely available" there would not be the need to file for Freedom of Information Act to access such information. The Court also reasoned that federal law, 28 U.S.C. §534 (b), states that "exchange of records and information … is subject to cancellation if dissemination is made outside the receiving departments or related agencies," supporting that the records and information are not free for distribution to public.

Reforms in the EU Proposal and Possible Reform for the U.S.

The proposal by the European Commission has expanded and specified more detailed about what qualifies for the right to be forgotten. Among these details are four major changes to the current Data Protection Directive. First, the proposal includes any websites that operate in the European Union nations to comply with the information erasure requests, regardless of where their server is located. This is important because the Directive would not be operative the way it should if only websites with servers located within the Union were to be regulated. As we can see with the Google case, the server for the Google search engine is outside the territory of the Union. However, Google operates in Europe by supplying localized advertisement to the European users, meaning they are using the location information of the users to track where they are and provide them with advertisements and

information that pertains to their daily life. Second, the proposal places the burden of proof on website operators to argue why they need to keep the information on their websites. This makes sense in a way that if it is the right of the individual to ask to remove his or her personal information, they should not have to argue about why they need the information erased. Instead, the controllers and operators of websites must explain to individuals why they cannot erase the said information against their request. The third element of the proposal is to include punishment for not complying with the request, which strengthens the right of the individuals. The proposal states that controllers and operators that do not provide mechanisms for request or fail to promptly respond to requests can be fined "up to 0.5 % of its annual worldwide turnover" (Article 79 4 (a) of the Proposal for data protection Regulation). Finally, the proposal specifies the possible reasons for when controllers are unable to comply with the request to erase any information. These reasons—for exercising freedom of expression, for public interest in public health, for historical, statistical, and scientific purposes, for compliance with legal obligations, and when controllers can restrict instead of erase information—lay out the range of activities that allows controllers to keep information available on their websites, which they must make an argument for.

With the contents of the EU's proposal in mind, some issues must be addressed to discuss how the right to be forgotten can be implemented into the U.S.—and possibly to other countries. These issues relate to erasure, particularly what constitutes erasure, what could be requested for erasure, and its scope.

Information that Can Be Requested for Erasure

A primary issue to consider is what information can be requested for erasure. Among many ways to classify information, it is necessary to classify information based on who had posted it because responding to erasure requests may have to be treated differently based on this information. Hence, information may be classified into three types: information posted by the requester; information initially posted by the requester then re-posted by someone else; and information initially posted by someone else (Fleischer 2011; Rosen 2012). The first type is the least controversial as anybody who posts something on a website should have the right to erase their own post.

The second type of information is a post that has been reposted by third-party. This type may contain some controversy. *G. R.* incident is probably a close example of this type. Although he did not post it to any website or show it to anyone, he made the video clip himself and leaving it in school for anyone who stumbles upon it to handle it. The video was shared by schoolmates and eventually got posted online. If *G. R.* was to request the erasure of the video, where would he make such request—Facebook, YouTube, Google, Yahoo? It might be easier for websites like

Facebook and YouTube to comply by conducting a simple search on their server and removing any copies found. For search engines such as Google and Yahoo, it may be more complicated as they are merely producing a list of search results that stem from the keywords and the majority of results are actually saved on servers of other websites. So, the best possible response for search engines might be to block the requested content. Yet, this still contains an issue of the blocked content remaining in the server. To avoid such problem, another possible response for search engines is to notify the websites holding contents that there has been a request to remove the content.

Finally, the last type is information originally posted by a third-party. Even with this type of information, according to the EU proposal, the individual can request erasure of the content and the websites and the third-party who produced the content must prove that there is a good reason to keep the content. However, this type of information is the most controversial to deal with because one person is asking for controllers to remove (or block) information that is posted by someone else while he or she is the subject of that information. It is difficult to distinguish who holds the ownership of the information between the producer and the subject. Consequently, it could work against honest third-party producers of information who may have to face the burden of proving any actual historical, statistical, and scientific purposes on contents they produced, restricting their freedom of expression.

What Is Erasure?

Another issue to consider about the right to be forgotten is what to consider as an erasure or "to be forgotten." Would it have to be a complete removal from the server or could it be just a removal from public view? An immediate response would be to erase the information completely from website servers. One may be quick to ask "what about information that has been reposted?" If the information is reposted on the same website, it is plain and simple. As controller of the website, they have access to both the original post and the repost, allowing the erasure of both. The only additional measure needed would be to notify the person who made the repost that the information is being deleted due to a legitimate request made by the original poster. When the information has been reposted on a different website, it gets out of their hands. It is nearly impossible to know where the information was reposted, and even if they were able to track it, they do not have the authority to erase information from other website servers. Either the website that received the request or the individual making the request would have to again request the erasure to that website. Theoretically speaking, if the information was reposted to hundred different websites, for example, hundred different requests would have to be made in order to remove the information completely from the Internet. This is likely to be

the case also when an individual finds information after a search conducted on a search engine, similar to the Google Spain case.

An alternate response, which might be more plausible, is to remove contents only from public view. When search engines track reposts of contents on other websites for the purpose of removing information from servers, they may possibly intrude upon the operation of other websites. Also it places a huge burden on search engines to go through all websites that operate in the Internet. There are nearly 1 billion websites that currently operate on the Internet, with several websites launching and closing per minute throughout the world ("Total Number of Websites" 2015). The biggest issue with this response is that it keeps the information on servers, which can again be accessed and made public (e.g., physically copied onto thumb drive at the server site). With the Internet, however, we have to accept that we cannot expect to completely remove information from existence after it has made its way onto the Internet. We have to accept that there will be a copy of information stored somewhere by someone. Consider it similar to your friends remembering something you have done in the past. It may be stored on a super computer that acts as the server for company like Google and Facebook; or it could be stored in a friend's computer hard drive. As long as it is not easily accessible to unspecified individuals by a simple strokes of words, we have to accept that, whether we like it or not, there will be traces of embarrassing information that are still part of us.

Scope of Erasure

One last issue to consider for the right to be forgotten is the scope of information that individuals could ask to erase. It is impossible to simply forget every embarrassing incident that took place in our lives—it might haunt us since there is always someone who knows about it or something that will constantly remind us of it. The purpose of the right to be forgotten cannot be to remove all embarrassing past. Even if all contents can be erased completely from the Internet, there will still be someone who remembers the incident and nothing can be done about it. However, it can work to relieve people from some of the bad decisions that they may have made while they were so-called young and restless. The period of adolescence is a particularly sensitive time for any person since their brain and their mental capacity are not fully developed. In some sense, they are able to perform as well as any adult would but, in other aspects, they have trouble behaving as society expects them to do. Especially, their cognitive skills are easily to be influenced by emotions, meaning that they think that they are doing something correct or they are certain that they want to say something, only to regret having done so after the fact when the emotions have faded away (Steinberg 2005).

In the context of posting something online, adolescents may think that they are posting something very funny that they want to share with their friends, but they may later realize that it is humiliating and want to remove it. However, when their

friends repost it or copy to some other websites, the matter becomes larger than simply removing the original post. The regret that comes to them later is the reason why they need guidance and protection and it has always been that either the parents took on that role or the State has done so in *parens patriae*. As the Court has recognized in *Lawrence v. Texas* (2003), discrimination based on moral disapproval is generally unacceptable, but the whole idea behind protecting youth and having a separate legal system for juvenile offenders is based on such moral grounds. Although much has been dismissed, with youth frequently being prosecuted and convicted as adult, the legal system and society still accepts that youth have diminished rights and responsibilities when it comes to their legal status (Levesque 2014). So, for some minor crimes and delinquent behaviors, rehabilitative treatments rather than punitive ones are given to youth.

The need for greater protection for youth by the state is found in some of the legislation that was enacted and took effect in the U.S. or legislation that is in the process of being enacted—despite some criticisms against them (see Szoka and Thierer 2009 for an extensive review)—such as Children's Online Privacy Protection Act of 1998 and the subsequent Do Not Track Kids Act of 2013, and California's Privacy Rights for California Minors in the Digital World Act. Simply put, the purpose of these statutes is to protect youth and their personal information from the aggressive business activities of collecting, using, and disclosing them for financial gains. In fact, this entire area of law focuses on the need to protect youth from information (see Levesque 2007). Although this is a little different protection than what the right to be forgotten is aiming to protect, it can be a starting point where the state recognizes the vulnerability of youth in online settings. This may be not only for the youth, but also for adults who might have done some regrettable acts while they were young.

Conclusion

Advances in digital technology and telecommunication have brought significant changes on how people live their daily lives, more so for the younger generation. They are faced with more intrusive invasions of their privacy as their daily activities involve online activities. They communicate and interact with each other using SNS and other communication services, browse through merchandise and place orders on shopping sites, search for information needed for their homework, and enjoy their free time listening to music and watching movies. While many services and information provided are from website operators, more and more information is now user-generated content. The atmosphere of online activities now requires people to pitch in by placing contents online themselves to fully interact with other people.

For youth, submitted contents are often blurbs and images from their daily life activities. As it has become the norm for people to share where they are, what they are doing, what they are eating, who they are with, and so on, they are basically

stripping themselves of privacy. Some people argue that they should have thought about what they were doing before they posted online. However, one thing to consider is that these are not simply behaviors by choice; they are expected behaviors for participating in the digital age. For instance, when a couple has a baby, their friends and acquaintances expect to hear about the birth of the baby as soon as possible. So, the new parents write on their SNS accounts as soon as the baby is born, with a picture of the newborn baby. SNS makes it convenient for people to announce news to peers and for friends to hear the news as early as possible. This is how disclosure of information occurs. Those who do not use SNS tend to fall behind on the most up to date information of others around them. And they fail to contribute to that discussion. Yet, when people easily post their contents online, they do not necessarily consider the possible harm of having their information kept outside of their own reach.

The *G.R.* example discussed in the beginning of this chapter is a good example of harm caused by personal information having been made public and out of the person's reach. Another example of having failed to be cautious with private information that recently became a major social problem today is what is called "revenge porn." Revenge porn involves intimate images that either people took themselves then shared to their romantic partners or their partners have taken, which later became publicly released. As these images are very sexually explicit, they can be detrimental to the victims when made public, especially for the female victims. Revenge porn has become an important social problem and even legal responses are beginning to emerge on this matter. Fortunately, Google has committed to honor individuals' requests to remove nude or sexually explicit images shared without their consent from Google Search results (Murphy 2015).

Google's decision to take action against revenge porn could be the breakthrough for the discussion of recognizing the right to be forgotten. As the world's leading portal website, Google was able to consider the potential harm of certain publicly available personal information. However, efforts to protect individuals should be a collective one and not from a single company. It is so easy to make any personal information public—it only takes a few clicks. On the contrary, it is nearly impossible to retract information open to the public back to privacy. Since individuals are not able to recover the privacy of their own information, support from the public domain—the state—is necessary. When a youth is harassed and bullied by known and unknown people from the Internet and there is no way for the youth to protect themselves, the state should step up to protect them. So, the right to be forgotten should be a positive right of individuals, a right that requires the government to actively protect its citizens.

So far, the response from the United States has been that the right to be forgotten violates the freedom of expression stated in the First Amendment. However, also as important, yet often neglected, is the right to privacy. When the Constitution and the Amendments were enacted, current Internet privacy issues were not a concern because individual privacy has been the norm, which continued until recently. The very first time a concern about privacy was raised was with the development of photography technologies. That discussion of the right to privacy started a wave of

lawsuits and legislative responses to protect at least the minimum amount of violation of privacy. Even if it were not warranted in a federal statute to protect privacy, a significant number of States have accepted the possible intrusion of privacy (Prosser 1960). The right to be forgotten is very similar to the right to privacy and it may not be a stretch to consider it a matter of privacy. Then, it should be much easier to understand the need to protect people and their personal information after it has been made public. It should not matter whether individuals themselves revealed information to the public or someone else did. Personal information is still personal and people should have the right to say it should be shared with others or be kept private. Therefore, rather than outrightly rejecting the right to be forgotten because it seems to contradict the freedom of expression, it may be necessary to consider having both and have a balance between them. That way people can be assured that they can be judgment-free from the past that is no longer relevant to the current and future self, even if the past that they regret might not be fully forgotten (e.g., people still remember or people have a copy saved on their computer), it would not be publicly viewable from online search so.

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Chapter 3
Protecting Youth from Sexualized Media: Media Literacy

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Introduction

"But you're a good girl … must wanna get nasty" were the song lyrics that played while Miley Cyrus stunned a national audience during the 2013 Music Television Video Music Awards as she twerked on singer Robin Thicke while wearing nude-colored plastic bikini, sticking her tongue out, and holding a foam finger between her legs. Children who idolized Miley Cyrus from Disney's *Hannah Montana* were presented with a sexualized idea of "growing up" (Shewmaker 2015). This performance is just another example of the inescapable sexual content in today's media.

While the presence of sex in the media and pop culture is not a new phenomenon, the targeted marketing of sexual content to children is alarming (Gunter 2014). Many journalists, child advocacy organizations, parents, and psychologists have become concerned about the increased sexualization of girls and argue that it is harmful to both girls and boys (Wilcox et al. 2004). Children's unprecedented and unsupervised access to the media through the advent of new technology brings a sense of urgency to this debate (Buckingham and Bragg 2004).

Research has shown that the sexualization of the media greatly impacts the socialization of children (Levesque 2007). Narrow and sexualized ideals of beauty can lead to a host of mental and physical health problems for girls and boys (American Psychological Association 2010). The media also depicts gender stereotypes that affect the formation of children's identity, as well as their interpersonal relationships and sexual experiences in the future (Shewmaker 2015).

Congress and other government agencies have authority to regulate the media, but have failed to protect children from sexual content in the media (Levesque 2007). Likewise, the Supreme Court has granted broad First Amendment rights to

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R.J.R. Levesque (ed.), *Adolescents, Rapid Social Change, and the Law*,
Advancing Responsible Adolescent Development,
DOI 10.1007/978-3-319-41535-2_3

the media industry and will not prohibit media that is harmful to minors if it interferes with adults' rights (Levesque 2007). With the advancement of technology and increased prominence of the media in children's lives, the sexualization of the media is a pressing issue for child development and society as a whole.

This chapter argues that the government can create and support media literacy programs in schools that educate children to be critical media users in order to interpret and evaluate the media messages they encounter. The chapter first describes the pervasiveness of the media in children's lives and defines what is meant by sexualization. It then discusses research on the media's effects on children, which is followed by a discussion of government agencies' roles in regulating certain forms of media, as well as the Supreme Court's First Amendment jurisprudence protecting media. That background then leads to the conclusion that government intervention is needed. The government should provide funding to public schools, as they have the legal authority as custodians of children to implement media literacy programming. Empowering children through media literacy education is an effective means of countering the harmful effects of media messages. Rather than deny children access to potentially harmful media, which has proven both legislatively and judicially impracticable, society should educate children through media literacy programs to counteract problematic media messages.

Media in Adolescents' Lives

Youth's media use has increased exponentially as media has become more accessible through digital media, including computers, handheld and console video game players, and other interactive mobile devices such as cell phones, video iPods, and tablet devices (Shewmaker 2015). Almost all children (98 %) have at least one TV set at home, 72 % have a computer, and two-thirds (67 %) have a video game player. Less than a majority have handheld game players (44 %) or parents who own a smartphone (41 %) (Rideout 2011), and some 88 % of teens have or have access to cell phones or smartphones (Lenhart 2015). Teens use smartphones or other mobile devices to access the Internet regularly. Ninety-two percent of teens go online daily and 24 % go online "almost constantly" (Lenhart 2015). A recent study found that a majority of all US children have televisions in their bedrooms and many children also have unsupervised access to computers; therefore much of the media content that children view is in the absence of parental monitoring and supervision (Wilcox et al. 2004). In total, adolescents are exposed to media an average of 10 h and 45 min per day (Shewmaker 2015). Massive exposure to media among youth creates the potential for consistent exposure to sexualized depictions of women and girls, teaching children that women are sexual objects (Shewmaker 2015).

Sexualization in the Media

Throughout US culture and across nearly every media form, women and girls are depicted in sexualized ways (Shewmaker 2015). In response to public concern about the sexualization of girls, the American Psychological Association (APA) formed a task force to (a) define sexualization; (b) examine the prevalence and provide examples of sexualization in society and in cultural institutions, as well as interpersonally and intraphysically; (c) evaluate the evidence suggesting that sexualization has negative consequences for girls and for the rest of society; and (d) describe positive alternatives that may help counteract the influence of sexualization (American Psychological Association 2010). According to the Task Force (2010, p. 1) sexualization occurs when

> A person's value comes only from his or her sexual appeal or behavior, to the exclusion of other characteristics.
>
> A person is held to a standard that equates physical attractiveness (narrowly defined) with being sexy.
>
> A person is sexually objectified (made into a thing for others' sexual use) rather than seen as a person with the capacity for independent action and decision-making.
>
> Sexuality is inappropriately imposed upon a person

Any one of the above conditions indicates sexualization. The fourth condition is especially applicable to children, who do not choose to be instilled with adult sexuality, but rather it is imposed by culture and media (American Psychological Association 2010). A recent book summarized this trend:

> The turn of the new millennium has spawned an intriguing phenomenon: the sexy little girl…with preternaturally voluptuous curves, and one whose scantily clad body gyrates in music videos, poses provocatively on teen magazine covers, and populates cinema and television screens around the globe…she is Lolita. (Durham 2008, p. 22)

Television programming for children is becoming increasingly sexualized. In a 2011 study, youth reported that TV was the medium where they were most likely to encounter sexual content, with three quarters of kids saying that they had seen sexual material there (Media Smarts 2016). Most shows aimed at youth include sex and sexual content (Media Smarts 2016). Furthermore, research shows that kids can often take away inaccurate messages about sex when they are left to interpret media on their own without guidance from an adult. For instance, in an episode of the American sitcom *Friends*, a character became pregnant despite using a condom, and this left children with the impression that condoms failed more often than not (Media Smarts 2016).

Video games have long been viewed as being highly sexualized. They often contain hypersexual depictions of women wearing very revealing clothing with disproportional and unrealistic bodies. A study found that 50 % of women in video games for adolescents were wearing either halter tops, tank tops, or bikinis, revealing their bellies, legs, arms, and cleavage (Kirsh 2010). In the *Grand Theft*

Auto series, women, and in particular, minority women, were portrayed as prostitutes and highly sexualized (Kirsh 2010).

Music videos have been shown to contain the highest amount of sexual content compared to other media youth consume (Kirsh 2010). Sexual objectification in music videos is more likely to involve females who are provocatively dressed and often in the background as scenery (Zurbriggen and Roberts 2013). In a study of music videos aimed at black audiences, women were seldom taken seriously as equitable partners; instead, women's chief value was their sexuality or physical attributes (Zurbriggen and Roberts 2013).

Toy manufacturers produce dolls, known as "Bratz Dolls," which have skinny bodies clothed in black leather miniskirts, feather boas, thigh-high boots, and heavy makeup and market them to young girls (American Psychological Association 2010). These dolls have been highly competitive with Barbie dolls, which have faced increasing criticism for their "impossibly proportioned bod[ies]" (Anderson 2013, p. 1).

Magazines inappropriately impose sexuality upon girls and overemphasize physical attractiveness. Feminine beauty is narrowly portrayed as having "flawless skin, a thin waist, long legs and well developed breasts" (Zurbriggen and Roberts 2013, p. 9). This ideal is commonly portrayed in magazines, and computer retouching makes the ideal even less attainable. Magazines such as *Teen Vogue*, *Seventeen*, and *Elle Girl* "downsize the sexualized messages of their adult version publications" (Zurbriggen and Roberts 2013, p. 8). Magazines function as training manuals for teens, discussing sexual etiquette (Zurbriggen and Roberts 2013). A research study found that 52 % of articles in *Seventeen* focused on sexual behavior and health (Kirsh 2010). Magazines encourage girls to buy products and lose weight to "beautify" themselves so that they will be desirable to boys (Zurbriggen and Roberts 2013).

Retail stores have taken a similar approach by creating clothes that are designed to enhance the sexual attractiveness of adults for young girls (Gunter 2014). The clothing options include sexy camisoles, thongs, padded bras, and emblazoned tee-shirts with inappropriate slogans, such as "Eye Candy" and "wink wink" (Gunter 2014; Zurbriggen and Roberts 2013; American Psychological Association 2010). Stores such as Abercrombie Kids, the Limited Too (now Justice), and the Victoria's Secret Pink line are notorious for sexualized clothing (Zurbriggen and Roberts 2013). The message that it is important to be "hot" is central to the marketing of apparel (Lynch 2012). This kind of marketing narrows expressions of empowerment and self-confidence to being hot and dressing sexy. Lynch's (2012, p. 64) interviews with teenage girls revealed that girls are getting the message that being a girl means you have to be "hot": "The way I dress says that I have a nice shape." "It says I'm fine." "It says that I want guys' attention." "I wear makeup so boys can see the good side of me." Another girl stated that she wears "both preppy and slutty clothes [which say that] I'm tough but still sexy and a girly girl".

Mass media also captures the intimate details of celebrities' lives into the tabloids and the lives of young consumers (Lynch 2012) There has been a pattern since the 1990s of female stars who have grown up in the entertainment industry,

and in order to present themselves as more mature, they become more sexualized (Lynch 2012). The stripper pole in Miley Cyrus's Teen Choice Awards performance is a recent example (see Lynch 2012), as well as her aforementioned performance at the 2013 Video Music Awards. The message given to fans, who are predominantly young girls, is that "growing up" includes sexualizing oneself (Shewmaker 2015).

The problem with these kinds of representations marketed to young girls is they send the message that a girls' value is found in her physical attractiveness. These images also seem to dictate that girls need to be sexual at a young age (Starr and Ferguson 2012). Furthermore, advertisers prey on children by intentionally making them feel insecure in order to sell products that will supposedly make them sexy and desirable. This, in turn, leads to self-sexualization among girls, who report feeling the pressure from their peers to be sexy in order to be popular (Starr and Ferguson 2012). Girls may even use media tools to send or post pictures of themselves on social media to enhance their self-esteem, reinforcing the harmful gender stereotype that a female's value lies in her physical attractiveness (Bullen 2009).

Media Effect Theories

Psychologists offer three theories for understanding how the media influences children: the cultivation theory, priming, and the social learning theory (for a review, see Levesque 2007). Gerbner's cultivation theory suggests that children construct a specific image of reality and beliefs about the world as they are exposed to images from the media. Priming theory is another theoretical perspective which suggests that presentation and processing of a stimulus with a particular meaning activates related concepts and calls them to mind. For example, when one emotion, thought, or concept is primed, it triggers similar emotions, thoughts, or concepts (Kirsh 2010). The theory proposes that frequently encountered and related schemas eventually shape sexual behaviors and lead to stereotypes regarding sex and gender.

Bandura's social learning theory explains how children learn culturally appropriate gender roles by observing and modeling others and getting reinforcement from others (Starr and Ferguson 2012). This theory suggests that girls learn about the female role and its expectations because doing so brings rewards—being consistent with expectations feels rewarding (Levesque 2007). When a girl imitates her mother putting on lipstick and the mother rewards this feminine act by purchasing the girl her own lip balm, the girl is observing and learning from the consequences of her gender-linked behavior. Bandura suggests that young children are especially likely to adopt gender-linked behaviors when their role models' behaviors are rewarded or go unpunished (Levesque 2007).

The Impact of Sexualized Media

The 2007 APA report called for more research on the prevalence of sexualization and its influence (American Psychological Association 2010). Recent studies have contributed to this field of research, but there is still a lack of breadth and depth in media effects' research (American Psychological Association 2010) because there are a variety of media forms and many factors that impact children's socialization. Correlational and experimental research between exposure to sexual content and effects have found that the "media keep sexual behavior on public and personal agendas and reinforce a relatively consistent set of sexual and relationship norms" (Levesque 2007, pp. 131–132). In sum, research has found that sexualization negatively impacts children's sexual attitudes and beliefs, physical and mental health, and sexual behavior (Levesque 2007).

Sexual Attitudes

Studies suggest that explicit sexual media impacts sexual attitudes (Levesque 2007). One study found that adolescents who watched X-rated movies report a greater dislike toward condom use in comparison to other youth (Kirsh 2010). Similarly, other studies found that children who watched sexual-oriented television had greater permissiveness toward sexual behavior and felt dissatisfaction with being a virgin (Kirsh 2010). Recent studies found that higher levels of sexual media consumption were linked with stronger beliefs that women are sex objects (Kirsh 2010). The study also found that those children who had exposure to explicit sexual content, such as pornography, had a stronger attitudes about women as sex objects than those who watch less explicit content, such as music videos (Kirsh 2010). These studies suggest that both the amount of sexual media and the explicitness of the sexual media consumed can influence sexual attitudes (Kirsh 2010).

Physical and Mental Health

Adolescence is a time of transition when youth undergoes significant physical, cognitive, and social changes. Consistent exposure to sexual media and narrow ideals of attractiveness effects how girls view femininity and sexuality (American Psychological Association 2010). The media provides little information about sexual health and tends to promote sexual stereotypes (Pinkleton et al. 2008). Furthermore, self-objectification can also lead to unhealthy sexual development as measured by decreased condom use and diminished sexual assertiveness (American Psychological Association 2010). Some researchers describe the increased sexualization of the media and childhood as a public health concern because of the

overwhelming number of teenage pregnancies and sexually transmitted diseases (Zurbriggen and Roberts 2013). Moreover, sexualization and exposure to cultural ideals of beauty can cause eating disorders, low self-esteem, and depression for young girls and adolescents (American Psychological Association 2010). Low self-esteem can, in turn, lead to negative mood and mental health consequences (American Psychological Association 2010).

Sexual Behavior

Media encourages sexual activity by developing and promoting irresponsible behavior (Levesque 2007). Adolescents' perceptions of their peer's sexual behaviors greatly impact their decision to engage in sexual behavior (Kirsh 2010). Scholars often describe the media as a "super peer" that encourages sexual activity among adolescents by giving them the idea that sexual activity is more prevalent among their peers than it is in reality (Kirsh 2010). Furthermore, viewing high levels of sexual content during adolescence has been linked to increases in the onset of intercourse and the amount and type of noncoital sexual activity, such as breast and genital touching (Kirsh 2010). A study that eliminated the influence of a number of social factors found that teens who were heavy viewers of sexual content were twice as likely to engage in intercourse the year following the study when compared to light viewers of sexual content (Kirsh 2010).

Implications for Gender Socialization

From the time children are born, they are exposed to stereotypes of what it means to be a boy or a girl. By the age of three, they are beginning to learn gender stereotype rules about appearance and activities (Shewmaker 2015). A four-year-old girl will know what kinds of toys are designated "for" girls and boys and will not want to break that social norm (Shewmaker 2015). As children grow up, there is pressure from peers and society to fit into gendered stereotypes. Media and marketing have been identified as influential in promoting narrow and rigid gender roles that people "buy into" (Shewmaker 2015). Media messages depict "girls as passive, boys as active, boys with trucks and super heroes, girls with Barbies, dollhouses and kitchens" (Bullen 2009, p. 150).

A content analysis of gender roles in the media in 21 separate studies revealed trends across multiple media platforms: women are underrepresented in the media and when women do appear, they are often in sexualized or subordinate roles. Studies also revealed that gender stereotypes persist in the media (Shewmaker 2015).

Children are constantly interpreting these messages and trying to form their own identities. Moreover, Cultivation Theory suggests that children who consistently

see sexualized females and gender stereotyped views will learn to internalize those ideas (Shewmaker 2015). Additionally, there is concern that the prevalence of sexual material and gender stereotypes in the media has an impact on children's attitudes and relationships with the opposite sex (Gunter 2014). Research shows that sexualized media messages that emphasize romance and physical relationships over friendships and emotional connection lead to problems for both girls and boys (Shewmaker 2015). Among girls, the "thin ideal" leads to body dissatisfaction, low self-esteem, and dieting at a young age (Shewmaker 2015). For boys, sexualized messages affects the way that they learn to interact with females (Shewmaker 2015). Boys may also have trouble developing meaningful relationships with girls (Shewmaker 2015). Ultimately, the media's role in the persistence of gender stereotypes negatively impacts child development.

The Legal Foundation of Responses to Sexualized Media

Congress and Federal Agencies

Both Congress and federal agencies that have authority to regulate aspects of the media industry have failed to regulate content that may be harmful to children (Levesque 2007). The Supreme Court has also granted broad First Amendment protection to the media industry (Levesque 2007). Additionally, the Supreme Court has failed to carve out an exception for media content that is "harmful to minors" because the legal system does not recognize children as having the same constitutional protections as adults (Levesque 2007).

In 1990, Congress passed the Children's Television Act (CTA), noting that "special safeguards are appropriate to protect children from over commercialization on television" and "television station operators and licensees should follow practices in connection with children's television programming and advertising that take into consideration the characteristics of this child audience" (Smith 2015, p. 1017). The CTA required that children's programs "limit the duration of advertising … to not more than 10.5 min per hour on weekends and not more than [twelve] minutes per hour on weekdays" (Smith 2015, p. 1017). This regulation limits children's advertising exposure but does not regulate the content of those advertisements (Smith 2015). Congress has not passed any other laws regulating children's television since the enactment of the CTA (Smith 2015).

The Federal Communications Commission (FCC) and the Federal Trade Commission (FTC) are the regulatory agencies that have authority over the media; however, their role in regulating media has been limited. The Federal Communications Act of 1934 delegated to the FCC the ability to "make such regulations … that … will promote public convenience or interest or will serve public necessity …." (Smith 2015, p. 1017). The FCC regulates interstate and foreign communications by radio, television, wire, satellite, and cable (Federal

Communications Commission). The FCC can also regulate obscenity, profanity, and indecency on broadcast airwaves (Smith 2015). The increasing sexual conduct, graphic violence, and vulgar language in the media indicate the FCC's lack of oversight in the media industry (Levesque 2007). Moreover, the Supreme Court has declined to extend the FCC's regulating authority to other media, such as cable or the Internet because they are subscription-based, whereas broadcast content is available to the public (Smith 2015).

The FTC has authority over advertising and can prohibit advertisements that are unfair and deceptive (Smith 2015). An advertisement is deceptive if "there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment" (Smith 2015, p. 1019). However, it is unlikely that an argument that sexualized representations of girls contain a "representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."

In the 1970s, both the FCC and FTC were asked to ban children's advertising outright or adopt stricter standards for such advertising. Neither agency took action (Smith 2015). It is believed that lobbying efforts by the powerful media industry played a part in this failure (Smith 2015). In 2013, the FCC sought public comment on "how to empower parents to help their children take advantage of the opportunities offered by evolving electronic media technologies while at the same time protecting children from the risks inherent in use of these technologies"; however, no action has been taken by the FCC.

Alternatively, self-regulation by the media industry is an ineffective solution because companies believe that sexualization and gender stereotyping is good for their bottom lines (Levesque 2007). It is evident that the media industry cannot be trusted to address this problem independently (Smith 2015). Essentially, the result of legal mandates is that the legal system relies on the industry to regulate itself, and the industry has little incentive to change course.

The Supreme Court's First Amendment Jurisprudence

Legislative actions aimed at protecting children from harmful media tend to be found unconstitutional pursuant to the First Amendment (Levesque 2007). The First Amendment provides that "Congress shall make no law … abridging the freedom of speech." The First Amendment contains no qualification or limitations. The right to speak and develop one's own thoughts is highly valued by American society and protected by the legal system. As such, courts have given the media unprecedented protection from censorship (see Levesque 2007).

In *Denver Area Educational Telecommunications Consortium v. FCC* and *United States v. Playboy Entertainment Group*, the Supreme Court struck down efforts to control the discretion of the cable industry. The Supreme Court has also struck down efforts to limit the Internet in order to protect children (Levesque 2007). The Child Online Protection Act of 1998 is Congress's most recent

legislation regarding children and the media. It attempted to proscribe content that is "harmful to minors" somewhere in between the standard for "obscenity" and "indecency" (Levesque 2007). This material would have been legal for adults but illegal for children because it is "harmful to minors" (Levesque 2007). In *Ashcroft v. ACLU*, the Supreme Court upheld a preliminary injunction, finding that the law is likely unconstitutional (Levesque 2007).

In the media-violence causation cases, courts have given broad First Amendment protection to the media industry (Levesque 2007). In a 2011 case, *Brown v. Entertainment Merchant's Association*, the Supreme Court found a California law that prohibited the sale or rental of "violent video games" to minors without parental consent violated the First Amendment (Brown v. Ent. Merchs. Ass'n 2011, p. 2731). The statute did not survive a strict scrutiny analysis (p. 2731). The law was seriously under inclusive because it did not preclude minors from having access to information about violence in other forms of media, only in video games, and it was seriously over inclusive because it infringed upon the First Amendment rights of parents who thought violent video games were a harmless pastime (p. 2731). The Court also determined from the evidence that there was no "compelling" link between violent video games and their effects on children (p. 2731).

Minors' Rights

First Amendment jurisprudence varies in its treatment of minors' rights (Levesque 2007). Sometimes minors are treated like adults and given the same protection under the First Amendment. In other cases, they are treated as children who need protection and control. This type of treatment is not peculiar to the media, but the media context serves as a prime model of the types of challenges facing the development of youth's rights (see Levesque 2008).

A few specific examples are illustrative. In *FCC v. Pacifica Foundation*, the Court held that states may limit adolescents' access to indecent speech (Levesque 2007). The Court found a public interest in preventing transmission of questionable material from broadcast from 6 am to 10 pm. A significant factor in this decision was the "reasonable risk that children will be in the audience" (FCC v. Pacifica Found. 1978, p. 732). However, beginning with *Butler v. Michigan*, there is a long line of cases that refuse to protect minors from indecent speech when that protection infringes upon adults' right to access the speech (Levesque 2007). More recently, in *Reno v. American Civil Liberties Union*, the Court struck down provisions of the Communications Decency Act, an attempt to protect minors from explicit material on the Internet, because it interfered with the rights of adults to access that material (Calvert 2001).

The failure of the legal system to protect youth, their families, and society from the harmful effects of the media is rooted in the fundamental problem with how the legal system, as influenced by societal beliefs, approaches minors' rights (Levesque 2007). Because of minors' particular vulnerabilities and their place in society, they are

generally deemed incompetent to control their own rights (Levesque 2007). Therefore, they are not given all the constitutional protections as adults (Levesque 2007).

The Supreme Court has deemed parents the primary caretakers of children who are responsible for upbringing. In *Meyer v. Nebraska* (1923), the Supreme Court established the right to parenting as a basic fundamental liberty. The Court held that parents may choose to teach their children, foreign languages without state encroachment. Similarly, in *Pierce v. Society of Sisters* (1925), the Court struck down an Oregon law that required attendance at public schools, holding that it unreasonably interfered with the liberty of parents and guardians to direct the upbringing of their children. In *Wisconsin v. Yoder* (1972), Amish parents wanted to remove their children from school after the eighth grade out of fear that high schools instill values that the parents found incompatible with Amish values. The Court ruled in favor of the parents, without even asking what the children wanted. The Court essentially gave parents the right to limit their children's access to ideas (Levesque 2007, 2008).

In *Prince v. Massachusetts*, the Court affirmed that parents play a central role in the upbringing of children but recognized the role of the state when parents have failed or need assistance (Levesque 2007). The Court recognized that the state has an interest "to protect the welfare of children" and to see that they are "safeguarded from abuses" which might prevent their "growth into free and independent well-developed men and citizens" (Prince v. Massachusetts 1944, p. 165). The Supreme Court found that state had a compelling interest in the protection of children from "harmful" speech (Levesque 2007). Additionally, the Court carved out an exception for minors because the "State's authority over children's activities is broader than over like actions of adults" (Levesque 2007, p. 203).

Similarly, in *Ginsberg v. New York* (1968), the Court held that material that is not obscene for adults may nonetheless be harmful for children and thus may be regulated (Levesque 2007). The Court upheld a conviction of a bookseller who sold "girlie" magazines to minors. The Court highlighted the state's power to control the conduct of children over that of adults because of the state's interest in the well-being of its youth. Because children are under the control of their parents and because of their unique vulnerable status, the Court noted that their First Amendment rights are limited compared to adults (Levesque 2007).

In both *Prince* and *Ginsberg*, the Court failed to explain its reasons for treating children differently from adults in regard to the First Amendment (Levesque 2007). In an earlier case, *Bellotti v. Baird,* about a minor's right to abortion without parental consent, the Court described three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing" (Bellotti v. Baird 1979, pp. 633–34).

The vulnerabilities and special needs of youth identified in *Bellotti* are the guidance that the Court has provided; and they point to the need for more independent rights given the challenges that youth and their families face. For example,

because of the parental role in child rearing, the legal system assumes that parents are the primary sources of information about sexual health and control access to that information (Levesque 2007). However, it is difficult for parents to control the information their children have access to because technology has made media accessible on many devices. Additionally, many parents lack information about media and sexual health and cannot deliver it in a timely and effective manner, nor do they feel comfortable talking about sex. As such, children rank their parents behind their peers, schools, and popular media as the sources of information about sexuality (Levesque 2007). Because restricting children's access to media is impracticable, the involvement of these institutions in educating children about the media can effectively counteract negative media messages. The point is that providing children with more rights to access media literacy education will allow them to better deal with media access that they already have. Importantly, providing youth with more independent rights does not necessarily mean that they need more access to the media; it can mean that they have a right to resources to help them protect themselves from the media that already reaches them.

Media Literacy Programs

There are many ways to foster environments that help protect youth from the media. By far, the method that has gained the most legitimacy is media literacy programming. These programs have emerged from the recognition that a piecemeal legal reform approach that seeks to limit children's access to harmful media content is ineffective (Shewmaker 2015). Rather than attempt to regulate the various media sources children access, this approach champions the need to establish media literacy programs to help children deconstruct media messages and become critical media consumers. This approach favors the government as the major source of support for these programs that would be implemented in schools.

Media literacy has been defined as the "ability to access, analyze, evaluate, and communicate messages" (Timmer 2004, p. 351). Many educators agree that one of the primary goals of education is to develop students' ability to think critically (Scull and Kupersmidt 2011). Just as children learn to read and think critically about what they read, they should be given the tools to think critically about what they encounter in the media daily (Calvert 2000). Teachers can foster these skills by asking students about the messages and deconstructing them in order to understand their underlying persuasive elements (Scull and Kupersmidt 2011). Teachers can also teach children about the production methods used to create their favorite media and provide students with the opportunity to create their own media (Kirsh 2010).

Schools have traditionally been the place where children are taught societal values. Furthermore, there is substantial legal support for the authority of schools to implement media literacy programs. In addition to supporting media literacy in schools, the government can fund research on media literacy and work with existing media literacy organizations.

Legal Support for Media Literacy Programs

Schools have been tasked with the responsibility of shaping youth to become productive citizens capable of contributing to a democratic society (Levesque 2002, 2015). The legal system has supported schools in their custodial role. In *Safford Unified Sch. Dist. #1 v. Redding*, the Court stated that schools have a "custodial and tutelary responsibility for children." (Safford Unified Sch. Dist. #1 v. Redding 2009, pp. 383–84). In fact, schools stand *in loco parentis* over the children entrusted to them, with the power and indeed the duty to "inculcate the habits and manners of civility" (Vernonia School District 47J v. Acton 1995, p. 654) (citing Bethel School Dist. No. 403 v. Fraser 1986). In an age where mass media is ubiquitous, many scholars agree that understanding contemporary media is an essential aspect of citizenship (Martens 2010). Because school officials have custodial responsibility and act as a parents, it makes sense for schools to educate children on how to interpret media messages in order to counter their harmful effects both inside and outside of school.

Furthermore, in *New Jersey v. T.L.O*, the Supreme Court held that school officials retain broad authority to protect students and preserve "order and a proper educational environment" (New Jersey v. T.L.O. 1985, p. 339). Media literacy education would facilitate schools in maintaining a proper educational environment because media is part of school curricula in many ways. Media are part of the day-to-day operating practices of many American public schools, and "many teachers use video and mass media in routine ways without much explicit reflection on their education aims and goals" (Martens 2010, p. 9). Media literacy also relates to public health, such as violence, alcohol and tobacco use, self-image, and sexual behavior (Martens 2010), all of which find their way into schools. Educating children about the media messages could ameliorate problems in these areas, helping to maintain a proper educational environment.

Additionally, public school officials act in "furtherance of publicly mandated educational and disciplinary policies" (New Jersey v. T.L.O. 1985, p. 336). An effective way of countering the harmful effects of media messages on children is the establishment of national guidelines for media literacy programs in public schools. Media literacy has been mandated and taught in many countries, and the US is lagging behind the rest of the English-speaking countries in regard to media literacy education (Martens 2010). A national mandate would ensure that media literacy is incorporated into the public school curricula.

To support the mission of media literacy, the government should support media literacy organizations already in place. The Supreme Court's decision in *Bowen v. Kendrick* stands for the premise that, in producing government speech, the government may align itself with organizations that support its values (Bowen v. Kendrick 1988). For example, the Center for Media Literacy, the National Association for Media Literacy, and the Action Coalition for Media Education are just a few organizations who support media literacy education and are developing ways to implement and test the effectiveness of media literacy education. The

government can provide funding to these organizations to expand media literacy research and programming.

Effectiveness of Media Literacy Programs

Explaining and evaluating the effectiveness of media literacy programs has been a challenge because researchers use various theoretical and methodological models (Martens 2010). However, most evaluators use experimental field studies that take place during the school day or in community groups; most studies use qualitative and quantitative measures and control groups. Pretests and posttests are often conducted to measure whether the experiment causes a change in knowledge, attitudes, or behavior (Martens 2010). Overall, data support the conclusion that media literacy education increases knowledge and understanding of media messages (Martens 2010).

Research proves that media literacy education is valuable for children's cognitive development (Levesque 2007). Many studies show that a child's cognitive understanding can be influenced by media literacy programs in schools as early as kindergarten (Levesque 2007). In a study of elementary students who watched eight 10-minute video lessons and students in the control group who did not, the students exposed to the lessons made significant progress in television literacy, compared to students in a control group (Levesque 2007). Another study that involved a 10-lesson elementary school substance uses prevention program called Media Detective revealed that media-related cognitions about alcohol and tobacco products can be influenced by external factors, such as media literacy programs, and are related to the development of substance use later in adolescence (Kupersmidt et al. 2010). Boys in the Media Detective group reported less interest in alcohol-branded merchandise than those in the control group. Additionally, students in the Media Detective Group who were past users of alcohol or tobacco reported that they were much less likely to use substances in the future and greater ability to refuse substances than those students who were in the control group.

A study was conducted in 2012 to determine whether a media literacy curriculum addressing sexual portrayals in the media would influence adolescents' decision-making processes regarding sex (Pinkleton et al. 2008). The study found that participants who received media literacy training better understood the impact of media on teens' decisions about sex and were more likely to recognize that sexual depictions in the media are inaccurate and glamorized (Pinkleton et al. 2008). Furthermore, participants who received media literacy lessons were more likely than the control group to believe that their peers practiced abstinence and reported a greater ability to resist peer pressure. The media literacy lessons indicated a more logic-oriented decision-making process (Pinkleton et al. 2008).

A study of the effectiveness of a college course in media literacy indicated that holistic media literacy can be effective in providing students with tools to help them contend with media's influence on their daily lives (Duran et al. 2008). The study

found that the media literacy course mitigated the third-person effect of the media, discussed previously in the role of media as a "super peer" (Duran et al. 2008). The study also indicated that the experimental group was far more critical of advertisement, citing the need for more disclaimers about the product, while the control group focused on the storyline and characters (Duran et al. 2008). The experimental group noticed the tacit messages of the advertisement and more production features than the control group (Duran et al. 2008). Although the experiment was done in a college setting, the authors noted that media literacy should be a lifelong project because we are constantly exposed from early childhood to adulthood to messages that shapes our beliefs and values (Duran et al. 2008).

A comprehensive meta-analytic assessment of 51 media literacy interventions found positive effects on outcomes including media knowledge, criticism, perceived realism, influence, behavioral beliefs, attitudes, self-efficacy, and behavior (Jeong et al. 2012). Although there is a wide range of experimental research in measuring the effectiveness of media literacy, there is a consensus that media literacy education impacts youth's cognitive development and decision-making processes and can equip children with the tools they need to critique media messages.

Limitations of the Media Literacy Approaches

Research proving effectiveness does not necessarily mean that programs become effective immediately when implemented. That is the fundamental concern that arises when counting on media literacy programs. Additionally, several problems can arise when seeking to implement media literacy programs in schools. Many of these problems, however, can be countered with simple and creative solutions, as well as with political will.

Because it is difficult to measure the effectiveness of media literacy and the results are not immediate, policy makers do not realize the value of media literacy. Policy makers increasingly favor strong empirical data when making funding and programming decisions. It is difficult to prove the effectiveness of media literacy education on child development because there are many ways to implement and evaluate media literacy programs. Additionally, many sources influence child development. Further, policy makers often take a reactive approach to issues in schools and will not act until there is pronounced evidence of a problem supported by public consensus. Media literacy programs are both reactive and proactive in seeking to influence the impact of media on youth's attitudes, values, and behaviors. Policy makers need to be better informed of the nature of sexual content in the media and the negative influence it can have on youth. This chapter seeks to help inform scholars and those influencing policy makers of the need for media literacy.

A primary issue is that schools are already overburdened; they have a lot of curricula to teach. A solution to this problem is to incorporate media literacy into existing classes (Shaw 2003). For example, a cross-disciplinary approach to reading taken by some Pennsylvania schools uses the media so students can compare

information received on the radio or in newspapers and "discuss the reliability of information received on Internet sources; explain how film can represent either accurate versions or fictional versions of the same event, [and] explain the role of advertisers in the media" (Shaw 2003). Similarly, in Canada, media literacy is embedded into the language arts program (Shaw 2003). Media literacy can also be taught in conjunction with health classes. For example, children can learn about media messages from fast food commercials and learn how to evaluate them and apply them to their own lives (Bullen 2009). Media literacy can also complement sexual education classes and address the sexual content in the media, while discussing peer pressure and misconceptions. Discussions about these topics can teach children about the importance of autonomy and mutual respect in sexual relationships (Bullen 2009).

Another disadvantage of the media literacy approach is that schools are limited by tight budgets, and it would be difficult to introduce media literacy programs or train teachers to administer these programs (Shaw 2003). However, minimal training is needed to increase awareness and implement a program that helps students become active media consumers. One study found that a one-day teacher training workshop on media literacy education is effective at improving teacher's beliefs and knowledge about media literacy that are relevant for successful student outcomes (Scull and Kupersmidt 2011). While workshops may not address all issues relating to costs, they do reveal that costs need not be prohibitive.

Perhaps the most troublesome issue is one that is often ignored by advocates. While some media literacy programs have been implemented in schools, there are no national standards for the development of media literacy programs, as well as no standards for evaluation. More research in the area of media literacy must be conducted to determine the best methods of teaching media literacy (Levesque 2007). Additionally, the government should establish goals for media literacy programs and give schools guidance and training on how to implement them and how to get teachers and parents involved in educating their children about the media.

Involving parents is critical to addressing controversial matters involving sexuality and moral issues, but it need not mean an end to literacy efforts. In fact, the opposite likely is true. Controversy creates a role for governmental involvement. As much as parents have rights, so do youth. It is the government's ultimate responsibility to protect the rights of youth, even against their parents when they are unable to effectively guide and support their children's development.

Conclusion

The media, parents, schools, and the legal system pervasively fail to protect youth from harmful sexual content in the media. When parts of society fail, society typically turns to the government to shape responses. Regrettably, the government is political and susceptible to lobbying, and, as a result, has not produced legislation

that effectively regulates media content children access. Additionally, even if it wanted to regulate the media, as it admittedly has tried to do, government censorship of media is restricted by the Constitution's First Amendment. In this instance, the rights of adults are the ones that limit the ability of the government to regulate the media; e.g., adults wish to access or create sexualized media, and it is difficult to create safe harbors for youth.

This failure of protection is not peculiar to the media. Children's rights often lose out when pitted against those of adults; minors typically do not have the same constitutional rights as adults. As a result, sometimes children are protected from harmful media, and in other instances they are treated as adults. Sometimes minors' First Amendment right to access media is protected largely because society wishes to protect the rights of adults. Yet, it is clear that youth are differently situated than adults in that they can be more influenced by the media.

The legal system now needs to respond to that difference. The current understanding of media effects leads to the conclusion that the best way to address this issue is to give youth greater access to information about the media. By being better educated about the media, youth will be better equipped to analyze and respond to media messages. Media literacy programs can become an effective way for the government to help protect children from the harmful effects of sexualized media and help youth develop skills needed to engage their rapidly changing world.

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Chapter 4
Protecting Youth from Dangerous Media: Online Predators

Leo K. Yang

Introduction

The Internet allows users to communicate and form bonds with other users across the globe. This use, however, can be accompanied with the threat of online sexual exploitation, particularly solicitation of minors. Online sexual solicitation refers to requests to engage in sexual activities and/or sexual conversations, either through the Internet or face to face. Approximately one out of seven youth in the United States report having experienced online sexual solicitation (Jones et al. 2013). And other research shows that online sexual soliciting often results in sexual contact, with some studies reporting that 47.5 % of solicitations aimed at adolescents and children lead to sexual interactions (Schulz et al. 2015). Although such findings may raise the public's awareness regarding the need to protect minors from harm, doing so is not an easy task as adolescents outpace adults in their use of technology (Saleh et al. 2014), and this growing gap of technological proficiency adds to the already existing difficulties of monitoring and regulating adolescents' online activities.

The very nature of adolescence may influence adolescent users of the Internet and render them susceptible to online sexual exploitation. Adolescence can be described as a period of heightened sexual interest (Boies et al. 2010; Ponton and Judice 2004) as individuals actively seek relationships (Grello et al. 2003; Mendle et al. 2013) and even disregard potential risks when doing so (Tymula et al. 2012). In that sense, it is not surprising that the Social Networking Sites have become the new arena for adolescents where they can freely and privately form new bonds and pursue romantic relationships (Chang 2010). However, the content, structure, and users of Social Networking Sites are often unregulated, making these sites somewhat ideal hunting grounds for predators who can gather information and directly communicate with potential victims in hopes of sexual encounters.

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R.J.R. Levesque (ed.), *Adolescents, Rapid Social Change, and the Law*,
Advancing Responsible Adolescent Development,
DOI 10.1007/978-3-319-41535-2_4

As sexual solicitation of adolescents has become more easily achievable by motivated offenders, monitoring and regulating adolescents' Social Networking Sites use have become crucially important in protecting minors from unwanted online sexual solicitation. In most cases regarding sexual exploitation through Social Networking Sites, there exists a dynamic relationship between offender and victim. Adolescents can be deceived or at times willingly fall victim to online sexual exploitation (Wolak et al. 2008). What society often fails to acknowledge is that unmonitored adolescents can also become offenders themselves and target others through Social Networking Sites. In that sense, the digital revolution has presented new challenges that include raising the awareness as well as responsibilities of adolescent users of the Internet.

Vulnerable traits associated with online sexual solicitation need to be thoroughly investigated for the legal system to protect minors from online predators. This is especially critical as online predators tend to possess a great understanding of adolescents and target those who are most vulnerable (Groppe 2007). An equally important task is to address offender–victim dynamics. Society may be holding a misleading perception that all adolescents are innocent and that all online offenders are older male pedophiles (Wolak et al. 2008). Such stereotypes must be clarified as they may lead to ineffective protections of minors in addition to problematic legal responses. Adopting a more accurate and flexible view of online offenders will lead to better protection of vulnerable adolescents from online offenders. Thus, legal responses must be carefully implemented based on effective offender typologies and offender–victim dynamics.

Previous legal responses to convicted sex offenders often have been criticized as being unconstitutional and ineffective. Such criticisms stem from blanket bans on the Internet or Social Networking Sites that were implemented for all convicted sex offenders. Blanket bans can be seen as responses that largely ignore empirical understandings of offender typologies as well as offender–victim dynamics. Such responses may inhibit proper deterrence and, further, may lack therapeutic effects. In that sense, legal reforms must focus on deterring high-risk offenders as well as teaching adolescents the proper use of their newly gained autonomy and privacy. Technological developments are altering the previously held assumption of complete parental control over adolescents. Adolescents' increased privacy and autonomy is a byproduct of the digital revolution that parents and policy makers should acknowledge and react accordingly.

Unanticipated Risks Associated with Social Networking Sites

The portable nature of recent technology and its increasing affordability have presented adolescents with privacy and autonomy that allows them to seek sensations, build relationships, and fulfill sexual curiosities unrestricted by time and

place. Due to the sense of anonymity provided by the Internet, it is likely that adolescents perceive the Internet as the best venue to fulfill their sexual curiosities without risking social stigmatization and embarrassment. It is also likely that the sense of anonymity may amplify adolescents' risk-taking behaviors (Joinson 2001; Livingstone and Helsper 2007; Runions et al. 2013). Relatedly, many adolescents turn to Social Networking Sites in hopes of building new relationships (Blais et al. 2008). However, there are unanticipated risks associated with Social Networking Sites, namely the sexual exploitation of minors, to which society has not yet been prepared to respond accordingly.

Investigating who online offenders are and how they operate is a necessary step to protect minors from online sexual solicitation. It is a commonly held conception that people can act differently online than they would in the real life (Casale et al. 2015; Suler 2004). In that sense, online offenders who exploit adolescents may be vastly different from offline predators in terms of strategies as well as demographics. Studies of online offender typologies have revealed surprising results. For example, an online victimization survey revealed that 47 % of online offenders were younger than age of eighteen. It also found that 67 % of offenders were male, 19 % were female, and 13 % of offenders' gender was unknown. Results show that a large proportion of online offenders did not fit the stereotype of an "older male predator" (Finkelhor et al. 2000; Spencer 2009). Seto et al. (2011) defined online offenders as predators who use technologies to contact children to create opportunities for sexual offending. This broad definition and the statistics regarding offenders are a reminder that online sex offenders do not share universal traits and, therefore, must be categorized into subgroups.

The digital revolution may have expanded the risk of sexual exploitation of adolescents. Due to the lack of public awareness and appropriate preventive measures, it is evident that many adolescents have not yet adopted a proper reaction to the new challenges provided by the digital revolution. Furthermore, parents may not be aware of such risks and may be surprised by the high rate of online sexual solicitation. In fact, research shows that roughly 20 % of minors have reported experiencing an online solicitation (Finkelhor et al. 2000). More recent data showed that approximately one out of seven youth in the United States had experienced sexual solicitation (Jones et al. 2013). In another sample, 5.6 % of male adolescents and 19.1 % of female adolescents reported having been unwantedly sexually solicited on the Internet at least once in the past six months (Baumgartner et al. 2010). Perhaps the more disturbing finding was that less than 10 % of sexual solicitation was reported to the authorities and, in 75 % of incidents, adolescents had no or minor reactions to the experience (Finkelhor et al. 2000). Such results can be explained by the lack of public awareness of online sexual solicitation. Every member of society should be aware of the unanticipated perils brought by the digital revolution.

Vulnerable Adolescents in Social Networking Sites

Technological developments such as smartphones, tablets, and portable computers have contributed to the *always on* or *plugged in* culture among adolescents (Loubser 2012). These devices allow adolescents to access the Internet with ever-increased privacy and autonomy. As of 2013, 95 % of teens regularly use the Internet (Madden et al. 2014) for a variety of reasons (see Blais et al. 2008 for review). When considering the fact that heightened sexual curiosity, risk-taking behavior, and the need to build relationships are defining features of adolescence, the increased privacy, and autonomy are factors that must be dealt with extreme caution. Compared to the past, parents are unable to identify with whom their children are communicating and forming bonds. This reality is becoming more indisputable as more and more adolescents are visiting Social Networking Sites. In fact, research shows that over 70 % of adolescents are on Social Networking Sites (Lenhart et al. 2010; Tsitsika et al. 2014). Unsurprisingly, the main motivation for Social Networking Sites use among adolescents is to maintain and make new relationships; social interaction is a popular choice of Internet activity for both boys (63 %) and girls (68 %) (Lenhart et al. 2001). In many occasions, Social Networking Sites allow adolescents to engage in private communications with multiple users at once, expanding their opportunity to build intimate relationships. Adolescents may choose to communicate with online strangers for reasons of entertainment, social inclusion, maintaining relationships, meeting new people, and social compensation (Peter et al. 2006). Predators may be well aware of adolescents' need to build relationships and may take advantage of the functions of Social Networking Sites (Quayle et al. 2014). A self-report survey revealed that 4.5 % of respondents reported having solicited adolescents and 1.0 % reported having solicited children. Importantly, 47.5 % of these solicitations lead to sexual interactions (Schulz et al. 2015). In a similar study, 9.8 % of participants reported having sexual interactions with unknown youth ranging 0–17 years of age (Bergen 2014). It is, thus, crucially important to identify vulnerable situations and characteristics of adolescents that may increase the risk of becoming a victim of online sexual solicitation.

As suggested by ecological models, all aspects surrounding an adolescent must be considered since no child exists in isolation of their social and environmental surroundings (Bronfenbrenner 1979; Hamilton-Giachritsis et al. 2011; Whilttle et al. 2013). These models suggest that individual, family, community, and culture must be taken into account when investigating vulnerable factors associated with online sexual exploitation of adolescents. Similar to offline child abuse, girls are more likely to be targeted than boys (Baumgartner et al. 2010). Also, adolescents are at a greater risk of unwanted sexual solicitation compared to younger children (Wolak et al. 2008). In fact, girls between ages fourteen to seventeen are twice more likely than ages ten to thirteen to form relationships with strangers they met online (Wolak et al. 2003). This result may be explained by older adolescents' increased need and capability to form bonds. Family factors are also crucial. Girls with high

conflict levels with their parents and boys with low levels of communication with parents are likely to form bonds with strangers online (Wolak et al. 2003). Peer-relationships are also an important factor as adolescents who struggle with social interactions among peers in school are more vulnerable to online sexual solicitations (Stanley 2001). Wolak et al. (2003) found that troubled boys and girls were 11 % more likely to form romantic relationships, 11 % more likely to be asked to meet face to face, and 12 % more likely to have attended a face to face meeting with a person they met online compared to less troubled adolescents. On the other hand, adolescents with parents who oversee their Internet use are found to have experienced fewer negative events, perhaps because adolescents who are aware that they are being monitored tend to engage less in sexual conversations with others online (De Graaf and Vanwesenbeeck 2006; Soo and Bodanovskaya 2012). Adolescents' awareness of parental monitoring and supportive parent–child relationships are thus a powerful protective barrier (Whittle et al. 2013).

As most adolescents actively seek relationships, those with poor relationships both at home and at school are at a greater risk of online sexual solicitation. Lack of healthy relationships may be related to increased risk-taking behavior, which in turn may raise the likelihood of agreeing to a face to face meeting with online strangers. It is important to note that sexual solicitation involves a dynamic interaction between victims and offenders. Relying solely on victims' vulnerability factors is only a fragmentary attempt to protect minors as not all interactions between victims and offenders can be represented by a singular format (Briggs et al. 2011). Investigating the types, motives, and strategies implemented by online offenders are equally important steps to protect minors from perils of the digital era.

Offender–Victim Dynamics

Sexual curiosity, the desire to build relationships, and risk-taking behavior among adolescents can become dangerous combinations when motivated predators take advantage of the new functions provided by the Social Networking Sites. This is troubling as an increasing number of people are using the Internet for sexual activities (Cooper et al. 2006). Cooper (1998) proposed that "Triple A Engine" features of the Internet, namely accessibility, affordability, and anonymity, may facilitate online sexual abuse of adolescents. Online offenders can directly contact their victims by posing as either themselves or as an online persona at an affordable cost (Kloess et al. 2014). This has become more problematic as teens share more personal information on Social Networking Sites than they have before: In 2012, 91 % of adolescents posted photos of themselves which is a 12 % increase from 2006. Also, 71 % of adolescents posted the city or town they live in (10 % increase), 92 % posted their real name on the profile page, and 33 % of adolescents were Facebook friends with people they have not met in person (Madden et al. 2013). The abundance of shared information allows predators to select vulnerable targets. As motivated predators often synchronize the style of communication with

their victims and approach them with similar interests (Whittle et al. 2013), a predator's attempt to build trust with their target is likely to be more successful with more easily available information. Many predators build trust by providing attention and appreciation to make their victims feel special (Shannon 2008). Again, troubled adolescents with poor relationships at home and at school are especially vulnerable to such approaches. In fact, 73 % of victims who had face to face sexual encounters with an offender did so multiple times (Wolak et al. 2008). A victim's experience of online sexual solicitation can vastly differ from that of another victim because different offenders have different motives and strategies when approaching potential victims. In addition, the surrounding factors of a victim would heavily influence the victim's reaction to online sexual solicitation. Thus, exploring the various types of offenders will aid in a better understanding of offender–victim dynamics.

Researchers have offered a variety of ways to understand online offenders. Online offenders can be broadly categorized into two categories according to their motivation: (a) fantasy-driven and (b) contact-driven offenders (Briggs et al. 2011). Fantasy-driven offenders are characterized by their motivation to engage in cybersex with an adolescent, whereas contact driven offenders arguably pose a greater threat since they are motivated to develop sexual relationships with adolescents.

More recently, Tener et al. (2015) identified four categories of online offenders who used online communications to commit sex crimes against minors. The categories were based on offenders' patterns of online communication, offline and online identities, relationship dynamics with victims, and levels of sex crime expertise. 32 % of the entire offenders were categorized as the "expert type" who meet their victims online by sometimes fabricating online identities. They use multiple strategies to attract their victims and take sophisticated or extreme ways to conceal their crimes. Offenders in this category never get emotionally attached to their victims, therefore their motive seems very clear and dangerous. Second category of offenders is called the "cynical type" (34.6 %). They are similar to the "expert type" offenders but usually have smaller number of victims and have less sophisticated ways of committing the crime. Another important difference is that the "cynical type" offenders usually know their victims face to face and use the Internet as a tool to increase their chance of sexual exploitation. Again, their motive seems obvious. The third category of offenders is the "affection-focused type" (21.3 %). This group of offenders differs from the previous two groups in that they show genuine feelings of love, care, and affection toward their victims, even revealing their true identities, whereas the "expert types" and "cynical types" manipulate their victims so they appear loving and caring. Furthermore, the "affection-focused type" offenders sometimes begin the relationship without realizing that the victim is a minor. Tener and colleagues further notes that unlike the expert type offenders, it is rare for the affection-focused group of offenders to possess child pornography. In that sense, it is arguable rather "affection-focused type" offenders deliberately seek minors with motivations to sexually exploit them. The final category of online offenders is the "sex-focused type" (12 %) whose sole purpose is to have immediate

sexual encounters. They do not specifically seek minors nor invest much emotion and time. In many cases the "sex-focused type" offenders engage in victim initiated relationships regardless of the partner's age. Again, these differences among online offenders suggest that online offenders differ in motivation, strategies, and methods. Also, the assumption about online predators as "child molesters" or "rapists" may not be accurate in case of online sexual solicitation (Bourget and Bradford 2008), especially since "sex-focused type" and "affection-focused type" offenders do not deliberately seek minors.

In sum, the "expert type" and "cynical type" of offenders approach potential victims with false promises of intimacy. Such promises are powerful weapons as many adolescents are actively seeking attention, validation, and acceptance (Dombrowski et al. 2004). For most reported cases, sexual relationships between an adult and a minor did not involve physical force because many victims developed close relationships with the offender and even reported being in love (Tener et al. 2015). This may explain the extremely low report rate of sexual solicitation as predators tend to target lonely, shy, and "needy" adolescents (Sullivan 2009). In many cases regarding "affection-focused type" offenders, the relationship was initiated by the adolescent. The prolonged relationship may develop into a true affection from both sides. Relatedly, the "sex-focused type" of offenders pose a great threat since heightened sexual interests and risk-taking tendencies are expected features during the development of adolescents. In that sense, invitations of immediate sexual encounters can be tempting for many adolescents, leading to sexual exploitation. As can be seen, online sexual solicitation is a result of various dynamics between offenders and victims, therefore making a singular legal response and rehabilitation methods inappropriate approaches to solving this challenge.

Legal Responses to Online Offenders

In reference to Tener and colleague's typology, four categories of offenders differ in motive, means, and expertise. Unfortunately, the legal system tends to view all types of offenders similarly, perhaps as pedophiles, and tends to treat them with identical legal responses. For example, many convicted sex offenders were given blanket Internet bans, and more recently, a ban on Social Networking Sites was given as a condition of supervised release.

Critics of Internet bans argue that a blanket ban on the Internet given to all convicted sex offenders is unconstitutional. The primary goal of supervised release is not to incapacitate and punish, but to ease the defendant's transition into the community and provide rehabilitation (Brant 2008). Also, it is a fundamental principle guiding post-release condition which is supposed to be that the restrictions imposed on offenders be no greater deprivation of liberty than reasonably necessary (Wynton 2010). With that being said, the blanket ban on Internet use can be seen as an anachronous approach in the digital age. In fact, the Internet is quickly replacing

traditional venues of communication such as televisions, telephones, newspapers, and bulletin boards. Hence, the blanket ban on Internet can be argued as unconstitutional due to the indispensable nature of the Internet in daily lives.

The ban on Social Networking Sites could be an attractive alternative, but there are numerous loopholes to this approach. Online games and web forums could easily replace Social Networking Sites for motivated offenders seeking access to minors. Thus, the ban on Social Networking Sites is limited in that it is merely a temporary barrier in protecting minors from the perils lurking online. Nonetheless, due to the growing popularity of Social Networking Sites among minors, restricting high-risk offenders from accessing Social Networking Sites is an obvious and necessary measure.

Bans on Internet Access

In many cases regarding online sexual exploitation of adolescents, offenders have been banned from accessing the Internet as a condition of supervised release. For example, *United States v. Crandon* (3d Cir. 1999) upheld the Internet restriction for Crandon who communicated with a fourteen-year-old girl via the Internet and drove to meet her for sexual encounters. Also, *United States v. Paul* (5th Cir. 2001) upheld the ban for Paul who not only downloaded child pornography but also encouraged others to exploit adolescents. In both cases, the offense was seen as closely related to the Internet and therefore the ban was affirmed. For Crandon and Paul who used the Internet as a tool for sexual exploitation, the courts have upheld the complete ban on the Internet as reasonably necessary to protect the public by preventing recidivism (Brant 2008).

In other instances, the courts have appeared to be more reluctant in implementing blanket Internet access prohibitions for online offenders. This can be seen as the court's acknowledgement of the Internet's pervasiveness in the digital era. For example, *United States v. Sofsky* (2d Cir. 2002) rejected an Internet ban against an offender convicted for the possession of child pornography based on the virtually indispensable nature of Internet in today's world. Similarly, *United States v. Peterson* (2d Cir. 2001) vacated the Internet ban by comparing it to accessing a telephone; it noted that an offender might use the telephone to commit fraud, but this would not justify a condition of probation that includes an absolute ban on the use of telephones. In *United States v. White* (10th Cir 2001), White was sentenced to 24 months in prison followed by three years of supervised release for possessing child pornography. Unlike the case with Paul who committed the same crime, the Court overturned the Internet restriction for White. This overturn was based on the argument that a total restriction on Internet use is a greater punishment than necessary since it prevents convicted offenders from using the Internet for legitimate reasons. Since the Internet is an extremely valuable medium for information and communication, perhaps even indispensable for daily routines, a blanket ban on the Internet can be argued as too severe a deprivation of liberty.

It is evident that courts are attempting to find a balance between protecting the public as well as the individual liberties of convicted offenders. Finding an appropriate balance is a nettlesome conflict since the pervasiveness of the Internet in daily lives cannot be ignored. In fact, the Internet has ranked above books, newspapers, televisions, radio, and magazines as an extremely important source of information regarding health, politics, job search, and more (Habib 2004). The Internet has undoubtedly become a necessary tool for economic competition, making a ban on Internet use a severe economic deprivation. This reality is particularly important to consider for offenders who are expected to be reintegrated into society upon release. Due to the growing reliance on the Internet for daily activities, Internet prohibitions may be too great of an infringement on an offender's liberty.

The digital revolution has presented a new challenge for the courts and legal scholars. The Internet is already an omnipresent aspect of life, and its importance will continue to grow. Denying access to the Internet can be a serious deprivation, hence a compromise is necessary. In response to such a challenge, more recent legal responses toward online offenders have targeted specific elements of the Internet, namely the Social Networking Sites. The ban on Social Networking Sites likewise faces criticisms, nonetheless it is a preferred balance between protecting the public and individual liberties.

Bans on Social Networking Sites

As the Internet has heavily saturated our daily lives, the courts unavoidably became more reluctant to impose complete bans on released sex offenders' Internet use. This tendency is evident in cases such as *United States v. White* (10th Cir. 2001), *United States v. Sofsky* (2d Cir. 2002), and *United Sates v. Freeman* (3d Cir. 2003) where the Internet bans were overturned by courts concluding that members of the modern society cannot afford to be without Internet access. Perhaps due to such inclinations, courts recently approached the issue with a more narrowly tailored fashion by explicitly banning sex offenders from accessing Social Networking Sites. However, bans on Social Networking Sites still face criticisms among scholars (Brant 2008; Habib 2004), especially because many states are imposing such bans on *all* registered sex offenders. A blanket ban on Social Networking Sites to all convicted offenders neglects the fact that online offenders do not share universal characteristics. The obvious next step in improving legal responses would be to impose Social Networking bans only when closely considering offender typologies, as will be discussed in the next section.

Another criticism regarding the ban on Social Networking Sites is that such bans may be impractical to enforce. For example, the installation of monitoring software is only effective for already existing Social Networking Sites. Many new Social Networking Sites are being developed; thus, requiring constant and frequent software updates. Such maintenance would be extremely costly and difficult to

implement. Furthermore, it is questionable whether such software could keep up with the rapid technological developments. It is highly possible that new and advanced devices could allow unmonitored access to Social Networking Sites. Thus, a ban on Social Networking Sites can be seen as a temporary barrier in protecting adolescents from motivated offenders.

Additionally, motivated online offenders could seek other venues to gain access to potential victims. For example, a motivated offender banned from accessing Social Networking Sites could seek online games as their next available medium to have access to potential victims. Online games would be a preferable alternative since gaming is a popular hobby among minors. Also, numerous online communities allow direct communications among users. Although Social Networking Sites provide offenders an opportunity to gather information regarding potential victims, motivated offenders do not have to rely solely on Social Networking Sites for direct communication with minors. Nevertheless, Social Networking Sites are popular playgrounds for unsuspecting minors; therefore, banning high-risk sex offenders from accessing Social Networking Sites is an obvious and necessary measure. A complete ban on all computer-related devices may perhaps fully protect minors from online predators; however, this extreme approach is unlikely to be a popular and reasonable choice in the digital era due to the growing importance of technology. A narrowly tailored ban for high-risk offenders in addition to introducing preventive measures that consider offender–victim dynamics are the next necessary steps to protect minors from online sexual exploitation.

Legal Reforms

Although it may be tempting to implement a complete ban on Internet use by all online offenders, the online environment has become an indispensable element in the digital era. Thus, finding a proper balance between protecting minors and individual liberty has become a complicated task, especially regarding online sexual exploitation of minors. With that being said, legal reforms must be narrowly tailored so that specific offender types are given specific legal responses, rather than blanket bans given to *all* offenders. As online offenders are heterogeneous groups with different motives and strategies, it is important to refrain from perceiving all online offenders as older male pedophiles since data shows that many online offenders deviate from this stereotype. Holding on to such stereotypes will manifest itself in poor legal responses that disregard offender typologies and offender–victim dynamics. Such responses, as previously criticized, can be a great deprivation of liberty as well as an ineffective measure to protect minors from high-risk offenders. Narrowly tailored legal responses that fit specific offenders would be required for enhanced deterrence and rehabilitation and, ultimately, for better protection of minors from online sexual solicitation.

As online sexual exploitation is a result of dynamic interactions between offenders and victims, many minors do not report their experiences to the

authorities and even profess love toward their offenders. Perhaps the most vital and urgent matter is to raise the awareness of minors and parents regarding such perils. Thus, preventive measures must be implemented both at home and at school. Preventive measures are especially important because upcoming technological developments may present new threats. Establishing and enforcing new laws may become necessary, but, in the long run, preparing adolescent users of the Internet with awareness and responsibilities will certainly act as the most fundamental protective barrier against harm.

Reforming Social Networking Sites Bans

Social Networking Sites are appealing to both adolescents and predators for different reasons. While minors perceive Social Networking Sites as a digital playground that allows them to maintain and form new relationships, Social Networking Sites may be perceived as a perfect hunting ground for motivated offenders. Hence denying high-risk offenders from accessing this potential weapon seems to be an obvious measure. However, not all online offenders deliberately seek sexual encounters with minors as established in previous research. Also, 47 % of reported online sexual solicitation cases involved offenders younger than age of 18. These results pose an important question of whether the ban on Social Networking Sites should be implemented to *all* apprehended online offenders, including minors.

A firm legal response toward adult online offenders must be established by using offender typologies such as Tener and colleagues' four categories of online offenders. As an example, the "sex-focused type," "expert type," and "cynical type" offenders undoubtedly must be banned from accessing Social Networking Sites as "expert type" and "cynical type" offenders deliberately seek sexual encounters with minors. The "expert type" and "cynical type" offenders utilize Social Networking Sites to sample and attract potential victims while taking advantage of adolescents' need to form relationships. "Sex-focused type" offenders too must be banned since they would willingly have sexual encounters regardless of the other person's age. Since many adolescents on Social Networking Sites are at a stage of heightened sexual interest with risk-taking tendencies, the "sex-focused type" offenders pose a great threat to adolescent users. In sum, motivated offenders who used Social Networking Sites as tools to have sexual encounters with minors must be denied access. It is, however, debatable whether the ban should be imposed on all "affection-focused type" offenders.

Tener and colleagues' typology also reveals offender types that do not warrant Social Network Site restrictions. For example, offenders categorized in the "affection-focused type" use Social Networking Sites as a medium to form new romantic relationships, which is perfectly legal. In many cases, the "affection-focused type" offenders form bonds with minors without realizing the other person's age, as minors sometimes deceive others about their age. In such cases, it is questionable whether offenders in this category are pedophiles who are, by

definition, sexually attracted to prepubescent children (Wolak et al. 2008) and it is questionable whether the ban should be imposed to them as well. As Social Networking Sites are swiftly growing as a powerful medium of information and communication, the ban on Social Networking Sites to all "affection-focused type" offenders may not be necessary, perhaps may even be a deprivation of liberty. Obviously, if the offender categorized in the "affection-focused type" continued the relationship after realizing that they were interacting with a minor, the ban should be imposed. Thoroughly investigating each case in terms of motivation, process, and outcome of the offense would be required to confidently implement legal responses that deter high-risk offenders and provide proper therapeutic measures. Such measures are important for justice to be properly individualized, which is a foundation of justice.

Another important matter that must be addressed regards adolescent offenders who used Social Networking Sites for sexual encounters. As almost half of reported online sexual solicitation involves offenders younger than age of 18, some may argue that motivated offenders, regardless of age, must be banned from accessing Social Networking Sites while others may argue that adolescent offenders should be given leniency and avoid labeling them as sex offenders. Since increased interest in sexuality, the need to build relationships, and risk-taking behaviors are natural and expected aspects of adolescent development, it is somewhat predictable that many adolescents would be actively using Social Networking Sites for sexual encounters. Thus, society must abandon the assumption that all minors are innocent and harmless.

Sexual exploitation in Social Networking Sites is an example of a new challenge provided by the digital revolution which the society, parents, and legal system have not yet been prepared to respond appropriately. The need to implement mandatory education programs incorporating the features of adolescence and technology use cannot be stressed enough. Education programs aimed at raising the awareness of potential perils and guiding appropriate use of technology among adolescents are undeniably vital prerequisites in the digital era. Such preventive measures would ensure safe use of Social Networking Sites among adolescents and thus protect them from being victimized and also prevent them from becoming an offender as well.

Implementation of Preventive Measures

Movement toward protecting minors from unwanted online sexual exploitation should not be solely focused on banning high-risk sex offenders from using Social Networking Sites since the offense involves a dynamic relationship between offenders and victims. Preventive measures are crucial steps, perhaps even more important than the ban itself. The mandatory education program focusing on the features of the adolescence in relationship with their technology use can protect minors from becoming a potential victim as well as a potential offender.

Attempts to protect minors from online sexual solicitation should start at home. Both adolescents and their parents must be aware that motivated offenders give false promises of trust and intimacy to attract minors for sexual encounters. It is crucially important for parents to be involved in adolescents' Social Networking Sites use as minors who are aware that they are being monitored engage less in sexual conversations with strangers online (De Graaf and Vanwesenbeeck 2006; Soo and Bodanovskaya 2012). Parental engagement in adolescents' lives would counter the risk-taking tendencies of adolescents and, furthermore, guide their sexual curiosity in healthier directions (Berson et al. 2002). Preventive measures at home would thus prevent adolescents from becoming potential victims and/or offenders. Scholars previously recommended installing computers in the living room so that parents could have greater control over adolescents' use of Social Networking Sites (Saleh et al. 2014). This, however, is no longer an effective solution as other devices such as phones, tablets, and gaming consoles allow access to Social Networking Sites. Forcibly removing the computer from adolescents' room can further complicate the matter especially for those who are already experiencing poor relationship with their parents as poor parental monitoring and relationships with parents is associated with increased likelihood of online victimization (Ybarra et al. 2007). More technological development will enable minors to access the Internet privately and freely, thus healthy parental involvement becomes increasingly important.

Preventive measures at home may be insufficient to fully protect minors due to the growing gap of technological proficiency between parents and adolescents. Thus, mandatory education programs must be introduced at school. Such programs would be a good supplement to the existing sex education since Social Networking Sites can be closely related with sexual activities. One of the most essential recommendations of such programs would be to advise minors not to post personal information on Social Networking Sites for everyone to see. This can drastically deter online offenders seeking minors living close by. Borrowing from anti-cyberbullying policy (Hinduja amd Patchin 2007), education programs on online sexual solicitation should further educate teachers and students regarding specific definitions of online sexual solicitation, legal and social consequences, and procedures for reporting. In addition to formal education program, educational brochures should be distributed to students and parents so that parents may learn to react accordingly (Diamanduros et al. 2008). Internet safety programs can be effective in raising the awareness and knowledge of dangers of the Internet (Chibnall et al. 2006). The National Computer Security Alliance survey of 2010 concluded that youth are not receiving adequate instruction to use digital technology; this leaves them unable to navigate cyberspace in a safe, secure, and responsible manner (Kraft and Wang 2009; National Computer Security Alliance 2010). Surely, there is a great need for implementation of education programs at school environments. In the long run, education may be more effective than regulation aimed toward restricting uses (Szoka and Thierer 2009). As online sexual solicitation often involves dynamic interactions between offenders and victims, educating adolescents about proper responses to a wide variety of situations is

necessary to prepare them for unanticipated perils that may come with further technological developments.

The increased risks associated with Social Networking Sites are a byproduct of digital revolution that demands urgent interest from parents, policy makers, legal scholars, and minors themselves. Parents and policy makers must acknowledge that minors in the modern society have greater autonomy than ever before. Banning high-risk sex offenders from accessing Social Networking Sites may merely be a provisional measure of protecting adolescent Internet users. The most important necessity is to educate minors to become responsible users of technology.

Conclusion

The increased privacy and autonomy enjoyed by adolescents of the digital era begs for immediate attention. As adolescence is a period described as sexually curious, risk-taking, and relationship-seeking, the Social Networking Sites are obviously appealing playgrounds where they can freely seek intimate relationships. Unfortunately, the contents, structure, and the users of Social Networking Sites are often unregulated. This is an indication of how society has not yet fully coped with the digital revolution. The defining features of adolescence have a dangerous synergy when motivated offenders take advantage of the functions provided by Social Networking Sites. Without proper awareness and responsibilities, adolescents not only can be exploited by motivated offenders but also can become online offenders themselves. In that sense, preventive measures aimed to increase the awareness and responsibilities related with Social Networking Sites use needs to be properly addressed both at home and at school. The digital revolution has tremendously influenced peoples' lifestyles and it will continue to do so. It is time to acknowledge that parents' alleged complete control over adolescents is waning. Trying to restrict online freedom may have backfiring effects as adolescents' autonomy and privacy will be strengthened along with more technological developments. It may be best to acknowledge their new freedom and focus on raising their responsibilities. In other words, appropriate education should be prioritized over regulation.

Deterring high-risk offenders from Social Networking Sites may protect vulnerable adolescents as Social Networking Sites provide motivated offenders with sufficient information about potential victims as well as opportunities to directly communicate with them. This danger is likely to be graver in countries with high population density and developed transportation systems where offenders can easily schedule face to face meetings with their victims. Thus, deterring high-risk offenders from accessing Social Networking Sites remains a necessary measure. However, bans themselves are only provisional barriers as motivated offenders can seek other venues such as online forums and online games to have access to their victims. In that sense, society should not rely solely on banning access. It is also important to note that not all online offenders are pedophiles, and regrettably, not all

adolescents are innocent. The commonly held perception that all sex offenders are older male pedophiles needs to be confronted as holding on to such stereotypes may prevent proper protection of adolescents from other potential offenders, especially their peers. Broader society and the legal system need to grasp a flexible view of online offenders and implement legal responses accordingly. Thus, accurate categorization of offenders will become increasingly necessary.

The digital revolution has brought unanticipated perils that need to be properly addressed. This is especially true given that technology is heavily embedded in the lives of most adolescents. Future research must focus on the traits of adolescence in relationship with technology use. More empirical evidence will aid in raising the public awareness and also help implement better legal responses. The type and strength of the legal response would depend on the culture, norms, and the situations of various countries, thus the standard of balance between the protection of adolescents and protection of individual liberty will differ. Nonetheless, appropriate legal responses that effectively protect vulnerable adolescents and accurately apprehend offenders would derive from better understanding of offender–victim dynamics. But more importantly, adolescents must be properly educated regarding their use of technology. Mandatory education programs at school will become a necessity of the digital era as new technology will continue to influence peoples' lives, for better or for worse. It is very possible that new technological developments will bring more unanticipated problems, much like the rise of Social Networking Sites did. Thus, the most important step in protecting adolescents of the digital era is to raise the awareness and responsibilities of adolescents so that they may be prepared for a upcoming perils associated with new technological developments.

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Chapter 5
Protecting Youth's Right to Engage Media: Sexting

Haley Johnston

Introduction

A sixteen-year-old girl is dating a sixteen-year-old boy and decides to send a naked photograph of herself to his phone. The boyfriend receives the sext and keeps it to himself, not sending it to anyone else. A sheriff then asks to search that same boy's phone for information in an unrelated case, and the boy's mother allows the sheriff to search the phone without a warrant. While searching the phone, the sheriff discovers the naked photograph of the boy's sixteen-year-old girlfriend, and initiates a sexting investigation, suspends the charging of the sixteen-year-old girl and boy with felony counts for violating child pornography laws. This story seems far-fetched, since the boy and girl were in a consensual sexual relationship; however, this situation was a reality for two teenagers in North Carolina (Drew and Weiss 2015).

With teenage sexting on the rise, many states have prosecuted minors for sexting under existing child pornography laws. Criminally punishing teenagers for consensual sexting acts against the best interest of the teenager. The Supreme Court has repeatedly looked to the "best interests of the child" when making decisions to make sure minors' rights are protected. Punishing minors under a statute that was meant to protect minors, such as child pornography statutes, acts against the best interests of the minor. Accordingly, consensual teen sexting cases should be removed from criminal justice systems and lawmakers should enact statutes decriminalizing consensual sexting between minors. Rather than punishing teenagers, schools and parents should educate teenagers about the risks associated with sexting so that teenagers are able to better protect themselves.

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R.J.R. Levesque (ed.), *Adolescents, Rapid Social Change, and the Law*,
Advancing Responsible Adolescent Development,
DOI 10.1007/978-3-319-41535-2_5

A Closer Look at "Sexting"

"Sexting" is a combination of the words "sex" and "texting" (Mummert 2010). The term "sexting" refers to sexually suggestive content (in the forms of words or images) sent through an electronic medium, including text messages and emails (Machometa 2014). People of all ages can sext, but the practice is typically associated with teenagers for whom sexting is a common practice. Since sexting has become so prevalent among teenagers, sexting has been described as a "form of 'relationship currency'" for teens. Some teens use sexting as part of their sexual activity, while others sext in lieu of actual sex; other teens use sexts for nonsexual purposes, "such as a joke or entertainment" (Mummert 2010, p. 74). Every sext involves "four different roles: (1) the subject of the photo, (2) 'the person who took the photo,' (3) 'the distributor(s) of the photo,' and (4) 'the recipient(s) of the photo'" (Ryan 2010, pp. 360–361). Individuals can, and often do, play more than one role. Sexting may occur between two minors, between two adults, or between a minor and an adult.

Prevalence

Sexting is prevalent among teenagers. A study conducted in 2012 by different researchers showed that sexting was related to the high school grade: freshman, sophomore, junior, or senior. For females, the percentage of students reporting having sent a sext increases from freshmen at 14 % to seniors at 24.2 % (Strassberg et al. 2012). Senior females are also more likely (46.2 %) to receive sexts than their freshmen peers (25 %). The same is true for males, with 26.5 % of senior males reporting having sent a sext, while only 9.2 % of freshman males reported sending a sext. The most shocking statistic is that 65.1 % of senior males reported having received a text, an increase from 38.5 % of male freshmen.

While the exact statistics vary by study, one result remains consistent: sexting has become commonplace for teenagers. Because sexting is a relatively new social phenomenon and legal issue that so many teens are participating in, current legal responses to regulated sexting are characterized by "rapid change, uncertainty, and ad hoc application of laws that are poorly suited to protecting teenagers from the harms of sexting" (Lampe 2012–2013, p. 705).

Consensual Versus Exploitative Sexting

Even though so many teenagers reported that they willing participated in sexting, sexting is not harmless. Like the rest of the Internet, sexting poses potential harms to minors participating in sexting. According to the World Health Organization,

"the most polarizing public health threat presented by the Internet may be as a means to intentionally or unwittingly jeopardize the safety of children and adolescents" (World Health Organization 2011, p. 10). The World Health Organization's concerns also apply to sexting. Sexting can be unsafe because it can be done at the push of a button and once the creator of the image has transmitted it to anyone else, the creator loses control of the image.

Sexting is also harmful when it is not consensual. "Consensual sexting" occurs when there is consent from the subject of the sexting image, the person who transmits the image, and the person who receives the image (Machometa 2014). Often, consensual sexting occurs when the creator, subject, and transmitter of the sext are all the same person. "Non-consensual" or "exploitative sexting" occur when there is not consent from either the subject of the sexting image, the person who sent the image, or the recipient of the image. When a sext is transmitted to other people besides the intended recipient, it is exploitative sexting. This form of exploitative sexting happens in many situations: an ex-significant other sending the sext to other teenagers, an ex-significant other sending the sext to a revenge porn website, the recipient of the sext simply decides to send the sext to others for no obvious reason, or, even worse, the recipient of the sexted image blackmails the person in the photo with a threat of disclosure (see Sabbah-Mani 2015). The blackmail can include performing sexual services. Worse yet, the sext may make its way to the child pornography market, and the minor in the photo may become commercially exploited or entice predators. Exploitative sexting may damage the minor through mental anguish from embarrassment and humiliation of the photo being dispersed, harassment and bullying, economic harm if the image is found by a potential employer or college recruiter, suspension or expulsion from school if the school prohibits sexting, or criminal punishment and the associated social stigma with being forced to register as a sex offender.

Issues of Consent for Teenagers

The ability of minors to give consent to sexual activities raises both legal and social issues. In the United States, the age of consent varies by state, and has changed throughout the years. In the past, the legal age of consent ranged from as young as 7-years-old in Delaware to as old as 21 in Tennessee (Korenis and Billick 2013). Most states currently set their age of consent to around seventeen to eighteen. One scholar argues that the age of sexual consent should be, "not be so early that little protection is provided for the child but it should also not be so late that a person can be convicted of statutory rape when the victim is fully capable of consent and readily acquiesced to a proposal or even invited a relationship" (Korenis and Billick 2013, p. 176). For example, states that set the age of consent at 17-years-old, a 17-year-old dating a 15-year-old can be charged with statutory rape. The arbitrary bright-line age of consent legal standards are often in contrast with human development and maturity.

Additionally, while teenagers who reach the age of consent may consent to sexual activity, they still may be prosecuted for sexting because of their status as a minor. Since sexting is often punished under child pornography statutes, teenagers are unable to consent to photos of themselves being released. This is particularly problematic when the minor is taking a photo of himself or herself and sexting it, since the minor "consents" to the auto-pornography sext in the colloquial sense, yet still may be punished under the child pornography statute.

Despite the legal standards, are adolescents realistically able to consent to sexual activity and sexting? Age of consent laws presume that a person of a certain age has the capacity to make a voluntary decision to engage in sexual activity. The social science arguments surrounding teenagers' ability to consent focus on whether consent by a minor to an inherently risky activity, such as sexting, should be treated the same as consent by an adult. Social scientists have aptly pointed out that capacity may not always be a bright-line rule, but situational (Benedet 2010). Therefore, it is difficult to pinpoint the factors that indicate a teenager is capable of consenting.

Consent includes the capacity of the parties involved and the relative power possessed by each party in sexting (Drobac and Hulvershorn 2014). Age has been one of the factors used to determine "power," as it relates to consent. Since teenagers generally have little power, child pornography statutes (theoretically, at least) protect teenagers from exploitative sexting by adults.

Decision-making capacity is another factor to consider when discussing teenagers' ability to consent. When it comes to decision-making, adolescents' brains are trained to seek and appreciate stimuli that is rewarding, more so than adults' brains (Drobac and Hulvershorn 2014). This is one of the ways in which teenagers are more vulnerable than adults, and may make it more difficult to differentiate between exploitative and consensual sexting for teenagers. If a teenager engages in sexting and receives positive feedback for sexting, it makes it more likely the teenager will decide to engage in sexting again to seek that same reward. However, there is a fine line between encouragement and coercion, and a teenager's desire for positive responses may lead the teenager to fall victim to an exploitative sexting situation.

The gender of both parties engaged in sexting also impacts a minors' ability to truly consent. One scholar suggests that the relative power of parties engaged in sexual situations may be more affected by gender than by age (Benedet 2010). Therefore, whether a teenager is able to consent may be partially dependent on the teenagers' gender.

While there may not be one specific age at which all teenagers have the capacity to consent, setting a bright-line rule provides protection to vulnerable adolescents who fall below that line. With bright-line rules, it is clear that if a person engages in sexting with a minor, it is illegal. However, this point cuts both ways, since often times when there is a bright-line rule parties who are above the line, yet are exploitative sexting another adult, may be overlooked because they meet the statutory requirements (Benedet 2010).

There will always be the question of whether teenagers can truly consent to inherently risky behaviors, such as sexting, in the same way that adults can. Since

all teenagers mature at different rates and have different experiences, it is unrealistic to conclude that one age can successfully act as the age of consent for all teenagers. Many teenagers may be able to fully consent to sexual activity, but it is unrealistic to believe that all teenagers are capable of consenting to sexting in the same way as adults.

Prosecution of Minors for Sexting Under Child Pornography Laws

Lawmakers, judges, and prosecutors have crafted legal responses to the potential problems caused by teen sexting. Nearly all "solutions" have been rooted in criminal law. Some state governments have prosecuted minors for sexting under existing child pornography laws—which is the focus of this chapter—while other state governments have drafted criminal statutes specifically to address teen sexting (Lampe 2012–2013).

Under the federal child pornography statute, commonly known as the "Child Protection Act," a maximum sentence of 30 years in prison may be imposed on:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in…with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct. 18 U.S.C. § 2251(a).

Categorizing sexting as child pornography makes it so all actors involved could face the same charge, regardless of whether they created the sext, were the subject of the sext, distributed it, or received it.

Since passing the Child Protection Act, the Supreme Court has explained the purpose of the Child Protection Act. In *New York v. Ferber*, the Supreme Court articulated five reasons why the government has greater leeway to regulate child pornography: the government has a compelling interest in child protection, the distribution of child pornography is related to the sexual abuse of children, advertising and selling child pornography creates an economic motive, there is no real value of permitting child pornography, and child welfare trumps the First Amendment rights of individuals (*New York v. Ferber* 1982).

Applying these rationales to consensual teenage sexting leads to doubt whether the government should have greater leeway in regulating sexting. The application of child pornography laws to sexting is difficult, since on the surface, teen sexting may be indistinguishable from adult-produced exploitative child pornography. However, sexting is easy to differentiate from child pornography when considering the motives behind each and the possible harms that may result.

First, the government absolutely has a compelling interest in child protection. Since there are harms that may result from sexting, the government has a compelling interest to protect minors from those harms. However, is the government

protecting a minor if they incarcerate a teenager for consensual sexting with their high school girlfriend or boyfriend? Prosecuting teenagers under child pornography laws for consensual sexting does not serve the governmental interest of child protection. This factor weighs in favor of the government *not* having the leeway to regulate consensual teenage sexting.

Second, the distribution of sexts does not necessarily lead to sexual abuse in the same way that child pornography does. Since sext photos are primarily created and distributed by the same individual, there is less of a risk that the image will be exploited and pass into the child pornography network. One of the Supreme Court's concerns in *Ferber* was that "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation" (*New York v. Ferber* 1982, p. 759). One of the crucial ways child pornography differs from sexting is that sexts are largely self-created and self-distributed. The subjects in the images in consensual sexts choose to take the photograph and distribute it. Children depicted in exploitative child pornography do not have that choice. Therefore, the degree and kind of harm that teens may suffer from consensual sexting is less than the harm that may be suffered by children from adult production and distribution of child pornography. This rationale also weighs in favor of the government not being able to regulate consensual teenage sexting like child pornography.

Third, generally, there is no economic incentive to sexting. It could be argued that sexts may end up in the child pornography network, but with the way teenagers communicate through sexting, it seems unlikely that this is the result in a majority of cases, especially with consensual sexting. This factor comes out neutral in the case of sexting.

Fourth, sexts do have value to teenagers. As discussed earlier, a large amount of teenagers sext. Many teenagers incorporate sexting as a regular part of their dating life, and use sexting as a way to either supplement sexual activity, or use sexting in place of sexual activity (e.g. Hiffa 2011). This value to teenagers further tilts the scale in favor of the government not having more leeway to regulate consensual sexting.

Fifth, while child welfare trumps the rights of individuals, should child welfare trump the rights of children? Sexting prosecution is an interesting situation where a law that was made to protect children has been used to prosecute children. The statute is infringing on the rights of the people it is trying to protect.

Overall, the government has a compelling interest to protect children. However, in consideration of the reasons why a government may place special regulations on child pornography articulated in *New York v. Ferber*, the government should not have more authority to regulate consensual teenage sexting. The government needs to recognize that using child pornography statutes to prosecute children may not be promoting child welfare.

It is reasonable to take issue with the fact that, regardless of whether all parents involved consent to sexting, it is still illegal under child pornography statutes. Child pornography statutes are too broad to apply to sexting cases. In other areas relating to minors' rights, such as medical treatment, legislatures have enacted targeted

statutes, under which minors are considered adults for the purpose of consenting (Alderson et al. 2006). These statutes allow minors to consent for treatment for sexually transmitted diseases, birth control, pregnancy, substance abuse, and mental health problems. Under these specialized statutes, legislatures are concerned about the vulnerability of minors. The concern is the harm of requiring parental consent for these services. Removing the hurdle of parental consent was designed to encourage minors to seek treatment when it is important to their help. But since sexting is not something as serious as medical treatment, and also parents could not consent to their child sexting, sexting will probably not be classified as an area where minors may consent like adults. In the current legal landscape, consent plays no role in sexting for teens.

Consensual Teenage Sexting Under Child Pornography Laws

In multiple states, teenagers have been prosecuted or threatened with prosecution for participating in sexting. In *A.H. v. State*, a Florida appellate court upheld a 16-year-old girl's conviction for sending sexually explicit photos to her 17-year-old boyfriend (*A.H. v. State* 2007). For her role in taking the photos, A.H. was convicted of a second-degree felony for "producing, directing or promoting a photograph or representation that she knew to include the sexual content of a child," in violation of Florida's child pornography statute (*A.H. v. State* 2007; Fla. Stat. § 82.071(3)).

In justification of its decision, the court explained its interpretation of the child pornography statute's purpose:

> The statute is not limited to protecting children only from sexual exploitation by adults, nor is it intended to protect minors from engaging in sexual intercourse. The state's purpose in this statute is to protect minors from exploitation by anyone…The State's interest in protecting children from exploitation in this statute is the same regardless of whether the person inducing the child to appear in a sexual performance and then promoting that performance is an adult or a minor. (*A.H. v. State* 2007, p. 235)

If the majority accurately stated the purpose of child pornography statutes—to protect minors from exploitation from others (although the dissent disagreed about this)—the statute should not apply to minors who voluntarily produce and transmit sexts of themselves to others. If two consenting minors are engaged in sexting, were both minors exploited? Was either of the two minors *actually* exploited? The court contradicted itself when it stated that A.H. "was simply too young to make an intelligent decision about engaging in sexual conduct and memorializing it" (*A.H. v. State* 2007, pp. 238–239). The court openly admitted that A.H. did not have the capacity to make an informed decision about sexting, yet held A.H. criminally liable for her behavior.

Other states have also threatened to prosecute minors under child pornography statutes for self-created or "auto-pornographic" sexts. In *Miller v. Mitchell*, a high school principal confiscated students' cell phones and found photos of "scantily clad, semi-nude and nude teenage girls" (*Miller v. Skumanick* 2009, p. 637). The principal then gave the phones to the district attorney, and the district attorney conducted an investigation and threatened to file child pornography charges against approximately twenty-five students unless the students agreed to complete a counseling-diversion program. The first photo at issue depicted two girls "from the waist up, each wearing a white, opaque bra," the second photo showed a third girl in a white, opaque towel that was wrapped around her body "just below her breasts" (*Miller v. Skumanick* 2009, p. 639). The girls in the photos claimed that they did not distribute the photo to anyone, but rather, another person sent it to a large group of people without their consent. The parents' of the girls in the photos brought suit pursuant to 42 U.S.C. § 1983, alleging: (1) violation of plaintiffs' First Amendment right to free expression; (2) "violation of plaintiffs' First Amendment right to be free form compelled expression"; and (3) retaliation against parents for exercising their Fourteenth Amendment rights as parents to direct the upbringing of their children (*Miller v. Skumanick* 2009, p. 640). Ultimately, plaintiffs were granted a temporary restraining order, enjoining the district attorney from pressing charges against the students.

Teenagers should not be charged, convicted, or even accused of "committing a crime" by participating in consensual sexting. This does not act in the best interest of the minor nor does it solve a larger problem.

Best Interest of the Child

The current statutory regime of prosecuting minors for sexting under child pornography statutes does not act in minors' best interest. In *Bellotti v. Baird*, the Supreme Court determined the constitutionality of a state statute that prohibited unmarried pregnant minors from obtaining an abortion without either consent from both of the girls' parents or judicial bypass (*Bellotti v. Baird* 1979). The court ultimately determined the statute was unconstitutional since it did not act in the minor's best interest. The Supreme Court provided three reasons as the basis for limiting minors' abortion rights: (1) "the peculiar vulnerability of children;" (2) "their inability to make critical decisions in an informed, mature manner"; and (3) "the importance of the parental role in child rearing" (*Bellotti v. Baird* 1979, p. 634). The Court stated that these reasons justify the conclusion that children's constitutional rights cannot be equated with adults' constitutional rights.

Analyzing these factors in light of consensual sexting reveals that teenagers' rights should not be limited, and their rights *should* be equated with those of adults. First, the vulnerability of children is undeniable, especially in the context of peer-pressure. This goes in favor of limiting teenagers' rights. Scholars note that minors face a period of increased vulnerability during the middle of their

adolescence due to brain development and maturing, and relative to adults, adolescents' decision-making process is based on seeking heightened reward, rather than avoiding harm (e.g., Scott and Steinberg 2008).

Second, teenagers have the same cognitive functions as adults. Even though individuals continue to psychologically develop and mature in their adult years, there is not a large difference between the decision-making capacity of late adolescents and adults (Scott and Steinberg 2008). All adolescents develop and mature at different rates and in different environments. By the age of sixteen, adults and adolescents share the same logical competencies. However, adolescents still exhibit a tendency to take more risks than adults, which displays that adolescents are able to understand the risks, yet sometimes do not make "good" decisions. Scholars attribute this to adolescents being influenced by emotions and social influences Scott and Steinberg 2008). Scholars have suggested that an adolescent's decision-making capacity is not tied to age, but to when the adolescent goes through puberty (Scott and Steinberg 2008). Child pornography statutes do not consider the maturity level of individual teenagers, and assume that all minors are too immature to make decisions regarding sexting. Because of this categorical approach, minors are treated legally as children even when they are competent to perform adult functions and make competent decisions.

Third, parents play an important role in child rearing, but they do not play an important role in their child's sexting. A survey conducted by a family support charity in the United Kingdom revealed that many parents would prefer to ignore the sexting phenomenon: 46 % of parents indicated they did not intend to talk to their children about sexting before it occurred (Gunter 2014). Many parents felt ill-equipped to deal with sexting because they did not have enough information about sexting; when parents who were surveyed accidentally found out that their child was sexting, they were often shocked (Gunter 2014).

If we accept the theory that adolescence is a period of heightened vulnerability, and prosecuting minors and sentencing them to jail will negatively impact the development of minors at such a crucial time in their lives. Prosecuting minors for sexting under child pornography statutes does not act in the best interest of the child, and teenagers' rights should not be limited in the sphere of consensual sexting. Therefore, under the rationale used in *Bellotti v. Baird,* the use of child pornography laws for prosecuting minors for sexting would be unconstitutional, since it does not act in the minors' best interest.

Spare the Prosecution—Benefit the Child

Consensual teen sexting cases should be removed from criminal justice systems and lawmakers should enact statutes decriminalizing consensual sexting between minors, and perhaps consensual sexting between a minor and an individual within 3 years of age of the minor (the 3-year exception is borrowed from Joanna R. Lampe's proposal for decriminalizing consensual teen sexting, Lampe 2012–2013).

Preventing long prison sentences and sex offender registrations for consensual teenage sexting is essential to serve the best interest of minors. However, since sexting still has some harmful consequences, minors must learn the legal and non-legal consequences that may result from sexting and learn how to practice safe-sexting.

Decriminalize Consensual Teenage Sexting

The purpose of teenage sexting laws should be to protect minors from harms associated with sexting. Governments should enact statutes that decriminalize consensual teenage sexting, while allowing charges to be brought for exploitative sexting. This allows criminal charges to be brought when the sext is not consensual by any party involved in the sexting. In the current legal system, the potential harms that may result from consensual teenage sexting do not justify the potential harm of prosecution and convictions leading to jail time and registering as a sex offender. Simply put, the punishment does not fit the "crime."

With the potential harms in mind, affirmative consent is necessary by all actors for a sext to be consensual. Additionally, the sext must be between two minors or between a minor and a young adult within three years of age of the minor. Throughout the semester, we have evaluated the pros and cons of bright-line laws. Therefore, my solution is a hybrid: a bright-line rule with an exception. Since many teenagers and young adults have relationships, and an 18-year-old should not be legally punished for consensually sexting her 17-year-old boyfriend, a 3-year exception is appropriate. This exception aims to protect younger children from being exploited by adults. This proposed statute still gives the government the ability to punish traditional child pornography and limits teenagers' sexting to only consensual situations between minors and young adults within three years of the minor.

Education and Parent Approach

Since teenagers spend a majority of their time at school or at home, parents and schools are in the best position to educate and prevent against teenage sexting. Schools play an influential role in teenagers' lives and are critical to the education and protection of teenagers. Schools should play a critical role in preventing and educating teenagers about sexting.

The Supreme Court has a wide range of views for the level of authority a school should have over its students. For example, the Supreme Court held that strip searches in schools are unconstitutional under the Fourth Amendment in Safford Unified Sch. Dist. #1 v. Redding. But Justice Thomas disagreed with this assertion, arguing that the Supreme Court should return to the common-law doctrine of *in*

loco parentis, under which courts were reluctant to interfere with the routine business of school administration (*Safford Unified School District #1 v. Redding* 2009).

Sexting education should be incorporated into schools' existing sexual education curriculums, health classes, and other previously existing initiatives—such as the anti-bullying initiative, which would address concerns about exploitative sexting (Machometa 2014). Anti-sexting initiatives should begin early, such as middle school, before the teenagers begin sexting. These programs should teach students how to resist peer-pressure to sext, explain the dangers associated with sexting, offer advice for how to deal with receiving unsolicited sexts, and offer students the opportunity to speak with teachers or counselors about sexting without the threat of discipline or criminal action. School sexting policies should not include punishment for sexting, since discipline discourages a student seeking help for issues related to sexting. School districts should also educate parents about the prevalence of sexting and the related issues. Schools should provide parents with literature that informs them how to detect warning signs of sexting or the ramifications of sexting. Since there is so much information available online, schools should direct parents to certain websites that address sexting prevention.

Courts have recognized the importance of parents in guiding the moral upbringing of children. Almost a century ago, the Supreme Court recognized the parents' right to educate their children in *Pierce v. Society of Sisters* (1925). In *Wisconsin v. Yoder* (1972), the Supreme Court applied this right to Amish parents who wished to homeschool their children, holding that parents can control their children's education based on the parents' right to religious freedom. The rights of parents' are not unlimited, and in *Prince v. Massachusetts* (1944), the Supreme Court held that the government's interest in protecting children (through child labor laws) outweighed the parent's constitutional rights to rearing children and the child's right to practice religion. Likewise, in *Bellotti v. Baird* (1979), the Supreme Court reiterated the importance of the parental role in child rearing. Justice Rehnquist, dissenting in *Cary v. Population Services International* (1977), argued that moral issues concerning adolescents (such as the distribution of contraceptives, at issue in *Cary*) are best left to parents, not legislatures and courts. Because of the importance of the parental role in the moral upbringing of children, parents should also be involved in educating their children about sexting.

Opponents may argue that, since parents do not have a large influence on their child's sex decisions and sexting, parents are not in the best place to educate their child about the issues of sexting. While parents do not play as large of a role in their children's sexual lives as parents do in other areas, parents working in conjunction with schools to educate students about sexting may be the best solution.

Parents and schools—with their unique ability to influence adolescents—are in the best situation to deal with teenage sexting. This also aligns with the current views of our legal system, since it leaves the moral issue of texting to the parent, in conjunction with the school. This is in sync with the government's goals of child protection and protecting parental rights.

Conclusion

Adolescents' sexting raises many important issues relating to the protection of youth. But, current legal responses to protecting youth make one thing clear. Minors should not be prosecuted for consensual sexting under traditional child pornography laws. First, sexting is a common practice among teenagers, and is prevalent among teenagers all over the world. When sexting is consensual, there is not a "culpable party" and a "victim." Rather, teenagers who engage in consensual sexting are often sending sexual photos to their significant other or friends. Sexting generally remains innocent behavior for many teenagers, and they should not have to spend time in prison for taking a sexual photo of themselves and sending it to a consenting party. Child pornography laws have been used to prosecute minors in many situations, including when a 16-year-old girl sent her 17-year-old boyfriend a sext of herself, in the case of *A.H.*, and when a school official confiscated cell phones and found semi-naked photos of girls on the phone, in *Miller v. Mitchell.* The five rationales articulated in *New York v. Ferber* do not justify the government exercising additional authority to regulate consensual teenage sexting under child pornography laws. Likewise, the factors from *Bellotti v. Baird* indicate that it should be unconstitutional to prosecute a minor for consensual sexting, since it does not act in the best interest of the minor.

To solve problems raised by prosecuting minors for sexting, lawmakers should enact statutes that decriminalize consensual teenage sexting. Doing so will ensure that parties may recover from the harms associated with exploitative sexting, while minors will not be prosecuted for engaging in sexting with other minors. In place of criminalizing minors, schools and parents should work together to implement an effective sexting education regime. In schools, this could be incorporated in previously existing courses or initiatives, including those that help students understand coercive behavior. Since parents do not have all the necessary information to teach their child about sexting, or detect if their child is involved in an exploitative sexting situation, schools should educate parents about the reality and dangers of sexting.

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Part III
Education

Chapter 6
Protecting Students from Racial Discrimination in Public Schools

Robert Crawford

Introduction

The school to prison pipeline has become an increasingly popular topic of research in the field of Criminal Justice. These analyses focus on the racial biases that affect how disciplinary measures are given in public schools, and the increased probability that a child will end up in the system of corrections after being disciplined. Moreover, evidence suggests that minority children are segregated into the "slower" classes or special needs groups. While the evidence suggests that these actions have been consistently manifested in the public school system, a combination of recent empirical studies from various disciplines has uncovered another disturbing, yet consistent trend. Economically disadvantaged families are consistently segregated into poorer areas, which consequently confines them to lower quality school districts.

Citizens who are overrepresented in the sample of those experiencing the harmful effects of societal discrimination are minorities, but specifically young African-American males. Regrettably, it seems as though these discoveries are consistently overlooked when new reform policies are created for public schools. Initial empirical findings suggest that homogenous schooling may be a viable solution to the plight juveniles in the public school system face, and could diminish the overrepresentation of minorities in the school to prison pipeline. The history of discipline in public schools will be discussed before addressing the school to prison pipeline data. Legal trends of forced integration will be described and compared to societal trends of segregation. Then, policy implications of what we know about these issues will be presented.

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R.J.R. Levesque (ed.), *Adolescents, Rapid Social Change, and the Law*,
Advancing Responsible Adolescent Development,
DOI 10.1007/978-3-319-41535-2_6

History of Discipline in Public Schools

In 1642, when the first educational law was enacted by the Massachusetts General Court mandating parents to guarantee that their children were able understand basic laws and religious principles, it was already an accepted societal norm for educators to assume the responsibility of guarding young minds on school grounds (Coulson 1999). Adopting the common law principle of *loco parentis*, American schools embraced their role as educators and protectors of future generations' wellbeing in order to mold citizens who would be able to contribute to society (Goddard et al. 2001). As time progressed, this idea that the state government has a unique, and powerful interest in effectively molding children while under its supervision has only become more entrenched in American ideology. To effectively shape children, schools have consistently relied on disciplinary measures. Although public schools have been granted broad and flexible powers believed to be necessary to cogently shape students, they have struggled to find a disciplinary approach that has the ability to punish while simultaneously nurturing students as well.

Initially, school discipline was handled by a swift application of physical force, more commonly referred to as a spanking (Ellison and Sherkat 1993). However, as time progressed, more and more parents became less supportive of such a level of discipline. The reduction in community endorsement of the tactic stemmed from increase awareness of the prevalence in which arbitrary abuse, or unwarranted acts of vitriolic chastisement occurred (Dupper and Montgomery Dingus 2008). The effectiveness of the punishment itself was disputed with escalating fervor as well, mainly because of the growing skepticism attributed to its efficacy in aiding a teacher's ability to control a classroom and deter students from engaging in misconduct (Dubanoski et al. 1983). Based on the shift in support for spanking, schools began to rethink their procedures (Farrell 2015). While several punitive measures were experimented with, a seemingly viable solution emerged from the rest: out of school suspensions. Following the supposedly commonsense logic that, if there is a bad seed, it should be removed lest it sprout and affect its surrounding environment, temporary termination of educational activities to teach students a lesson became commonplace in the American public school system (McNeely et al. 2002).

Retributive action became more prevalent in public schools to show a "get tough on delinquency" approach (Skiba and Peterson 1999, p. 337). Even though zero-tolerance approaches, such as suspensions, were initially created to remove students who were excessively violent or who brought weapons on campus, the stratagems soon became applicable to all actions that did not align with school codes (Skiba and Peterson 1999). An increasing number of students began to be removed from school grounds, and miss substantial amounts of instruction (US Bureau of Labor Statistics 2012). On a surface level, the approach seemed to be creating the desired effects. Students who did not take their studies seriously, or who were disrupting the learning experience of others were removed more frequently, allowing the "good" students to flourish and be able to strive towards becoming model citizens. Therefore, the strategy was viewed as a valid approach.

But, as time progressed, more recent studies have begun to show that out of school suspensions were based on invalid assumptions, and actually perpetuated a counterintuitive trend (Christle et al. 2005). Schools with higher rates of suspensions were shown to have lower rates of academic success.

Moreover, children and adolescents who were removed from campuses multiple times had an increased, and statistically significant likelihood of ending up in the criminal justice system (Wald and Losen 2003). Because educational success has been a fundamental foundation of numerous societies since the days of Plato, this quickly became a growing topic of concern (Barrow 2011). To put the seriousness of the situation into perspective, the Supreme Court even ruled that there is a major interest in keeping students in school in order to not put them on the streets, and inadvertently force them into criminal activity (*Goss v. Lopez* 1975). As if these discoveries were not enough, there was also a glaring problem with distributions of out of school suspensions between ethnicities. At the elementary level, Blacks were found to be suspended at a rate 5.5 % higher than Whites, and a mind-blowing 17 % higher during middle school, and high school (Losen and Martinez 2013).

The Switch from Retribution to Restorative Justice

Educational Reasons for the Switch

The switch from retribution to restoration in public schools became more widely used approximately 30 years ago, which is around the same time the criminal justice and juvenile corrections systems began to use similar techniques as well (Gonzalez 2012). The rationale behind the transition was established on proliferating amount of studies on how beneficial restorative justice could be if administered properly. Although the initial results were promising, they were limited and lacked significant funding to produce statistically significant results that could radically alter policies (Washington Research Project 1974). However, as more and more studies began to focus on the problems with schools' using punishments such as out of school suspensions, a greater amount of deficiencies were found in the practices. While suspending a student for a day or two (as is still common) may not appear to have drastic impacts on student success, studies began to reveal that just one suspension doubles a student's risk of dropping out, from 16 to 32 %. Additional studies concluded that 19,000 students were suspended per day during the 182 days in a typical public school year (Civil Rights Data Collection Data Snapshot 2014).

Previously conceived notions regarding the efficacy of retributive tactics have become less well-accepted over time. For example, one popular reason for the use of retributive punishments and added security measures like security guards, metal detectors, or heightened security systems was to improve the sense of safety for students and faculty (Steinberg et al. 2011). But, more studies on the topics

uncovered results that were not very supportive, such as discovering heightened security models did not seem to increase feelings of security for students in their own schools (Servoss and Finn 2014). Other works reaffirmed these findings, one of note being conducted by Balfanze and Byrnes in 2012, which focused on how seriously absences from schools can affect the overall learning experience.

Developmental Reasons for the Switch

As if educational problems were not enough, removal from school significantly inhibits other positive progression in other areas such as sexual, psychological, and social development. The normal advancement for children to develop socially acceptable behavior is directly contingent on the ability to be able to establish relationship with peers, and engage in sexually explorative behavior with children their same age (Cunningham and MacFarlane 1991). Hindrance to this evolution has been shown to significantly alter the normal integration of children and adolescents into society (Fine 1988).

Regardless of a person's belief as to which theory of human development is the most empirically sound or beneficial, it is logical to assume all are in agreement that there is a normal and healthy pattern of development that requires relationships with others in the environment (Erikson 1994). One example of empirical data on the subject is found in Lawrence Steinberg's "Cognitive and Affective Development" (2005, p. 72), in which he states:

> Adolescence is often a period of especially heightened vulnerability as a consequence of potential disjunctions between developing brain, behavioral and cognitive systems that mature along different timetables and under the control of both common and independent biological processes. Taken together, these developments reinforce the emerging understanding of adolescence as a critical or sensitive period for a reorganization of regulatory systems, a reorganization that is fraught with both risks and opportunities.

Research on cognitive and biological development such as this, combined with studies focused on the sensitive issue of adolescents and children discovering their identities and autonomy during the time they are being introduced to a school setting, only strengthened the idea that students need to be kept in the confines of school, and not rejected and expected to fend for themselves.

Another example of developmental research that reaffirmed the importance of the age range 6–18 was conducted by Cole et al. in 2004. According to their research, this time period is crucial for developing competence, fidelity, independence, and identity, and is directly shaped by experiences in school (Cole et al. 2004, pp. 320–324). During the earlier stages, every experience a child lives through has a significant impact on his or her development. For instance, removing a child from school, even temporarily, will most likely create feelings of inferiority in the child which may only continue to fester as long if such treatment continued. Adolescence is even more precarious because minors in this stage of life are

struggling to find their identity and sense of morality. They usually find their place in society by peer integration and adaption, and any alteration to this cycle could proliferate confusions with their role in life (Cole et al. 2004, p. 330). Removing them from school could conceivably confound the already arduous task of finding their identity by introducing potentially negative peer group influences from youth who also have been suspended and removed from school.

Financial Reasons for the Switch

A final addition to the scientific findings employed by proponents of abolishing retributive tactics to sway the tide against retributive punishments in schools is the increase in economic expenditures caused by students dropping out of high school and grade retention, direct symptoms of suspending students from school. Alvarez et al. (2009) conducted a longitudinal study of the injurious effects of children and teens dropping out of high school caused by multiple pejorative punishments such as out of school suspensions. The study concluded that there was a 24 % increase directly associated with those who were disciplined when compared to students who were not disciplined, which in turn costs the state an estimated between $5 and $9 billion dollars (Alvarez et al. 2009, p. 53).

The estimated costs were presupposed on lost sales tax revenue over the course of a lifetime ($279–507 million), the increase in welfare costs associated with dropout rates ($404–736 million), and the subsequent increase in court costs due to the established connection between students dropping out and entry into the correctional system ($595 million–$1 billion) (Alvarez et al. 2009, p. 56). Any savings generated by not having to pay for a student's education are wiped out by the other hidden costs associated with having to support those who cannot find work for themselves.

Other investigations have delved into other ways retributive disciplinary measures could hurt society in the long run. One such study conducted by Booth et al. (2012) accentuated the terrifying fact that retaining a student cost the state of Texas and its school districts an average of $11,543 a year per student (Booth et al. 2012, p. 14). The more a student is suspended, the less likely they are to graduate on time, thereby, extending the time and money required to accommodate them. If a student was not suspended, or disciplined so much that they were forced to miss time in the classroom, they might be able to increase the likelihood that they could graduate on time and contribute to their society while simultaneously eliminating the need for society to pay their school fees for another year (Booth et al., p. 12). These costs added together, when multiplied across Texas' annual retention rate of 6603 students resulted in an annual cost of $76 million (Booth et al. 2012, p. 12). These costs do not even include the other unseen costs associated with repeated confinement of students like purchasing power, earning potential, and sales tax revenues (Booth et al. 2012, p. 12).

Other alternative punishments that have been used with an increasing rate of occurrence are making students who break the rules are, but not limited to: having students pick up trash, using in school suspensions, requiring students to talk to other students they were disrespectful or mean to, and mandating that those who disobey policies attend school counseling sessions instead of being removed from campus (Casella 2003). As a result, out of school suspensions have been declining sharply, as have the overall number of school disturbances (Jennings et al. 2008). Money is being afforded to researchers and schools who are adopting this system with flourishing consistency, and it is being heralded as a final solution to the shortcomings retributive policies have been sustaining.

Initial Results from the Switch

In light of the overwhelming data accumulated on the subject, schools have begun to implement restorative measures at an increasing rate. Assurances have been taken to try and increase the sense of accountability restoration in employees, and students alike (Morrison 2003). A study of relative importance that determined the significance of restorative justice in high schools was a longitudinal study conducted by Thalia Gonzalez for over 5 years. The study indicated that a drop in the suspension rates of schools were seemingly correlated to an increase in feelings of school safety, standardized test scores, and graduation rates (González 2011, p. 15).

Other studies have examined alternative punishments that have been used with an increasing rate of occurrence are: making students who break the rules are, but not limited to: having students pick up trash, using in school suspensions, requiring students talk to other students they were disrespectful or mean to, and mandating that those who disobey policies attend school counseling sessions instead of being removed from campus (Casella 2003). Although juvenile delinquency rates have been declining since the mid-90s, the increased usage of curative techniques for punishment has also been correlated to the decline (Sickmund and Puzzanchera 2014). Plus, the school to prison pipeline issue has been addressed with increasing success. Regrettably, there is another issue that has not been handled as efficiently: the disproportional amount of discipline levied against minorities, and the over-representation of young Black males in empirical data.

Persistent Issues

Unfortunately, there is one element in America's educational system that has not been changing. The seemingly ubiquitous discovery found by past and present empirical studies is that even with the increased use of less stringent reformatory measures, minority children, and teenagers are still consistently disciplined more habitually than their peers, and consistently labeled as special needs (Gregory et al. 2010).

Additionally, African-American males are habitually overrepresented in these findings. Quantifiably, the problem of the school to prison pipeline may seem to be improving from the decreased occurrence of students being removed from campuses, but the consistent unearthing of racial discrimination sheds light on the much more disturbing issue that lies beneath the surface (Gegory et al.). While a restorative system of punishment is currently thought to be an effective panacea to the problem of children acting out in schools, and the disproportionate numbers between rates of ethnic discipline, its initial results appear as unable to remove the systemic casteism in public schools (Skiba et al. 2002).

Whether it be teachers, other faculty, or principals, racial biases have been found to affect the decision-making process involved in meeting out disciplinary measures, regardless of their level of severity. These trends are evidenced by the fact that schools with higher than average enrollments of blacks have a higher than average number of matters that are handled punitively (Wallace et al. 2008). In addition, it has been shown that, even though out of school suspensions have been used less and less frequently, African-American males are still dealt more punishments, restorative or not, for actions for which their white or other ethnic counterparts are not punished (Puzzanchera 2000).

The belief catalyzing these training techniques is that, if people are made aware of their biases, they will be able to actively fight against them. For example, the My Teaching Partner professional development program was supposed to enhance emotional, organizational, and instructional ties that students and teachers have to each other which was supposed to balance the equilibrium of discipline between races (Allen et al. 2011; Gregory et al. 2014). While there was a decrease in overall disciplinary rates in experimental groups, and a decrease in disparity between Black and White students, these results do not appear to be representative, or generalizable.

Although nascent, these restorative procedures and training seminars do not appear to have done much to eradicate the underlying issues that are consistently uncovered in public schools. While numerous plans and ratifications have been created, and there has been some drop in the statistics of different treatment of minorities, there is still a significant disparity between disciplinary measures given to minorities and Whites. While this may not make sense to some, or mean to others that these things just take time to work, there is a potential, psychological explanation for the inability for the gap to be closed: aversive racism.

Possible Causes of Persistent Issues

As Dovidio and Gaertner point out in their article "Aversive Racism" (2004), just because legal adaptions are made to protect African-Americans does not mean that society will internalize these changes and act accordingly. At the heart of the idea of aversive racism is that people will outwardly say that they are not discriminating against minorities because of their race, they are only doing so because the law tells

them they must, and will find other ways to discriminate against them whether it be consciously, or even subconsciously. This relates to a myriad of psychological research that all centers on the idea that humans like being around their own race, and identify with people of their own race as well (Katz 1964). All these empirical understandings, while seemingly unrelated, point to one conclusion: racism is an inherent, innate, and irremovable flaw of human character. Policies should be enacted that acknowledge these flaws in human character. By ignoring innate prejudices, which admittedly can range widely in their strength and expression, the issues inextricably connected to them cannot be solved.

The above has been supported by more relevant research conducted by Skiba et al. (2011) where they studied race-neutral techniques were implemented in schools. While, the overall disciplinary rate went down after implementing a restorative system in 426 schools in the study, there was still a glaring difference in the amount of African-American students when compared to the White students (Skiba et al. 2011). Empiricists appear to be surprised by these findings, or unconcerned about their prevalence (Puzzanchera 2000; Wallace et al. pp. 9–10). However, if de jure (legal) integration and de facto (actual) segregation patterns are examined, the current public school predicament is not very surprising.

De Jure Integration, de Facto Segregation in Public Schools, and de Facto Segregation in Society

Legally Mandated Integration

The renowned 1954 case of *Brown v. Board of Education*, a rare decision of unanimity on a hotly contested issue, firmly cemented the idea into American society that it is the Nation's goal to ensure fundamental rights to all ethnicities. In order to do so, abolishing segregation was necessary to maintain that one group is not inherently favored above others in society. The established practice of "separate but equal" in the 1896 case of *Plessy v. Ferguson* was ruled to be unequal based on the knowledge created by psychological research that separate educational facilities are congenitally unequal (*Brown v. Board*). The Justices involved went on to conclude that race based segregation was a violation of the Equal Protection Clause of the 14th Amendment (*Brown v. Board).*

States were immediately forced to begin integrating ethnicities into public schools of the 17 states that had laws establishing segregation. The backlash of the ruling was significant, as there were multiple violent outbursts where Whites used physical force to keep Blacks out of schools (Bickel 1964). However, over time, integration became the norm. The established systems of de jure segregation were slowly dismantled, and biracial systems of education became the norm. One specific implementation of de jure, or legally enforced, segregation has been efforts to support affirmative action through the 14th Amendment. A seminal case in the

relation of affirmative action to desegregation was *Green v. County School Board* (1968) in which the Court ruled that school boards would have to show meaningful, and statistical change in the racial construction of their schools. Busing was one of the first constructed means of implementing this rapid, and seemingly necessary system of forced integration.

While busing was not a new idea, as described by Sears et al. (1979), and had been used to transport Black children to segregated schools before, using specific percentages to transport a required number of children to different schools was unfamiliar (p. 372). Apart from the racial tensions that manifested in these schools where disgruntled children, both minority and majority, are displaced in order to create what was described in *Green* as a cohesive mix of students that can be used to create an environment optimal for learning, busing did not appear to imbue many positive changes. Regrettably, it soon became clear that, although integration was publically professed, minorities, especially Blacks, were and still are subjugated to segregation in the classroom (Barrett 2011; Levesque 2015).

Current Segregation in Schools

Research conducted by Katz (1964, p. 58) showed results that made it seem doubtful "whether school systems that desegregate under court order are willing to make the painful efforts necessary to bring harmony and mutual respect to a biracial classroom." It appears that those results were not far off. The Individuals with Disabilities Education Act of 1997 revealed that African Americans, who only constituted 16 % of elementary and secondary students in the U.S., composed 21 % of the total population in special education. Moreover, Black children from lower class families were almost two and a half times more likely than their peers to be identified by their teacher as having mental retardation (GAO 2013, p. 320).

The Act also recognized that mostly African American boys were misdiagnosed and misplaced into special education programs. Even though the act called for a change, and stated that there needed to be more education on the plight of young minority males in schools, the overrepresentation of African-American children in special education continues to be a critical problem. This directly contributes to the school to prison pipeline issue, as a national study focusing on secondary school enrollment discovered that 36 % of black male students with disabilities were suspended from school in 2009–2010 (Losen and Martinez 2013).

Another egregious example of segregation in public schools is the tracking strategy. Tracking refers to students' being grouped into classes that are composed of students with similar academic abilities (Rosenbaum 1976). However, it has been shown with increasing prevalence that the grouping of classes has become more based on ethnic and socioeconomic factors than on alleged academic indicators (Gamoran and Mare 1989, pp. 1173–1175). This research bolsters the persistent notion that there is a drastic gap in opportunity for students in the public school

system, and that attempting to implement restorative justice may not be able to extract the pervasive issues that integrated schools have been founded upon.

Current Segregation in Society

There is also a possibility that restorative justice and other proposed alternatives could be thwarted by historical trends of families with enough money leaving urban public school districts and placing their children in private schools (Frey 1979). This process is referred to as "White Flight." White flight is the tendency of White families to take their children out of public school, and place them into private or suburban schools in order to get them away from the poorer, urban families that can only afford to put their children in public schools (Kruse 2013). This follows a similar pattern found in Park and Burgess' criminological Concentric Zone Theory, and many other ecological theories as well. The main idea of these theories is that when something new and dominant is introduced to the environment, those that can escape it, will so as expeditiously as possible (Harris and Ulman 1945).

Numerous legislative proposals have been passed to regulate the harms caused by the prevalence of racism in areas other than schools. For example, the Civil Rights act of 1964 was a landmark moment in United States history because it eliminated segregation in public places (Civil Rights Act of 1964). After that, a litany of changes have been made to increase awareness, and decrease discrimination such as, but not limited to Civil Rights Acts of 1968, 1991, the Employment Non-Discrimination Act, the Fair Housing Act, and the Voting Rights Act of 1965 (Civil Rights Act of 1991). The majority of legal responses have focused on increasing access to education, creating more racially inclusive policies, and producing more opportunities for minorities, especially young Black males. Other measures deemed more radical, such as segregation based on racial quotas, have been discussed as well.

An embodiment of these new ideas is exemplified in acts such as President Obama's 2014 My Brother's Keeper initiative, which was supposed to decrease racial disparities by creating more opportunities for hardworking African-American Males (The White House, Office of the Press Secretary 2014). Other initiatives taken that are more appropriate to schools are the School Discipline Consensus Project, Supportive School Discipline Initiative, and other positive behavior and support systems in grades K-12 (Request for Information on Disproportionality Under IDEA 2014). But, it appears that legislative entities are simultaneously allowing zoning law to segregate poorer families through location-based discrimination or residential discrimination.

Residential discrimination refers to the zones that are established in every city or town that sanctions off areas into little boxes. If you live in a certain box, you can only go to the school or schools that are in that geographic area. Because wealthier families have the financial means to leave undesirable urban or rural areas that are heavily populated and put their children in other schools, the minority families who

cannot leave are forced to go to the schools in their area (Ladson-Billings and Tate 1995). Because of this, property values are lowered, which lowers property taxes, which takes away money from public schools (Hamilton, p. 648). Even attempts at creating more opportunities for poorer, minority children have been subverted by these processes.

In an attempt to alleviate the harmful effects of these societal trends, Magnet Schools were created in order to foster a more racially diverse environment for students to thrive in, and ensure racial integration as well. They are still operated under the same public school system that other schools are, but they are outside of the zoning confinements (Gamoran 1996, p. 8). However, because of the noticeable occurrence of White flight, these schools have very low representation of minority children, poorer children, and children with disabilities (Archbald 2004). These programs have also been criticized because it is said that they take money away from the regular public schools, and disadvantage children even more by not allowing students whose families cannot afford better schools to be afforded the same opportunities to succeed.

Policy Reform Implications

Economically disadvantaged and minority children need to be protected. They should not be victimized by arbitrary measures such as those that can derive from excessive discretion of school officials. Additionally, biases and prejudices that public schools and society were built on cannot continue to be ignored. Instead, a plausible alternative could be that legislative officials accept that de facto segregation occurs and will continue to occur. While other solutions have been proposed to address this problem, none seem to effectively, and quickly protect minority children currently in public schools. Based on the wealth of empirical knowledge on the subject, it seems a viable option for lessening racial biases in public schools would be state sanctioned homogenous schooling. To be clear, this proposal is different from forced segregation because these schools could be optional for students. The reasons that segregation is harmful listed in *Brown* includes: it places a discrepancy between races in society, it leads to feelings of inferiority in minorities, it distorts society's sense of reality, and it is frustrating for minorities (Cummings 1992, p. 730).

While these reasons for discrepancies between schools were undoubtedly true at the time, one needs to consider the possibility that these feelings of inadequacy could be eliminated if the schools, technology provided, and level of teaching given in these schools were created equal to other public schools. Would minority parents mind if their children went to homogenous schools if (1) they chose for them to go there; (2) the facilities were the same as other public school facilities; (3) the education they were receiving was equal or better than heterogeneous schools; (4) and their children were not being singled out in schools because of their race?

While any definitive answer is conjectural, recent studies have provided results that would suggest numerous parents would answer "No" to the previous question.

Single-sex schools have already been established, and continued upon conflicting findings that students score better on standardized test scores than those in co-ed schools (Truely and Davis 1993). As such, All Male Black Schools, an idea that has been proposed for some time, could be an acceptable alternative. The government would have to appropriate more funds toward the establishment of homogeneous schools in order to create a learning environment that is truly dedicated to change. Without the racial disparities that occur due to the biases that are inextricable in heterogenetic systems, homogenous schools need to be encouraged so that students will not harbor feelings of inadequacy from their peers, or by teachers discriminating against them. To be clear, no race or ethnicity would be forced to go to a school they did not want to go to. Rather, they would just be encouraged to go to schools primarily comprised of students of their same race and those schools would be supported with the resourced needed.

A school voucher program for minorities that would pay for expenses to go to schools where the majority of the population are of the same race is a feasible, and logical possibility. Although this would be undoubtedly challenged as unconstitutional (see Parents Involved in Community Schools v. Seattle School District No. 1 2007), there may well be some room for them. For example, schools have been challenged when they have been developed in a way that favors religious schools. A possible interpretation is that it would just be presenting parents with options, which they would not be influenced to accept in any way, according to the ruling established by the Supreme Court in *Zelman v. Simmons-Harris* (2002). In addition, if states are able to demonstrate compelling interests, they can implement policies that otherwise would be counter to the Constitution; and that actually was what permitted Brown v. Board of Ed to use racial characteristics to remedy the effects of discrimination. A compelling argument could be made in support of homogenous schools. Some will argue that segregating minority students seems atavistic, myopic, and facile on the surface. However, it truly addresses the issues that minority youth face in public schools without trying to assume that people are not inherently flawed. The government has a narrowly tailored, and significant interest in assuring children are protected in the institutions that were created to mold them into citizens that contribute, and do not take away from the advancement of society.

Conclusion

It is difficult to ignore the harms that come from discrimination in public school systems. To ensure that travesties stemming from discrimination happen the least amount of times as possible, it is time to consider alternatives. A system of homogenized education that is not required, but encouraged by the state is an option that merits consideration. The Supreme Court has repeatedly stated that children

have a unique, and delicate place in society that needs to be safeguarded at all costs. Society appears as if it wants to come together in order to protect its future generations from the inequities they suffer. However, it also appears that the methods by which the United States has tried to achieve this goal have not been working. Based on these perceptions, it seems that opportunistic isolation for minorities may yield a more promising future for some of them. Not isolated in the current sense of the term where they are given differential treatment through lessened financial and educational opportunities, but in the sense where minority and disadvantaged youth do not have to fear being ostracized in school for being different, or fear having an increased risk of being classified as special need. Acceptance of a problem is the first step to recovery; then, and only then, will the plight of disadvantaged children actually begin to improve.

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Chapter 7
Protecting Financially Disadvantaged Students' Educational Rights

Megan Lawson

Introduction

More than 16 million children in the United States live in poverty. The statistics from which this figure is derived are underinclusive, considering only those families whose annual income falls below $23,550 for four persons (or the equivalent proportional income for a family of a different size)—a value that has not changed to reflect inflation for many years (Ferriss 1970). Families of four who bring in $24,000 a year are not considered impoverished, although a reasonable assessment of the cost of living in contemporary America would demonstrate otherwise. The effect of an arbitrary poverty line means there are many more children living in poverty than are acknowledged by contemporary statistics and figures; America's epidemic of poverty is much more pervasive than society is willing to accept.

One of the many negative consequences of poverty is the impact that reduced resources have on educational opportunities for young learners. Children in poverty disproportionality represent the population of low-achieving students. They are less likely to pass standardized tests, take advanced or honors classes, and ultimately, less likely to graduate (Gorski 2013). In sum, the achievement gap between students in poverty and students from financially stable families is dramatic.

Both federal and state governments have responded to this educational crisis by attempting to impose legal reforms that focus on raising test scores, rather than assessing true student ability, even though the positive impact of such a regime is highly questionable and does little to address the root of the problem. Furthermore, many policy-makers and educators have come to accept the counterfactual ideology of a "culture of poverty" where they contend that those who are of a low means are lazy, less desiring to succeed, and less serious about education than their financially sound counterparts (Gorski 2013).

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R.J.R. Levesque (ed.), *Adolescents, Rapid Social Change, and the Law*,
Advancing Responsible Adolescent Development,
DOI 10.1007/978-3-319-41535-2_7

Such widely accepted myths regarding low-income families have led to the creation of academic and legal cultures ill-suited to serve the needs of students in poverty. As social science works to debunk these myths, the legal system can respond more appropriately by distinguishing children in poverty as members of a class in need of special protections and, even if the legal system refuses to do so, both the legal system and educators can better reach students in need by seeking alternative sources of school funding, practicing cultural competence, and moving away from test-focused teaching.

Poverty Myths and Their Consequences

Extensive misunderstandings on the topic of poverty have contributed to the development of widespread myths regarding low-income families and students. These myths are rooted in a general lack of societal awareness and misgivings about the reality of being poor in America. Before real progress can be made in combating these myths, the existence of these misunderstandings must first be acknowledged.

An increasingly pervasive myth circulating in American society is encapsulated in the "culture of poverty" ideology (Gorski 2013). American anthropologist Oscar Lewis coined the term "culture of poverty" with the publication of his book *The Children of Sanchez* in 1965. Lewis analyzed several low-income communities and extracted the characteristics universally present. He concluded that the uniformity of various characteristics across impoverished communities suggests that there is in fact a "culture of poverty," in effect suggesting that indigent persons share common ideas, beliefs, world views, and even behaviors, due to their shared status as low-income individuals and families.

Adherents to this ideology argue that indigent people "share more or less monolithic and predictable beliefs, values, and behaviors" (Gorski 2008, p. 53). In essence, the "culture of poverty" philosophy works to diminish the uniqueness of individuals, holding instead that a low socioeconomic status creates a type of being —one who cannot think or behave in a manner truly independent of his class. The "culture of poverty" ideology is often presented as an explanation for the perceived laziness or disinterest of impoverished students. It is also a stereotype applied to low-income parents when they are unable to attend school functions or provide appropriate time for educational learning in the home (Gorski 2008). Acceptance of this ideology has allowed policy-makers and educators to feel comfortable with and, ultimately, justify the achievement gap.

Various myths have arisen as a product of the "culture of poverty" ideology. Two of the most incessant myths prevalent within academia are that parents in poverty do not care about their students' education and that parents in poverty do not value education as much as financially stable parents value learning (Gorski 2008). These myths work to distance low-income parents from the educational system, making educators and the parents feel at odds with each other and hindering progress by blocking the development of beneficial relationships.

Another myth that is commonplace in academia, yet one which more and more educational advocates and social scientists are speaking out against, is the perception that standardized testing is the best method of determining student success and one that is inherently objective and fair (Epstein 1973). In all states, some form of standardized testing has been incorporated into the curriculum. Often, these tests begin at a young age and are administered periodically throughout a child's primary and secondary school years (Easton and Soguero 2011). Students are conditioned to view these tests as an indication of their level of intelligence and teachers are encouraged, and sometimes forced, to mold their approach around the administration of the exam—a practice known as teaching to testing (Gorski 2013). Because children in poverty tend to be less successful on these examinations, for reasons explored below, some educators begin to perceive children in poverty as less capable and even less intelligent. This misinterpretation of test scores may discourage educators from expending their time and resources on students from impoverished families, time and energy which are most needed to help those in poverty.

Perhaps the myth with the most far-reaching legal repercussions is that individuals, and in particular children, in poverty are not a "class" at risk of facing increased discrimination. The Supreme Court has held that classes of people that are more likely to face legal discrimination based on an identifying characteristic are entitled to special protection under the law. In order for a group to meet the criteria required for special legal protections, the Court generally considers three criteria: immutability, meritocracy, and a history of political-incapacitation (*Korematsu v. United States* 1944). In the past, the Supreme Court has determined that race, religion, national origin, and alienage are "suspect" classes and, therefore, the Court will closely scrutinize efforts to discriminate against people on those grounds. Governments can still discriminate, but the Court will hold them to a high standard and limit efforts to treat them differently because of their group status. However, the Court has not considered poverty to be a suspect class, as a class worthy of special legal protections. Without special legal protections, the poor, and especially poor children, face discrimination that perpetuates the cycle of poverty and inhibits progress and social mobility. In the academic setting, the lack of legal protection allows for the creation of programs that have a disparate impact on poor students. That is, it allows for programs that can discriminate based on relative wealth by treating poor students worse than better off students.

A final myth which has detrimental effects on students of all socioeconomic backgrounds is the Court's assertion that education is not a fundamental right. In a 1973 Supreme Court Case, *San Antonio Independent School District v. Rodriguez*, Justice Powell, writing for the majority, explained that while access to education is important, it is not a fundamental right protected by the Constitution. The Court may be correct. But, in many ways, such an assertion is at odds with the values emphasized, almost unanimously, by federal and local governments that recognize the importance of education. Until the Court recognizes education as a fundamental right, disadvantaged youth will continue to lack in the most basic of protections–including access to prospering school districts and qualified, able educators.

Debunking Myths About Children in Poverty

The publication of the "culture of poverty" ideology in the mid-1960s led to an outburst of social science studies regarding the effects of poverty on the individual and on the community. Various studies by social scientists across the globe questioned the idea that one's socioeconomic status could predict his or her opinions and behaviors. The question is still the subject of many studies and no finding has put the debate to an end. Yet, studies have slowly begun to chip away at the solid footing of this perspective, urging policy-makers and legislatures to consider a shift in viewpoint.

Various social science studies have found that parents in poverty care just as much about their children's education as do their wealthier counterparts. They just value it for different reasons, differences that lead to different areas of focus for their children. For example, in the early 2000s, researchers conducted interviews with first-grade students and their parents or guardians, most of whom lived in poverty (Compton-Lilly 2003). Researchers noted that, unlike their wealthier counterparts, parents in poverty stressed the importance of the application of educational skills to everyday life, rather than the importance of their children scoring high on standardized testing. For example, when asked about the importance of reading, low-income parents articulated a need for their children to read to complete the daily tasks of life, such as going to the grocery or traveling across town (Compton-Lilly 2003). While critics may interpret these responses as failing to view proficient reading as a core factor in the attainment of higher education and rewarding careers, these researchers argued that the responses of these parents are shaped by their own life experiences, many of which did not include higher education or stable careers. From these interviews, it is clear that the parents of these first-grade students value reading, and education in general, as an essential tool for everyday life.

Social science has also revealed various reasons why low-income parents may seem less interested in their students' education, bringing to light the effect poverty has on a parent's ability to be available for school functions and quality learning time at home. One of the primary reasons is that parents who work for minimum wage jobs often work less desirable hours (Gorski 2013). In an educational system framed around the typical nine to five workday, as almost all are, parents who work outside of these hours are often unable to attend parent-teacher conferences, student plays and productions, and various other social events hosted by the schools. Educators frequently perceive a parent's absence as a demonstration of a lack of interest or commitment to their child's academic success (Gorski 2008). Teachers may not understand the need to offer alternative opportunities for students and families living outside the norm. Similarly, parents who have no choice but to work in the evenings may not be available to sit down with their child and go over her homework. When families live in a state of poverty, even obtaining food for a meal can be a challenge—between hunger and an incomplete assignment, most parents will understandably and appropriately choose the latter.

A second major topic examined in recent research and examined by educational advocates is the practice of standardized testing. The numbers are clear: students in poverty are less likely to excel on standardized tests. They are more likely to need to retake the test and are less likely to score in the top percentiles. Scholars have argued that these numbers are not just the result of an achievement gap, they are the result of a much wider, and more damaging, opportunity gap (Gorski 2013).

Opponents of standardized testing argue that this method discriminates against and disadvantages non-English speaking students, minority students, special education students, and students in poverty. A summary of various studies has indicated the following: "Research has shown that minorities statistically have lower standardized test scores than whites because of existing, hidden biases in the development and administration of standardized test and interpretation of their scores" (Berlak 2001; p. 29). In a society where minorities are disproportionality represented among the poor, it is clear that students in poverty cannot anticipate the discrimination they will face in the testing room.

The means by which tests are administered may also disadvantage low-income students. Low-income students attending schools where most of their peers are financially stable may take standardized tests on a computer. However, unlike their peers, impoverished students may be ill-equipped to quickly and efficiently navigate a computer. If they do not have such technology in their household, the time it takes them to answer one question may significantly surpass the time allotted. In poorly funded schools, where most students come from low-income families, textbooks may be out-of-date and students may not have access to the books intended to teach to the test.

Standardized tests simply measure a student's ability to take a test. These examinations cannot and do not measure a student's creativity, determination, uniqueness of thought, or overall ability to contribute to society in a meaningful way (Gorski 2013). The biases present in these tests and the inability to truly measure a person's ability to contribute make standardized testing a weak indicator of potential. Instead, these tests persuade disadvantaged students that they are less intelligent than their peers who, all the while, had a better chance of meeting success (Gorski 2013).

A third topic of interest in contemporary legal research is the Court's designation of suspect classes. An assessment of the reality of poverty in America indicates that impoverished children, in particular, may be a class deserving of special protection by the legal system. Although it would admittedly be difficult to meet the indicia of "suspectness" for all impoverished persons, children are in a unique position and, given their inability to control their financial status, are more likely to meet the requirements as detailed by the Supreme Court. As to the first criteria, the Court has never deemed poverty to be an immutable characteristic. However, it is clear that children, except in rare circumstances, do not have the power to change their family's financial situation. Therefore, for at least children, living in poverty is entirely unchosen and immutable. Second, it should be clear that poverty has nothing to do with a child's merit. Finally, although children have not faced a history of political-incapacitation in the typical sense, one may argue that the

damaging effects of the broadening achievement gap make it more likely that children will be denied opportunity to meaningfully participate in government as they age. Though some continue to advocate for the realization that impoverished persons are more likely to face discrimination than those who are financially stable, the view of the Court, as will be examined below, has not been so kind.

Legal Responses to the Opportunity Gap of Academia

In response to the widespread acceptance of the "culture of poverty" ideology and its accompanying stereotypes, the executive and legislative branches of the U.S. government have made standardized testing a priority, operating under the belief that this "objective" assessment is a fair and efficient equalizer. At both the federal and state level, programs have been implemented to raise the bar, magnifying the phenomena of teaching to testing and, in turn, widening the achievement gap and the opportunity gap between the financially sound students and students in poverty.

Since the early 2011s, the executive branch of the federal government has introduced several academic initiatives to guide states, and most of those efforts focus on the implementing standardized testing. In 2001, the Bush administration introduced the *Left Behind Act* (Wanker and Christie 2005). A major provision of this act incorporated annual statewide assessments into all state school curricula for all children, beginning in third grade and going through eighth grade, in the subject areas of math and reading. In 2010, the Obama administration continued in this tradition with the induction of the Every Student Succeeds Act (Easton and Soguero 2011). Like No Child Left Behind, this act continued to require annual standardized testing across the nation. In addition, this act encouraged states to base school ratings and teacher raises, in large part, on testing results (Easton and Soguero 2011).

Understandably, the act incentivizes educators to teach to the test and encourages teachers to reach only for the absolute minimum results for their underachieving students. So long as the students pass, it does not necessarily matter how well they do. In Indiana, for example, teachers' raises and school ratings follow the pattern intended by the act and are based significantly on test scores (Kiger 2005). Opponents of this system argue that performance pay will only lead to more standardized testing, perpetuating the cycle of discrimination against students typically disadvantaged by these tests (Kiger 2005).

Opponents also cite the means by which school systems pay for standardized testing training and resources as a reason to oppose such incentivization. More and more frequently, schools are choosing to eliminate art, music, and physical education programs on the grounds that these programs are not tested and therefore an avoidable drain on the school's time and budget, as they will not aid in increasing school ranking (Gorski 2013). Schools persist in this manner even though research clearly indicates that these programs are essential to a healthy learning environment and the well-rounded education of youth. In fact, studies indicate that participation

in art and music programs actually helps to raise students' test scores and expand their cognitive ability overall (Gorski 2013). Nonetheless, struggling schools have seemingly turned a blind eye to these statistics and thus have limited, even further, educational opportunity for the impoverished.

By continuing to push for standardized testing and by focusing school funding and staff on the mission of increasing test scores, legislatures at both the federal and state level have largely ignored the glaring warnings of social scientists, whose research has clearly indicated that this method is not objective, fair, or the most effective manner of measuring success. Instead, the cycle of discrimination against impoverished and minority students is fed and disadvantaged students become less confident in their academic ability.

An area where legal reform has been not only ineffective but also largely inactive is in the consideration of poverty as a suspect class. The Supreme Court has rarely included poverty in discussions regarding suspect classes. However, some precedent on the matter does exist and this is worth noting.

The Supreme Court has not explicitly commented on the immutable quality of poverty. However, it is clear that this argument is stronger when applied only to children, who generally have no ability to change their economic status. Although immutability has not been discussed by the Court, the second and third criteria of the indicia of suspect class test have been analyzed. In 1966 Supreme Court case *Harper v. Virginia Board of Elections*, the Court held a poll tax unconstitutional on the grounds that "wealth, like race, creed, or color, is not germane of one's ability to participate intelligently in the electoral process" (p. 668). This holding made clear that one's economic status is no indication of their merit, thus suggesting that the Court has already, in precedent, satisfied the second criterion of the indicia of suspectness. It is the third criterion that will prove to be the most difficult to meet. In 1973, the Court held in *San Antonio Independent School District v. Rodriguez* that poor school districts are not a suspect class. In drafting the opinion of the majority, Justice Powell analyzes poor districts as a suspect class only in regards to the third criterion and, ultimately, finds no evidence of political-incapacitation.

Legal scholars are quick to point out that the Supreme Court has not yet decided whether poverty constitutes a suspect class, contrary to popular opinion on the matter. Proponents of this argument often cite to a 1969 Supreme Court decision, where Chief Justice Warren, writing for the majority, stated the following: "And a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race…two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny" (*McDonald v. Board of Election Commissioners* 1969, p. 807). Although *Rodriguez* followed *Harper*, the Court made no effort to dispute the above-noted assertion, making it potentially useful dicta.

The likelihood of the Supreme Court announcing poverty as a suspect category in the near future is slim. Although precedent indicates that the question is still open, the hope for legal reform in this respect is, admittedly, a long way off. Perhaps a more likely occurrence is the acceptance of education as a fundamental right. More and more, justices on the Court have been willing to view the

Constitution as a living, breathing entity that can adjust to changing times and evolving standards. Though perhaps education was not considered a fundamental right at the time of the founding, it is clear that education is now essential to attaining stable adulthood and thus arguably a key component of the pursuit of happiness.

Alternative Approaches to Achieving Equal Educational Opportunity

Although policy-makers have attempted to combat the ever-widening achievement gap through the implementation of programs aimed at equalizing educational opportunity, these efforts have served as little more than a bandage over a gaping wound. The federal acts incorporating annual testing into state curricula and the focus on "objective" examinations has only resulted in continued discrimination against the disadvantage. Policy-makers and educators can better reach students in poverty by moving away from a primary focus on test scores and through creating an equalizing source of funding for schools via state taxes. Additionally, adopting an anti-subordination approach in limited circumstances could help to decrease the opportunity gap. Ultimately, the Supreme Court has the power to change the way poverty is addressed on a national scale, by accepting impoverished persons—and specifically children—as a suspect class in need of special legal protections. However, because this change is unlikely to occur in the near future, it is up to legislatures and educators to face the reality of the poverty epidemic and the consequences financial hardship has on young learners.

By moving away from the teaching to testing curriculum, educators can use their time to better address the needs of their unique class population and allow students to gain academic confidence. Members of groups disadvantaged by standardized testing are likely to experience a decrease in confidence regarding their intellectual and educational abilities (Gorski 2013). By emphasizing alternative measures of success, such as the leadership, creativity, and strong work ethics, teachers can better prepare students to become effective contributors to society. Scholars have long suggested five different means of measuring student success, including teacher-student and teacher-parent interviews and teacher-developed testing (Quinto and McKenna 1977). By putting more control in the hands of individual educators, as these scholars suggest, legislatures can ensure that the unique needs of individual students can be addressed. For example, teachers who meet frequently with their students in interviews can better understand their student's needs and learning style, and thus prepare lessons which will more effectively reach her students. Researchers have demonstrated that the "one size fits all" approach does not work in the realm of standardized testing. Therefore, individualizing achievement assessments through the adoption of alternative measuring devices may be more insightful and fair.

A second means by which students in poverty can be better served is through equalizing school funding. Currently, many states base funding substantially, if not primarily, on local property taxes. Relying on property taxes for a substantial portion of a school's funding is problematic in that it contributes to unequal educational opportunities and increases the gap between the rich and the poor (Kenyon 2007). Students who come from low-income neighborhoods, where properties are generally less-expensive and thus bring in less tax-revenue, attend schools where funding can be quite limited. This financial drought is manifested in the quality and commitment of teachers, a limited access to technology, and a lack of textbooks and art and music programs. On the other hand, students who live in middle-class or wealthy areas benefit from much higher property taxes and are able to access the resources lacking in poorer communities. Class segregation makes it unlikely that time will naturally have an equalizing effect on funding revenue. Instead, legislatures should support a system where schools are funded primarily through state taxes. This source of funding would allow for a more equal distribution of funds, thus providing students of all socioeconomic backgrounds with a similar educational experience and working to decrease the opportunity gap in academia.

In recent years, states like Indiana have begun to slowly move away from this practice. For example, within the past 15 years, Indiana's "state share of general fund dollars…had grown to roughly eighty-five percent…" leaving only 15 percent to be covered by local property taxes (Cavazos and Elliott 2015, p. 1). Nonetheless, there is still a long way to go before funding is truly equalized; moving from property to state taxes is a firm step in a positive direction, but it is only a single step.

On the local level, administrators and educators sometime succeed in reaching students in poverty by adopting an anti-subordination approach when necessary. The anti-subordination approach holds that "it is perfectly acceptable, even desirable, to treat children different on the basis of their group membership if it will help them overcome the special obstacles they face" (Brittenham 2004, p. 870). Often, anti-subordination is seen as an alternative to equal treatment, which proponents of the former approach argue can still be unfair when results differ due to disadvantages endured by some but not others. In the school context, the acceptance of an anti-subordination approach in limited circumstance may be seen in allowing working parents to schedule phone conferences, rather than in-person meetings, throughout the school year, or by scheduling events on a weekend morning instead of during the evening, when parents may be working. Acceptance of the anti-subordination approach on a larger scale may allow teachers to more effectively reach students. A larger-scale adoption of this approach may be seen in the creation of a district-wide and fully funded tutoring program for children whose parents are not available to help them study in the evenings or through alterations in start and end times to better accommodate working parents. Although some argue that such actions constitute preferential treatment or discriminate against the majority, these efforts may well be necessary to ensure equal opportunity across the board (Brittenham 2004).

As previously noted, the Supreme Court has the ability to change the way poverty looks in America. If the Court is willing to recognize that impoverished persons, and especially impoverished children, are more likely to be discriminated against based on their economic status, and if the Court recognizes the singular importance of education in contemporary society and is willing to deem it a fundamental right, then much-needed protections can be extended to the poor. These protections could ultimately lead the court to decide that not only poor persons, but also poor school districts, are in need of legal protection, thus calling for the overturning of *Rodriguez.* These protections could encourage, and even require, policy-makers to take seriously the social science findings regarding the discriminatory nature and general insufficiency of standardized testing regimes.

Ultimately, these protections could provide students in poverty with a new force behind their identity—one which seeks to equalize their chances for success. In fact, scholars argue that one of the most detrimental effects of a diminished chance for success is the impact such knowledge has on students who fall within the statistical "failing" range. Children who are old enough, and self-aware enough, to understand that their situation places them in the category of "those more likely to fail" often distance themselves from an environment which, at this point, often begins to feel hostile (Gorski 2013). The Court's acceptance of poverty as a suspect class and education as a fundamental right would add an extra layer of support for these children, working to assure them that they are capable and that their disadvantage cannot be used as a means by which the educational system may, knowingly or inadvertently, inappropriately discriminate. The Court should take this step in an effort to reduce the opportunity gap that has segregated students across the nation.

Conclusion

Children in poverty make up a significant portion of young students in the United States, with one out of every five elementary or secondary students from families that live at or below the poverty line. Many others effectively live in poverty, although their family income technically suggests financially stability. The epidemic of poverty is perpetuated through cycles that disadvantage poor youth and make it less likely that they will be capable of climbing the socioeconomic ladder as they age.

Although education has, for many years, primarily been a state matter, the federal government has recently taken steps to decrease the achievement gap and improve public education nation-wide. However, the implementation of standardized testing regimes and the incentivizing of teaching to testing have done little to address the root of the problem: poverty and its undesirable consequences. Until policy-makers and educators face the reality of poverty in their communities, the cycle of disadvantaging and discriminating against the poor will continue to leave low-income students feeling unequal for the task placed before them in academia.

In a nation where substantial emphasis is placed on education, it is perplexing that the Supreme Court has not yet declared education a fundamental right. Until the Court does so, and until the Court chooses to acknowledge poverty for what it is—the result of a damning and destructive cycle—impoverished youth in America will not receive the legal protections they greatly need. With the continued work of legal and educational advocates, hope remains that the Court will be able to include the right to fair and truly equalized education as a fundamental right that children do not shed at the schoolhouse gate.

By studying and applying the lessons learned through social science research, policy-makers, educators, and the Court each have the opportunity to change the way poverty is addressed in public schools. Once the practice of cultural competence and general awareness of the consequences of poverty surpass the practice of teaching to testing on the priority lists of America's public schools, the opportunity gap growing between impoverished and financially able students may finally be combatted with success.

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Chapter 8
Protecting Students' Sexual Identity in Private Schools

Lauren Harrell

Introduction

As lesbian, gay, bisexual, and transgender (LGBT) people gain more social acceptance in the United States, the recognition of their identity as queer people is accompanied by legal victories that have expanded civil liberties for LGBT people. These legal victories guarantee LGBT people equal protection comparable to their straight counterparts in more areas than ever before in the history of the United States (see, for example, Obergefell v. Hodges 2015; U.S. v. Windsor 2012; Romer v. Evans 1996). However, despite the growing acceptance of homosexuality and gender variance, tension between civil rights for LGBT people and religious liberties remains strong. Often, children, whose parents have control over their education and religious formation, are caught in the tension between religions that view homosexuality as a sin and a culture that recognizes the natural existence of homosexuality among humans and the legitimacy of same-sex relationships.

While the government may be granting more rights to LGBT people, many institutions remain staunchly opposed to these changes. When a school is not run by the government, but by a private institution, it is the institution's values that largely dictate students' lives. In the United States, for instance, the Catholic Church has a great deal of influence over the education of children through the operation of Catholic schools. Catholic schools originated as a reaction to the Protestant influ-

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R.J.R. Levesque (ed.), *Adolescents, Rapid Social Change, and the Law*,
Advancing Responsible Adolescent Development,
DOI 10.1007/978-3-319-41535-2_8

ence in state-sponsored schools and provided a place where Catholic parents could send their children to learn their religious traditions and beliefs (Moreau 1997). While Catholic schools are no longer as popular as they were in the 1960s, focus on the benefits of attending Catholic school in the 1970s and 1980s lead many parents, both Catholic and non-Catholic, to choose this private schooling option as a way to give their children an educational advantage (MacGregor 2013). With a Catholic education, however, comes Catholic teaching on many social issues, including issues of sexuality. Although this is not unique to Catholic schools, Catholic schools provide a compelling example of conflict between religion and the LGBT community.

At a Catholic school, where religious doctrine deems homosexuality a sin, being an openly gay student, or even a child of gay parents, can lead to discrimination (Baumann 2010). Often, LGBT students who have attended Catholic school report feeling disconnected from their family, peers, and religion during their teen years (Maher 2007). This is often a result of shame and fear surrounding their sexual or gender identity, whether they are open about this identity to others or not. While it is important to respect religious freedom and parents' rights to influence their child's religious formation, sexual minorities who are not yet 18 need special protections into secure their psychological and physical well-being.

Although many schools run by religious organizations may struggle with this issue, the conflict between gay students and Catholic schools should be given special consideration given the prevalence of Catholic schools. In the 2014–2015 school year, there were 1,359,969 students enrolled in Catholic elementary and middle schools in the United States and 579,605 students enrolled in Catholic high schools. These schools are not exclusive to students who are raised in the Catholic faith. In the 2014–2015 school year, non-Catholic students represented 16.9 % of the total enrollment in Catholic schools. There are many reasons that parents may choose to send their children to Catholic schools that may not be purely religious. Whatever the motivation that parents have, the influence that Catholic schools have in the United States is significant (McDonald and Shultz 2015). The issues are likely to become even more pronounced as states have adopted vouchers to enhance educational opportunities for students from failing schools; and these vouchers permit the use of governmental funds to attend religious schools.

To understand the reasons that the LGBT students at Catholic schools need special consideration, it is important, first, to understand the heightened risk that LGBT teens face in any school and the religious dogma that may make some Catholic schools especially resistant to providing support for LGBT students. Second, it is important to examine the legal implications for schools, administrators, and parents when LGBT teenagers or parents seek out special accommodations to protect their right to live openly and honestly as a sexual minority. Finally, this chapter will present possible legal reforms that may address some of the most pressing issues that currently face LGBT students attending Catholic schools.

LGBT Youth and the Psychological Consequences of Inequity

Prevalence of LGBT Youth

Although they are minorities in regard to their sexual orientation and they may choose to keep their sexual identity private, lesbian, gay, and bisexual students can be found in most student bodies. Sexual orientation refers to both the emotional and physical arousal that a person experiences around people of the same sex, opposite sex, or both (Adolescent Sexual Orientation 2008). Although sexual orientation is about sexual attraction, it is not necessary for a person to be sexually active in order to have a sexual orientation and teenagers may identify as gay without ever having touched another person in a sexual manner (Adolescent Sexual Orientation 2008). Most LGB people begin to question their sexuality before entering secondary school. According to one study done by the Pew Research Center, the median age that LGB people reported first questioning their sexuality was at 12 years old and the median age they say they knew for sure that they were not completely heterosexual was 17 (Pew Research Center 2013). Even though LGB people first disclose their sexual orientation to another person at different times, many of them question their sexuality or identify as LGB before leaving high school. For this reason, it is important to consider the needs of LGBT youth before they reach the age of the majority. Although many people view sexual identity as an adult issue, many people who have not yet reached the age of majority grapple with issues surrounding their sexual identity.

Gender identity is an entirely separate issue from sexual orientation. Although transgender people may also identify as "queer", they are a unique subset of the LGBT community. According to the American Psychological Association, transgender youth, "consistently, persistently, and insistently express a cross-gender identity and feel that their gender is different from their assigned sex" (Mizcock et al. 2015, p. 1). Although it is difficult to know certainly what percent of the population is comprised of transgender people, transgenderism among youths may be as high as 0.5 % and have been documented in various cultures throughout history. Transgender teens may choose express their gender identity in a myriad of different ways, may not identify as one gender at all, and have needs that are different from their cisgender peers (see Mizcock et al. 2015).

Religious Schools and LGBT Students

Catholic schools have always had, and will continue to have, LGBT students in their classrooms. Although some people might think that the easiest solution to resolve the conflict that exists between Catholic schools and LGBT people is for LGBT students or parents to choose a different school, extracting LGBT students or

attempting to send them all to schools that are LGBT-friendly will do little to protect LGBT students. First, there is no way for parents, administrators, or students themselves to definitively know who will grow up to identify as LGBT and who will not. Furthermore, it is, of course, unrealistic to think that a student could immediately change schools once he or she realizes that he or she has a sexual orientation that might conflict with official religious teaching. Even if this was possible, a student might be LGBT and still want to practice the faith that he or she has grown up with or may choose to remain celibate. Inevitably, there will be LGBT students at Catholic schools and those students will have different needs than their straight peers.

Finally, it is not mutually exclusive to be Catholic and either LGBT or an ally of the LGBT community. Within the Catholic Church, there is a history of dissention among congregants on the Church's teaching on homosexuality. While the Vatican may be quick to stifle these opinions, it has not stopped many Catholics from disagreeing with the Church's official teaching. This means that teachers, administrators, parents, and students may either identify as LGBT or be fervent allies, while still adhering to the Catholic faith (Callaghan 2008).

Risks Associated with Being an LGBT Adolescent

In any school, LGBT students are at a heightened risk for bullying and harassment. The 2011 National School Climate Survey found that 2 out of every 3 secondary LGBT students surveyed said they felt unsafe in school because of their sexual orientation and over half of them reported that they had heard homophobic remarks from school personnel (Marshall et al. 2015). A school environment can be a very hostile place for an LGBT student and can significantly hinder the learning process as well as pose long-term mental health problems for teenagers. These problems at school can affect almost every aspect of an LGBT teen's life and last beyond the four years that LGBT students spend in secondary school.

For instance, one of the biggest problems LGBT teens face in school is bullying. Bullying contains three main elements: First, there must be behavior that is meant to harm or disturb another person. Second, there must be repetition of the behavior and, finally, there must be a perceived power imbalance between the bully and the bullied (Waldman 2012). In instances of LGBT bullying, the straight actor is usually presumed to be more powerful within the social hierarchy of a high school, possibly because of a general acceptance that being LGBT is inherently worse than being straight or because one student is simply more popular than the other. This imbalance in power can be especially dangerous in schools where teachers, administrators, or other school leaders either implicitly or passively reinforce the belief that being straight is superior to being queer, and inadvertently underscore the power imbalance. Hence, schools, especially those with policies that are anti-LGBT, can unintentionally support bullying without meaning to do so.

The consequences of the bullying and rejection for LGBT youth are often psychological damage and underperformance at schools. Adolescents who experience bullying are more likely to suffer from depression, anxiety, and low self-esteem than their non-bullied peers (Marshall et al. 2015). This can often lead to suicide and substance abuse. For instance, a study done by the Human Rights Campaign of 10,000 thirteen to seventeen year-olds who identify as LGBT found that LGBT youth are twice as likely as their straight-identified peers to experiment with drugs and alcohol (Human Rights Campaign 2014). The documented stress that LGBT students face often manifests itself in substance abuse problems.

Bullying and harassment also have documented academic effects and can lead to underperformance at school for some students. Peer victimization can induce higher levels of academic burnout and cause stress that lowers a student's ability to perform academically (Morin et al. 2015). This is true for LGBT students especially as evidenced by the fact that LGBT students often underperform academically relative to their straight peers and LGBT high school students have a much higher rate of truancy than straight high school students (Liboro et al. 2015). LGBT students are no less gifted or intelligent than their straight peers, but the stressors that they face at school increases the chances that they will avoid school and consistently underperform in academic settings.

Despite the dangers that students face, there are ways to mitigate the effects of bullying for LGBT youth. Research suggests that having supportive school administrators and personnel for LGBT youth can keep lessen the mental health impairments caused by bullying and can lessen bullied students risk for severe depression and suicide (Marshall et al. 2015). Connectedness with peers and supportive teachers can serve as a crucial protective factor against the negative side effects of bullying (Morin et al. 2015). However, connectedness and community support is limited in how much it can help victims of extreme bullying from internalizing peer victimization (Morin et al. 2015). Knowing how high the consequences of bullying can be, it is important for schools to have supportive teachers, administrators, and personnel that can help to ease some of the burden that students might face. At Catholic schools, where there are often explicit anti-LGBT policies, finding allies among adults might be especially difficult for students in need of support and connectedness.

Legal Issues LGBT Students and Catholic Schools

Catholic Schools and Religious Views on Homosexuality

Although the Catholic Church has taken a definitive stance on homosexuality, Catholic Social Teaching has led to a wide variety of different attitudes among adherents in regard to LGBT issues, depending on the culture and norms of the followers. On one hand, Catholic Social Teaching emphasizes that its followers

should seek out the least among the human race and care for the poor and marginalized. However, Catholic schools are by nature exclusive in that they can admit or accept students for any number of reasons. This paradoxical acceptance and exclusion can be illustrated by the Catholic Elementary Schools of the 1960s, which had almost exclusively Catholic students, but had much diversity in terms of socioeconomic status and ethnic background. Although the schools were almost exclusively designed to benefit Catholic children, discrimination among immigrants or poor people was not prevalent. Catholic schools have a complicated legacy of service to others and exclusion, depending on the time and location of the school (Scanlan 2008).

This apparent contradiction can be explained by one of the most important tenants of the Catholic faith, the idea that humans are all made in the image of God. Catholic Social Teaching encourages its followers to recognize an inherent "sameness" between all people. That is, for better or worse, we are all equal in the eyes of God. This communion between all people encourages adherents to be inclusive of the poor and the marginalized. It is impressed upon Catholics to see the image of God in all others, despite whatever sins they might have committed or the disparate situations that they encounter (Keiser 2015).

However, this belief in a unifying "sameness" can also be very damaging for anyone who lives in a way that deviates from an excepted social norm, such as being in a same-sex relationship or identifying as LGBT. When it comes to the LGBT community, the message of the Church is clear. The Church says:

> Some families have members who have a homosexual tendency. In this regard, the synod fathers asked themselves what pastoral attention might be appropriate for them in accordance with Church teaching: "There are absolutely no grounds for considering homosexual unions to be in any way similar or even remotely analogous to God's plan for marriage and family." Nevertheless, men and women with a homosexual tendency ought to be received with respect and sensitivity (Synod of Bishops 2015, n. 130).

Despite shifts in societal attitudes towards LGBT people, the Church's position on homosexuality has remained largely unchanged. Homosexuality is regarded as a sin. Acting on homosexual feelings, such as having a homosexual experience, or even having lustful thoughts about another of person of the same sex is something that should be confessed and repentance should be requested. In fact, the Church regards any sexual activity outside of marriage or sexual activity from which a child could not result as sinful activity. Although other people can confess and receive absolution for their sin, LGBT people who refuse to repudiate their relationship are living constantly in sin. However, absolute rejection of homosexual people is not an acceptable way of dealing with the "problem" of homosexuality and the Church affirms the dignity of LGBT people.

The Catholic Church in the United States will likely not change its teaching on homosexuality in the near future. Pope Francis famously said in July of 2013, "If someone is gay and searches for the Lord and has good will, who am I to judge?" (Hale 2015). Although Pope Francis, who was anointed Pope on March 13, 2013, is credited with taking a liberal stance on homosexuality and has been more open than

his predecessors to homosexuals in the Catholic Church (BBC News 2013), he still has firmly stated that he is against same-sex marriage and does not condone homosexual behavior (Ennis 2015). While this move from absolute condemnation is a positive step for LGBT people, it still does not encourage LGBT people to live lives that fully embrace their sexual identity, nor does it allow for the total dogmatic change that would be necessary for LGBT people to be fully accepted by the Church.

It is clear that the official view of homosexual activity as sinful has not changed in the hierarchy or law-making body of the Catholic Church, but that does not mean that all Catholics have static views that are consistent with the Vatican. In fact, what has changed quite a bit is the cultural acceptance of LGBT people in the United States, even among Catholics. According to a study done by the Pew Research Center, 46 % of religious Catholics and 62 % of cultural Catholics say that the Catholic Church should recognize same-sex marriages (Pew Research Center 2015). Acceptance of homosexuality and same-sex marriage is even more prevalent among young Catholics. In 2014, 85 % of Catholics aged 18–29 said that homosexuality should be accepted and 75 % said that they support same-sex marriage (Lipka 2014). It is apparent that identifying as a Catholic and supporting homosexuality are certainly not mutually exclusive for those practicing in the United States.

In the United States, people who identify as Catholic fall on a wide spectrum of beliefs about homosexuality. As religious liberty becomes a more contentious issue in Catholic schools, it is worth noting that, for Catholic young people, their religious beliefs may call them to be more inclusive than to condemn LGBT people and it is important to recognize the legitimacy of that viewpoint. When discussing religious liberty at Catholic schools, the views of the administration, faculty and parents are often given more weight or are seen as more important. However, high numbers of adolescents report having religious views and say that those views are very important to them (Levesque 2002). Simply because a person is under the age of 18 does not mean that they should not be allowed to practice their views the way that they choose.

The statistics on attitudes towards homosexuality among Catholics also suggest that views on homosexuality among Catholic Americans are more culturally than religiously motivated, since the Church's stance on homosexuality has remained largely unchanged, but society in the United States has experienced a dramatic shift in attitudes towards homosexuality, which is reflected in the attitudes of Catholic Americans towards homosexuality. Between 1973 and 2006, a study by the University of Chicago found that the percent of American adults who found homosexuality unacceptable had dropped from 88 to 40 % (Searcy 2011). There are many possible explanations for homosexuality's becoming socially acceptable in the United States than it was half a century ago, but it is clear that it has not been a religious renaissance that has brought about this change. Rather, cultural influences influence religious views on a variety of topics.

There is a strong argument that religious schools do promote a certain religious agenda. Attending religious schools have been shown to have a lasting effect on the

way that students incorporate religion later in their lives. However, it is important to consider that community values may be even more important than religious education in promoting a religion. Therefore, religious education is not a definitive factor in determining how a person will integrate religion in the rest of their lives. But, it is important to consider the consequences of religious education and the role that it plays in the United States (Levesque 2002).

Government Funding of Catholic Schools

As such, how we support and fund Catholic schools is significant, both for its implications on policy and for its legal relevance. Despite generally having wide discretion on what rules they would like to impose on their students, private schools may forfeit some of their autonomy when they choose to accept public funds. Whether Catholic schools should receive public funds, and for what sorts of programs, has long been a source of debate in the United States. However, the Supreme Court has ruled that allocating some public money to Catholic schools is not a violation of the Establishment Clause of the First Amendment, so long as the money does not specifically promote one religion over another (Zelman v. Simmons-Harris 2002). However, should Catholic schools choose to receive public funds, they invite more governmental control over their operation (McCauliff 2005).

Public funding for private schools has changed dramatically in the past 100 years. In 1941, 46 state constitutions specifically prohibited the allocation of public funds for schools run by religious organizations. However, many states were still providing public funds for the operation of Catholic schools that would have otherwise been forced to shut their doors. In 1940, the Indiana Supreme Court, for instance, found that it was not a violation of the state constitution for public funds to pay for teachers' salaries at Catholic schools under the theory that the curriculum of Catholic schools was so similar as to make them essentially public schools (Yale Law Review 1941).

Since the 1980s, the Supreme Court has moved away from the prohibition of providing funds for religious schools (Laycock 2009). Some would argue that allocating public funds for Catholic schools runs contrary to the Establishment Clause of the United States Constitution which stats that, "Congress shall make no law respecting an establishment of religion." (U.S. Const. Amend. I). At the time that this amendment was implemented, the Roman Catholic parochial school system was not in place, so it is impossible to know for sure what the intent of the drafters was in regards to Catholic secondary education, but it definitively did not refer to a prohibition on funding for Catholic schools. Proponents of "market-based separationism" argue that, if equal opportunities for funding are all available to all religions or secular institutions and that subsidies are formally neutral, there is no violation of the Establishment Clause (McCauliff 2005).

Students' Rights at Private Schools

Courts have established, clearly, that LGBT students in public schools have many rights guaranteed to them by both federal and state laws. However, many of these rights have been established based on the fact that schools and public school administrators function as state actors who are paid with public money. Therefore, the question that remains is which rights can also be transferred to students who attend religious or private institutions. The fact that students, or more likely their parents, choose to enroll in Catholic schools makes is less likely that students will be guaranteed rights that are in conflict with a religious school's policy.

In general, courts give Catholic and other private schools wide discretion in their ability to make and enforce rules that their students must follow. Private schools can dictate a variety of rules that students agree to follow by enrolling in the school. For instance, in *Gorman v. St. Raphael Academy* (2014), "an exemplary student" at St. Raphael Academy was threatened with expulsion because he refused to cut his hair. Russell sued for breach of contract and sought injunctive relief which the Supreme Court of Rhode Island refused to grant. The court found that it was perfectly legal for a private school to enforce whatever rules it wanted so long as the rules did not violate any laws.

Catholic schools have been given similar discretion in Federal Court. In *Silva v. St. Anne Catholic School* (2009), three sixth-grade students and their parents alleged that St. Anne violated Section 1981 and Title VI by implementing an English-only rule at the school. Adam Silva, a student at St. Anne's, refused to sign an agreement saying that he would only speak English at school. The United States District Court of Kansas found that the school's English-only rule was not an adverse action and had a legitimate, nondiscriminatory basis. Private schools are given broad discretion over how they want to run their schools, what rules they want to implement, and who they would like to accept into their schools.

However, this discretion given to private schools is not absolute or without limitations. In *Runyon v. McCrary*, the United States Supreme Court held that is was a violation of federal law for private schools to deny admission to African-American students based solely on their race. Specifically, the Court found that private schools had violated 42 U.S.C. § 1981, which finds that all United States citizens have an equal right to enter into contracts, regardless of race. It is worth noting that the case also specifically stated that the case did not address whether private schools could selectively admit students based on sex or religious affiliation because there was no specific statute regarding these groups of people. However, private schools do not have complete freedom to discriminate and can be regulated by the state or federal government (Runyon v. McCrary 1976).

These cases illustrate that private schools have the legal space to be selective or discriminatory in selecting the students that they accept so long as they are not in violation of a state or federal law. For LGBT students, this is important because private schools may decide to not follow a code of conduct that protects homosexual activity; they can use it as a valid reason to prohibit a student from entering a

school or for expelling them. Without special protection, similar to that provided by 42 U.S.C § 1981 in regards to race, LGBT people are vulnerable to discrimination in Catholic schools.

Protection from Harassment and Discrimination Based on Sexual Orientation or Gender Identity

Aside from access to Catholic schools, there is a wide array of other ways that LGBT students are unequal as compared to their straight peers in Catholic schools. This includes everything from sex education, school dress codes, and who to take to prom. However, the implications of facing harassment and abuse pose a serious barrier to equality for LGBT students. The grounds on which LGBT students can seek remedies for harassment in private schools may vary based on how the school is funded and the degree of harassment that the school is facing.

Federal courts have often recognized a cause of action for students who have experienced harassment and discrimination based on sexual orientation as a violation of a student's 14th Amendment right to Equal Protection under the law. For instance, in *Nabozny v. Podlesny*, a high school boy from Wisconsin sued his school district under 42 U.S.C. § 1983, alleging that his rights of equal protection and due process had been violated. The boy, Nabozny, was routinely physically abused and assaulted by his classmates because of his sexual orientation and was largely ignored when he reached out to administrators for help. Although the Court held that his Due Process Rights were not violated, the Seventh Circuit ultimately held that Nabozny's Equal Protection rights were violated on both the basis of his gender and his sexual orientation.

Instead of merely finding that Nabozny was treated differently than his female peers, and thus was discriminated against just based on his gender, the Court specifically found that Nabozny was treated differently based on his sexual orientation. The Court said:

> Our discussion of equal protection analysis thus far has revealed a well established principle: the Constitution prohibits intentional invidious discrimination between otherwise similarly situated persons based on one's membership in a definable minority, absent at least a rational basis for the discrimination. There can be little doubt that homosexuals are an identifiable minority (Nabozny v. Podlesny 1996, p. 457).

The seventh circuit clearly recognized that school administrators could be held accountable for treating students differently based on their sexual orientation and that the school's failure to implement their anti-harassment policy for a gay student violated his constitutional rights. Although the Supreme Court has never ruled that a peer harassment based on sexual orientation violate the Equal Protection Clause, this ruling is generally applied by other Federal Courts. (See, for example, Flores v. Morgan Hill Unified School District 2003; Gay-Straight Alliance v. Visalia 2001; Montgomery v. Indiana School District, 2000). Whether this same ruling could be

applied to private schools depends on whether the school receives federal funds or whether they were independent of government funding.

Protection for LGBT Students from Being "Outed" Without Consent

Another crucial issue that is unique to LGBT students is whether their sexual orientation should be exposed to others, including their parents. The Human Rights Campaign defines outing as, "Exposing someone's lesbian, gay, bisexual or transgender identity to others without their permission. Outing someone can have serious repercussions on employment, economic stability, personal safety or religious or family situations" (Human Rights Campaign 2015, p. 1). It is important to note that "outing" is not simply exposing someone's sexuality, but doing it without their consent. This can be especially dangerous for children of religious parents who may react very negatively. In some instances, teens who are outed may even be at risk for being thrown of their homes by their families. Because so many LGBT children experience violence, rejection, or disapproval from religious family members, they are more likely to hide their sexuality or to attempt suicide (Maher 2007). Whether a school, administrator, or a teacher has the right to out a student is critical.

Parental Rights of Children of LGBT Students

Attitudes of Catholic parents with LGBT children can vary drastically. For instance, there are organized groups of Catholic parents who advocate for their queer children actively speak out against the Church's treatment of LGBT children. They are proud of their queer children and want to see a space carved out for them in the Catholic Church. However, these groups only seem to underscore the rejection that the Church has exhibited to LGBT teens and their allies (Fortunate Families 2015).

Reforming Legal Responses

There are so many different issues facing gay youth in Catholic schools that it is impossible to say that there is just one solution that could put gay youth on equal footing to their straight peers or to ensure that they have the exact same rights as their straight peers. For this reason, a multi-faceted approach, addressing some of the most important issues, such as harassment, discrimination, and need for supportive communities is most crucial. Other issues, such as taking same-sex dates to

prom, sex education, and teaching LGBT history, are also important. However, the most important issues are addressed below.

Supporting Gay-Straight Alliances

Deciding how to ensure that safe spaces are being provided for LGBT students while honoring the religious views of the Catholic Church and remaining loyal to the First Amendment is not any easy proposition. Teachers, administrators, and other school personnel should not be forced to violate their own values. However, just as the beliefs of the faculty and staff of schools should be honored, so should the values of the students who attend the schools. As has been shown above, young people are increasingly accepting of LGBT people and often view it as consistent with their own religion. One set of values should not be held as superior to another simply because one set of values is held by minors and others are held by adults. Therefore, the United States should try to find a policy that protects both sets of values.

The United States can look to other countries for guidance on the best ways to handle this issue. For instance, Ontario, Canada passed legislation in 2012 that required all publicly funded schools to support Gay-Straight Alliances for students at their school, including publicly funded Catholic schools (Liboro et al. 2015). This legislation was specifically designed to address the rights of gay students at Catholic schools. After a number of Catholic high schools in Ontario refused to allow students to form Gay-Straight Alliances, the *Accepting Schools Act* required all schools in Ontario to support the groups if the students requested them (LaPointe and Kassen 2015). The schools were required only to honor to requests of students, but this can be a huge advancement for LGBT students and allies of LGBT students who previously had no voice on their campus.

As would be anticipated, this legislation was met with some resistance from Catholic schools. The *Accepting Schools Act* has still been met with opposition from administrators at Catholic Schools who have homosexual views and allows them to regulate the content that is generated by GSAs and to ensure that nothing is indecent. However, providing a space that is LGBT-positive and allows students to express their own views on homosexuality or gender variance is important (LaPointe and Kassen 2015).

Although Gay-Straight Alliances alone are not enough to equalize the school climate for LGBT students, Canadian Catholic schools that implemented support systems and programs similar to those in American secular schools saw positive outcomes for LGBT students (Liboro et al. 2015). Similar proposals could work in the United States, not by forcing schools to adopt specific religious voice points, but by creating a community where LGBT students are able to express themselves without fear of rejection.

The Student Non-discrimination Act

On February 10, 2015, Al Franken introduced a bill to the United States Senate called the Student Non-Discrimination Act, which would prohibit discrimination and harassment of students based on their real or perceived gender identity or sexual orientation. The Bill finds that although the discrimination that LGBT youths face has led to a high rate of suicide and other mental health problems, there is no federal protection specifically for sexual orientation. The Bill, using definitions from the Civil Rights Act of 1964, extends the protection of LGBT students to any private school that receives federal funds (Student Non-DISCRIMINATION Act 2015). Currently, there are more than 80 organizations in the United States that currently support this bill (Gay, Lesbian, and Straight Education Network 2015).

While this would be a legal help for anyone attending a private school that receives federal funds, it would be limited in its scope or ability to help LGBT students who attend private schools that are privately funded. It is clear that in order to reach these students, a federal statute, similar to 42 U.S.C § 1981, but that specifically applies to sexual orientation instead of race, would be necessary in order to reach those students. Given that there is not a similar provision that protects against private discrimination based on sex or religious affiliation, it seems unlikely that this would be enacted anytime soon. Still, the proposed statute does the important work of raising issues and providing a starting point.

Conclusion

There is considerable evidence that LGBT youth face substantial risks, discrimination, harassment, and other inequities in school. These dangers have severe long-term consequences for the mental health and overall stability of LGBT teenagers, who are more likely to commit suicide, experiment with drugs, and underachieve academically relative to their straight peers. At public schools, where the First Amendment prohibits schools from taking a religious approach to homosexuality, gay students are protected against discrimination, harassment, and being "outed" against their will. However, there are almost no protections at private schools that assert religious reasons for discriminating against LGBT youths.

Given the risks associated with the amount of bullying and harassment that LGBT youth face, LGBT students should be allowed to live openly without fear of retribution from the private organizations that might seek to inhibit their ability to live openly or to share information about their sexual identity. Although there are many different structures that these laws could follow, it is clear that it will require a specific statute to ensure that LGBT youths can live without being harassed or discriminated against. Anti-discrimination measures can be respectful of religious beliefs while still protecting students.

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Part IV
Families and Communities

Chapter 9
Protecting Financially Successful Youth's Incomes

Alyshia Jiwan

Introduction

In the United States, children have been part of the work force since the European colonist first arrived in North America (Moskowitz 2004). This affinity for child labor has continued into the twenty-first century, with recent research suggesting that between 80 and 90 % of children are employed during high school (Staff et al. 2009). Indeed, the notion of children being employed in their teens is now perceived as almost a rite of passage in America (Mortimer 2010). Research has further concluded that working as a teenager can be extremely formative for their current and future development (Apel et al. 2008). While studies have indicated that a large number of children are employed in menial positions, such as retail or other customer service positions (Win et al. 2007), a small percentage of children are employed in areas where they can make substantial amounts of money. For example, child actors can make millions of dollars before they reach the age of majority (Little 2014). The possibility that children can make significant sums of money leads to a major question: who has the right to control a child's fortune?

Beginning in the middle of the 1800s, serious concerns about child labor started to take hold (Perera 2014). And, due to the high rates of child labor in the early 1800s, protective child labor laws became necessary to safeguard working children in America. However, it was not until the early 1900s that several states started to adopt protective child labor laws (McGovern 1983). The culmination of this trend was the enactment of the *Fair Labor Standards Act* (FLSA) in 1938, which the Supreme Court upheld as constitutional in 1941 (United States v. Darby 1941).

The FLSA is a comprehensive reform that restricts the amount and type of work children under the age of eighteen are allowed to perform in the United States. Specifically, children over the age of sixteen can work virtually without restriction,

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R.J.R. Levesque (ed.), *Adolescents, Rapid Social Change, and the Law*,
Advancing Responsible Adolescent Development,
DOI 10.1007/978-3-319-41535-2_9

as long the occupation would not be "particularly hazardous" to children or "detrimental to their health or well-being," while children as young as fourteen or fifteen are only allowed to work in specific fields with the restriction that the employment does not interfere with their schooling or their "health and well-being" (McGovern 1983, pp. 295–296). Further, children under the age of twelve may be permitted to work, subject to education, wage, and hour restrictions, with parental consent (Fair Labor Standards Act of 1938, 29 U.S.C.A. §§ 212–213, 2015). While these broad federal regulations are the minimum standard for most fields across the country, states are still able to individually regulate child labor in excess of the proscribed federal laws (Munro 1996).

While child labor laws have made significant strides in restricting exploitation of children in the work force, there has not be a corresponding evolution of children's rights with respect to the money they earn from their employment. Minor children are still undeniably at the mercy of their parents when it comes to the ability to retain the rights to the money they earn as children (Barnett and Spradlin 1978). In fact, the majority of states still endorse the historical rule that a child's parents have a "right to the child's services and earnings" (Barnett and Spradlin 1978, p. 675, n. 7).

And while some states have updated their laws to give children the legal right to retain some of the money they earn in the workforce, most states have yet to make significant strides in this effort to protect a child's right to his or her earnings. Moreover, for the few states that have intervened in an attempt to give children more legal rights with respect to their earnings, most have taken a limited corrective measure that is focused almost exclusively on children in the entertainment industry or athletics (Cal. Fam. Code §§ 6750–6753, 2004; N.Y. Arts & Cult. Aff. Law § 35.03, 2013). Due to this oversight, the American legal system has failed to provide children with an absolute legal right to the money they earn from their employment.

Because the lack of protection with respect to children's earnings has not yet caught up with the growing trend of protective child labor laws, children are left vulnerable and are in a position to be exploited. While the current reforms enacted in California and New York are an excellent start in efforts to protect children's right to their earnings, in order to progress to a point where children's earnings are adequately protected states that do not currently have protective laws should adopt comprehensive statutes that will apply to children's earnings in all fields of employment. This reform will require that a more substantial portion of a child's earnings be placed into a trust account, and that children should be granted access to the trust account at an earlier age then typically has previously been selected.

This chapter will show how current state laws, such as New York and California, can be used as a template for reform to institute further protections for children's earnings. First, however, it is necessary to examine the history of parents' rights, the evolution of children's rights, and how the current regime is inadequate to deal with children's rights to their earnings. Next, an examination of California and New York laws will show how some states have responded to the issue of children's property rights with respect to their earnings, and how some states, like Indiana, have failed to address the issue of children's rights with respect to their earnings. Yet, when discussing children's ownership rights, it is also prudent to address how

understandings of children's maturity, development, and social construct can affect children's rational decision-making, and how this can be used to set threshold limits for certain rights and responsibilities of children. Based on this social science understanding, this chapter will then discuss children's rights with respect to their earnings. Finally, after revisiting the reforms in California and New York and identifying their shortcomings, an in depth and encompassing reform plan will be proposed to provide more protection to children with respect to their earnings. This will help protect children's interests in their earnings and moderate parents' historical rights.

Children Versus Parents: Whose Rights Come First?

Children are not mentioned specifically in any provision of the United States Constitution. Yet, that does not mean that they are automatically denied fundamental rights (Bellotti v. Baird 1979). By virtue of being a child, however, a minor's rights can be severely limited; specifically, the Court required that "constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children" (Bellotti v. Baird 1979, p. 634). A prime example of this is how children's rights are limited with respect to their earnings made as children (Siebeking v. Ford 1958; Hahn v. Moore 1956). For example, Benbow has noted that "[t]he earnings of a minor child rarely 'belong' to the child. They belong, instead, to the child's custodial parent who claims them" (Benbow 2007, p. 71).

This Constitutional, and traditional, view of children's earnings is consistent with the custom that parents have the right to raise their children as they see fit (Meyer v. Nebraska 1923; Troxel v. Granville 2000; Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary 1925). Indeed, courts have rarely felt the need to intrude on a parent's rights with respect to raising their children unless there is an extreme reason or compelling interest (Meyer v. Nebraska 1923). For instance, in *Prince v. Massachusetts*, the court interfered with a parent's right to raise their child because the welfare of the child was at stake (Prince v. Massachusetts 1944). However, it is generally assumed that parents have the best interest of their child at heart and will act according to the child's best interest (Parham v. J.R. 1979). Additionally, in the case of property rights and earnings, there seems to be a quid pro quo relationship expectation—because the parent has the duty to raise the child, it is expected that a child's earnings should be appropriated for the purpose of helping the parent support the child (Benbow 2007).

However, the notion that parents always protect the best interest of their child is a rather large assumption, and it does not always appear to be the case. In fact, the idea that parents are always acting in the best interest of their child seems particularly faulty when dealing with children's earnings. Jackie Coogan, who was a child actor and became famous in the early 1920s for his role in "The Kid" and later for his role as "Uncle Fester" in "The Addams Family" (Carlisle and Wolfe 1995), for example, made millions of dollars from a lucrative acting career when he was

child, but when he reached the age of majority he realized his fortune was gone—it had been squandered by his parents (Little 2014). In a similar case, Macaulay Culkin, who was a child actor best known for his starring role in the *Home Alone* movie franchise (Staenberg and Stuart 1997), was deprived of his earnings made while working as a child actor by his parents who used Culkin's earnings to support themselves under the guise of "management fees" (Davis 2006). Further, Shirley Temple, one of the biggest stars of the 1930s who stared in several movies, such as *Heidi*, and had several hit songs, the most famous of which were, and are still, *On the Good Ship Lollipop* and *Animal Crackers in My Soup* (Newsom 2015), had less than a hundred thousand dollars of her money remaining by the time she reached adulthood due to her parents' mismanagement of the money she made as a child actress (Christiano 2001). All of these cases seem to illustrate that relying on a parent's judgment for all decisions affecting their child—specifically when their child's earnings are concerned—may not, in fact, be in the best interest of the child.

While the United States Supreme Court is reluctant to interfere with a parent's right to raise his or her child as the parent sees fit, the Court has, in some instances, interfered when there is a countervailing state interest in protecting the welfare of children (Prince v. Massachusetts 1944). It appears that the Court is more willing to intrude on parental rights when it comes to protecting children's earnings as the Court has not taken issue with state laws that seek to interfere with a parent's historical right to their child's earnings. This idea of protecting children's rights has led some states (i.e., New York and California) to enact statutes that seek to remedy the immense conflict of interest between parents and their children when money is at issue.

Damming the Floodgates: Examining How States Have Responded to the Plight of Children in the Entertainment Industry

In response to the historical problem of parents misappropriating their children's earnings, some states have enacted laws to help remedy the situation—the most notable of which is California (Cal. Fam. Code §§ 6750–6753, 2004). In 1938, after he reached the age of majority, Jackie Coogan successfully sued his parents to recover the loss of his childhood earnings (Krieg 2004). As a result of this case, California passed several laws that are colloquially referred to as "The Coogan Laws," which have been codified into sections 6750 through 6753 of the California Family Code (Phillips v. Bank of America 2015). As part of "The Coogan Laws," the statute provided that "Coogan Trust" accounts be established and 15 % of the child's income be held in those trust accounts until the child reaches eighteen years of age or is emancipated (Cal. Fam. Code § 6750, 2004). Further, the trust accounts are sealed and cannot be accessed before the child reaches eighteen unless a party obtains a court's approval to access the trust (Cal. Fam. Code § 6753(b), 2004).

However, these protective measures are only available for children who are employed in "artistic or creative services" (Cal. Fam. Code § 6750(a)(1), 2004).

A similar protective measure has also been enacted in New York. Under New York's law:

> The court shall fix the amount or proportion of net earnings to be set aside as it deems for the best interests of the infant, and the amount or proportion so fixed may, upon subsequent application, be modified in the discretion of the court within the limits of the consent given at the time the contract was approved. N.Y. Arts & Cult. Aff. Law § 35.03(3)(b), 2013.[1]

In other words, the amount of that child's income that must be set aside in trust is essentially left to the judge's discretion. Further, while this provision does allow for more flexibility in the amount of money set aside for the child, the statute may not truly protect the child's financial interest, since it specifies that the court may consider the financial needs of the child's family when determining how much is proper to set aside (Siegel 2000).

In contrast, Indiana, as well as several other states, has yet to enact any substantial law related to the protection of children's earnings (Barnett and Spradlin 1978). In Indiana, children's property rights, which include their earnings, are still controlled by the more traditional law that gives parents the ultimate right to their minor child earnings (Siebeking v. Ford 1958; Hahn v. Moore 1956).

While the California and New York laws are an important step forward to protect children's rights to their income, they are still imperfect. Neither law mandates that even a majority of a child's earnings be set aside for the child's future use; California only requires that 15 % be set aside, while New York set aside an amount to be determined by the court (Cal. Fam. Code §§ 6750–6753, 2004; N.Y. Arts & Cult. Aff. Law § 35.03, 2013). Additionally, these laws only apply to children working in the entertainment industry or an athletic field. While this makes sense, as California and New York are the main centers for the entertainment industry (Krieg 2004), neither state offers protection to the numerous children working in more mundane and traditional jobs, such as those in retail or the food service industry (Win et al. 2007). In order to provide comprehensive protection to children, these flaws must be addressed when implementing a new law.

Understanding the Capacity and Maturity of Children

Enacting laws for the purpose of protecting children is based on the presumption that children are immature, not able to take care of themselves and, therefore, require guidance (Scott 2000). Because children are perceived as vulnerable, in need of parental guidance, and having a reduced decision-making capacity, courts allow minors' rights to be limited (Bellotti v. Bairdi 1979). However, at some point children must cross the invisible barrier into adulthood where they are assumed to

[1]N.Y. Arts & Cult. Aff. Law § 35.03(3)(b).

be able to take care of themselves (Scott 2000). The basis of this barrier is usually age. However, age is being used as proxy for actual maturity (Scott 2000).

Children tend to be seen as mature when they are perceived as less vulnerable, less in need of parental guidance, and have an increased decision-making capacity (Bellotti v. Baird 1979), but it is difficult to credit these characteristics with a specific age. An additional problem with using age as a bench mark for determining adulthood is that different responsibilities and privileges are awarded to children at different ages (Todres 2012). For example, children are not allowed to vote until the age of eighteen (Todres 2012), but they are allowed to work without parental consent at fourteen (Moskowitz 2004). Yet, the use of age is almost universally applied because it would be virtually impossible to evaluate each child in each case for a specific level of maturity (Todres 2012); using a bright line rule, like age, is usually due to concerns about administrative efficiency (Scott 2000). So the pertinent question is: at what age should children be considered mature enough for specific responsibilities or consequence?

While the word "child" refers to anyone who is under the age of majority ("Child." Merriam-Webster Dictionary, n.d.), the term adolescence refers specifically to children who are developing into adults, ("Adolescence." Merriam-Webster Dictionary, n.d.). However, while the term "adolescence" is not clearly defined, adolescence is usually thought to begin at puberty (Burt et al. 1998). But, "in the United States adolescence typically is thought of as covering the years from 10 to 19" (Burt et al. 1998, p. 24). In the legal context, distinguishing between these terms is often significant as each term correlates to a perceived level of maturity. For example, in *Roper v. Simmons*, Justice Kennedy addressed three traits of adolescences that make children less culpable in criminal situations, these traits are: (1) an "underdeveloped sense of responsibility," (2) susceptibility to peer pressure, and (3) uninformed nature (Roper v. Simmons 2005). By extending these factors, a benchmark maturity level can be established for evaluating the age at which children are old enough to handle certain responsibilities or consequences, like those associated with earning and managing money.

Immaturity and an Underdeveloped Understanding of Responsibility

While it is commonly assumed that children lack maturity and have an underdeveloped sense of responsibility, this might not always be the case (Defoe et al. 2015). In *Hodgson v. Minnesota*, the court references psychological research suggesting that "adolescents [have] decision-making skills comparable to those of adults" (Steinberg et al. 2009, p. 584). Further, in *Roper v. Simmons*, Justice Scalia cited research that suggested "middle adolescen[ts] (age 14–15) … [have] develop [ed] abilities similar to adults in reasoning about moral dilemmas, understanding

social rules and laws, and reasoning about interpersonal relationships and interpersonal problems" (Roper v. Simmons 2005, pp. 617–618).

In order to explain the inconsistencies between these opinions on adolescent maturity and those expressed in *Roper v. Simmons*, where a seventeen year old was presumed too young for adult criminal culpability, some psychologist have suggested that adolescent brains have different types of reasoning processes (Albert and Steinberg 2011). Research has described these processes as "hot" and "cold" cognition (Aronson 2007). When adolescents are engaged in "hot" cognition they are making decisions in a heightened emotional state and their decisions tend to be poor or risky (Feld 2013; Figner et al. 2009). "Cold" cognition, on the other hand, is a more deliberative type of decision-making process that occurs in low emotion, stress-reduced environments—this tends to make these decisions more rational (Panno et al. 2013).

A comparable explanation differentiates adolescent decision-making processes into cognitive and psychological reasoning (Steinberg et al. 2009). This distinction is similar to that of some researcher's "hot" and "cold" divisions, as cognitive reasoning allows adolescents to engage in logical reasoning, whereas psychological reasoning is an exceedingly rash process that tends to be enhanced by the presence of an adolescent's peer group (Steinberg et al. 2009). Research has indicated that adolescents are engaging in cognitive reasoning, adolescents who have reached the age of fifteen appear to be equally competent to adults (Steinberg 2013). Using these distinctions in adolescent reasoning, Steinberg distinguished the *Hodgson* case by suggesting that the decision to have a child is processed under logical reasoning and, therefore, adolescents of a younger age are mature enough to make these types of decisions (Steinberg 2013). On the other hand, as in *Roper* and *Graham v. Florida*, adolescents who engage in criminal activity are likely engaging in psychological reasoning, which is most likely why the court considered the defendants too immature to be sentenced to the equivalent adult punishment for their crime (i.e., the death penalty and life without the possibility of parole, respectively) (Roper v. Simmons 2005; Graham v. Florida 2010).

Peer Pressure and Its Effect on Adolescent Reasoning

When children are in social groups they tend to influence each other's behavior; this effect is commonly known as "peer pressure" (Steinberg and Monaham 2007). While peer pressure is most commonly connected to behaviors classified as undesirable or deviant, such as riskier behavior like drinking and engaging in sexual activity (Lansford et al. 2014), it can also refer to peers influencing each other to engage in more desirable behavior, like getting good grades (Steinberg and Monaham 2007). Yet, there does not need to be any specific behavior associated with peer pressure and its associated risks: "the mere presence of peers activates adolescents' reward centers … [which] may make teenagers more inclined to take risks when they're with their friends" (Steinberg 2011, p. 44). Moreover, in general,

adolescents are more likely to be influenced by their peers than adults (Gardner and Steinberg 2005).

On the other hand, Steinberg and Monahan found that children become less susceptible to peer influences between the ages of fourteen and eighteen (Steinberg and Monahan 2007). This indicates that while peer pressure is associated with "hot" decision-making and can exacerbate poor decision-making in adolescents (Aronson 2007), yet this negative effect decreases starting at the age of fourteen, making children between the ages of fourteen and eighteen more capable of emotional decision-making (Steinber and Monahan 2007). While there is progress in this area during late adolescence, these emotional decision-making processes are not fully stable until a person's early twenties (Casey et al. 2011). However, this does indicate that, with respect to peer pressure, adolescents are similarly capable of making an informed decision at the age of sixteen as they are at eighteen. This insight indicates that the line being drawn between certain ages and certain responsibilities is rather arbitrary (Todres 2012). Aligning adolescents' maturity more closely to their legal responsibilities will help ensure their adolescents are jointly given responsibilities and rewards at a more apposite time.

When Are Children Old Enough? Applying a Social Science Understanding to Children's Earnings

"The development of decision-making capacities in children and adolescents is not a new topic of interest and dates back hundreds, if not thousands, of years" (Kambam and Thompson 2009, p. 173). When courts have previously looked at making age determinations for legal issues, such as criminal responsibility, the courts have looked at maturity to approximate an appropriate age at which the benefit or responsibility will attach (Roper v. Simmons 2005). This is because the courts believe that children under a certain age are not culpable for their conduct due to, among other things, their immaturity (Slobogin 2015); this makes maturity pivotal to how children are treated (Todres 2012).

However, with respect to children and earnings, there has not been a significant amount of research that specifically evaluates when children are mature enough to responsibly handle money. Nevertheless, the factors used to determine criminal culpability can provide guidance for determining when a child may be mature enough to handle money. Because criminal culpability for juveniles is determined by their maturity and response to peer pressure, which can ultimately affect child's freedom and fundamental rights (Roper v. Simmons 2005; Graham v. Florida 2010), these factors can be considered adequate to analyze when a child is mature enough to control his or her own earnings. Therefore, the more specific question to be addressed is: at what age should children be considered mature enough to be allowed full access to their earnings?

While some may argue that emancipation would be a better tool than age restrictions to ensure children had ownership rights to their earnings, age restrictions would likely be more easily adopted. This is because, when dealing with family law, there is an almost irrefutable presumption that children are better off in the custody of their parents. (DeShaney v. Winnebago City Dep't of Soc. Servs. 1989). Because of this presumption, a state would be unlikely to institute a reform that was based on disassembling the family unit.

Based on the current psychological understanding of children and adolescents, adolescents at the age of sixteen have comparable maturity and decision-making skills to adults when engaging in logical reasoning, which courts have determined includes such decisions as whether or not to bear children (Steinberg 2013). While there has not been a significant amount of research that connects maturity with adolescents' ability to handle money appropriately, how adolescents conduct themselves with respect to accessing their money and making long-term decisions with respect to their financial future would likely involve a "cognitive" or "cold" reasoning process similar to that of whether or not to have children. This is because decisions about money, like those of child bearing, do not need to be made in an immediate manner and adolescents can make these decisions "in an unhurried fashion and in consultation with adults" (Steinberg et al. 2009, p. 586).

While there is undoubtedly some pressure from peers with regards to managing money, particularly with vast sums of money, it seems reasonable to distinguish financial decisions from those typically being made under highly emotional, spontaneous circumstances, like that of decisions to consume alcohol, have sex, or engage in other risky behavior, which tends to result in poor decision-making (Steinberg 2005). Further, research also indicates that peer pressure is less of a factor in logical decisions making (Steinberg and Monaham 2007). This means that peer pressure may not significantly affect an adolescent's decisions regarding the management of their finances. While some peer pressure will be unavoidable for young adults, the amount of influence peers have over one another seems to decrease after the age of fourteen, making sixteen a less risky age to be making important life decision, including that of financial responsibility (Steinberg and Monaham 2007).

However, financial competence is a learning process that is best accomplished by having access to money (Goowin 2008). Therefore, the threshold age for children to have full access to their earnings should be at a younger, more beneficial, age—like sixteen. Making the threshold age even as high as eighteen is misguided, as this risks discouraging youth from entering the work force since, while they would be able to work relatively freely at the age of sixteen, they would not, at present, have legally protected rights to their earnings (Todres 2012). Allowing young adults earlier access to their earnings made as children helps to align an adolescent's responsibilities and rewards.

Reforming the Law to Protect Children's Earnings: Sometimes Less Protection Is More

Nobody is arguing that young children should be given unfettered access to the potentially vast sums of money they can receive while employed in the entertainment or other potentially lucrative industry. Moreover, it is important to preserve the money children make for their future. In order for states, like Indiana, to adopt a comprehensive and instructive law, three shortcomings need to be addressed in the current laws and approaches being used in a minority of states, such as California and New York, as they only provide minimal protection to children with respect to their earnings. The first flaw is that, while the California and New York laws provide a good starting point for reform, they are limited because they only apply to certain types of employment, such as entertainment or athletics (Cal. Fam. Code §§ 6750–6753, 2004; N.Y. Arts & Cult. Aff. Law § 35.03, 2013). To address this flaw, the first point a state looking to improve their current law, or implement a new law should address is the comprehensiveness of the statute. Unlike the current oversight in the California and New York statutes, a state like Indiana would want to have a law that encompasses all types of employment.

A second flaw is that the portion of a child's earnings that are required to be set aside for their future is either minimal, as under California's law (Cal. Fam. Code §§ 6750–6753, 2004), or discretionary as under New York's law (N.Y. Arts & Cult. Aff. Law § 35.03, 2013). To address this flaw, it is first important to distinguish between the amount of money a child earns and the amount of money the child has access to. While it would be ridiculous to require a portion of a child's babysitting money in a trust until they reached a designated proper age, it would be equally irresponsible to allow a young child access to millions of dollars. And while some people may not think of children as earning millions or several hundred thousands, the fact remains that some children actually are. Child actors who earn significant sums of money are not uncommon and they face real threats to their future financial wellbeing. This can create a discrepancy between a child's interest in their money, and a parent's, possibly nefarious, interest in their child's earning, which current approaches do not protect against.

Therefore, to counteract this problem, a new approach should specify that the amount of access a child has to his or her earnings be based on three factors: (1) age, (2) the amount earned, and (3) the industry where the child is employed (i.e., child athletes and actors, who have the potential to earn substantially more money than their fast-food counterparts, will have slightly different access restrictions). These factors can be used to distinguish categories, like tax brackets, that come with different levels of the child's access to his or her money. By graduating the amount of access a child has to their earnings, the child can learn monetary responsibility gradually by being slowly introduced to the often-difficult financial decisions the child will be required to make as an adult (Scott 2000). A remedial approach could require a larger portion of a child's income to be set aside and be protected for the child's future. For example, a new approach in

Indiana would require that for children under the age of fourteen, who are formally employed in the entertainment industry, an athletic occupation, or an occupation that would have a similar earning potential, 75 % of the child's earnings should be put into a trust account, similar to that of a Coogan Trust account (with the money only accessible with permission from the court) (Cal. Fam. Code §§ 6750–6753, 2004), while the remaining 25 % should be left in parental control to support the child in pursuing their career. Such expenses should rightfully include: clothing, travel expenses, lessons, tutors, etc. Additionally, parents who were acting as the child's manager would be allowed to take management fees comparable to the industry standard, which are approximately 15 % of the child's gross earnings, from the 25 % excluded from the trust (Warren and Wechsler 2014). In order to ensure that the 25 % is being spent appropriately, the child's parents should be required to submit audited financial statements with their income tax return.

Another problem with the current approach in New York and California is that there is no gradation of finically responsibility. This is a problem as, in addition to prolonging the potential divided interest between parents and their children, it does not allow children to learn financial responsibility before they gain access to the money put aside for them. Based on current research, children are likely able to make responsible decisions with respect to their finances at fairly young ages and allowing them to practice financial responsibility with a relatively minor amount of their wealth would help them prepare for the future. To remedy this, a state like Indiana could graduate the financial responsibility by granting children between the ages of fourteen and sixteen, who are formally employed in the entertainment industry, an athletic occupation, or an occupation that would have a similar earning potential, full ownership rights to any amount earned under the lowest income tax bracket (Roberts 2014). However, to protect the child's financial future, any amount earned above the lowest income tax bracket would be distributed in the same manner for children under the age of fourteen. This means that 75 % of the child's earnings over the lowest income tax bracket should be put into a trust account, similar to that of a Coogan Trust account (with the money only accessible with permission from a court) (Cal. Fam. Code §§ 6750–6753, 2004), while the remaining 25 % should be left in parental control to support the child in pursuing their career. Such expenses would rightfully include: clothing, travel expenses, lessons, tutors, etc. Additionally, parents who were acting as the child's manager would be allowed to take management fees comparable to the industry standard, which are approximately 15 % of the child's gross earnings, from the 25 % excluded from the trust (Warren and Wechsler 2014). To ensure that the excluded 25 % is being spent appropriately, the parents must submit audited financial statements with their income tax return. Finally, any money remaining from the 25 % must be returned to the child when they reach the age of sixteen.

While children who earn millions are the main focus of these types of laws, any child who earns money should be entitled to same protection from potential financial pilfering; this, as mentioned previously, is a key oversight in current approaches. Yet, even though children are likely capable of making responsible decision with respect to their financial future, even adults have been known to

squander vast amounts of money. Because children in more mundane occupations will likely make substantially less money, the protection in place does not need to place as much emphasis on protecting children from themselves. A suitable compromise to these competing interests could require 75 % of any earnings made by a child under the age of fourteen to be placed in a trust account, similar to that of a Coogan Trust account (with the money only accessible with permission from the court) (Cal. Fam. Code §§ 6750-6753, 2004), until the child turns sixteen. And the remaining 25 % of the child's earnings would be the rightful property of the child and not the child's parent. However, to account for children who make a significant amount of money in more standard occupations, a similar gradation system should be used to that of children in high-income occupations. An example of this type of reform grant children an absolute right to any earnings within the lowest income tax bracket (Roberts 2014), with any amount over the tax bracket threshold amount being put into a trust account, similar to that of a Coogan Trust account (with the money only accessible with permission from the court) (Cal. Fam. Code §§ 6750–6753, 2004), until the child reaches the age of sixteen.

A third, major flaw in the current laws in New York and California is that children are not granted ownership of the money set aside in trust until they are eighteen. This is a problems as, based on the current social and psychological understanding of adolescents, adolescents are likely capable of making responsible decisions with respect to their money at the age of sixteen. Moreover, it makes very little sense for minors at the age of sixteen to be allowed to work without parental consent, and with very few restrictions (Moskowitz 2004), but still be subjected to severe limitations on access to and possession of their finances. To remedy this conflict, a state like Indiana, where no law currently exists, could grant minors full access to any of their restricted earnings made as minors at the age of sixteen and any earnings made after the age of sixteen.

This type of proposal can be used as a template for states like Indiana, where no law currently exists, or as sources of reform for states like New York and California, where laws currently exist but require improvement to fully protect children. By addressing these three flaws in current methods, states like Indiana can better align the responsibilities a child undertakes by joining the work force with the corresponding reward of certainty that they will be able to retain ownership rights to their earnings.

Conclusion

Children have been a part of the American work force for centuries (Moskowitz 2004). And, while the federal and state enacted child labor laws have provided some protection for children with respect to wages, hours, and conditions (Fair Labor Standards of 1938, 29 U.S.C.A. §§ 212–213, 2015), there is still a serious lack of protection with respect to children's rights to their earnings.

Traditionally, courts have been reluctant to interfere with a parent's right to raise their children (Meyer v. Nebraska 1923; Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary 1925), assuming that the parents are acting in the best interest of their child (Parham v. J.R. 1979). However, it appears that the courts are less reluctant to intrude on a parent's historical rights when it comes to children's earnings.

Within the last century, some states, such as California and New York, have made some changes with respect to protecting children's earnings. However, these reforms have been inadequate since the laws tend to be narrowly tailored to specific situations and under protective of children. Indeed, some states, including Indiana, have not enacted any substantial protective laws in this area (Siebeking v. Ford 1958). Because of this void, new laws can and should be enacted to protect a child's right to his or her earnings made before the age of majority.

To preserve a greater portion of a child's earnings, this type of law should be implemented in states that currently have no relevant laws at all. Additionally, this proposed reform would apply to all children in the workforce, not just a specific subset (i.e., child athletes and children in the entertainment industry). While it is tricky to develop a comprehensive reform that takes into account the subtle differences in income across different job sectors, and the responsibility and maturity required to exercise control of money, the gradated release of money reflects the psychological understandings of maturity and mirrors the current legal construct of allowing children of different ages to acquire different responsibilities (Scott 2000).

This type of reform will allow the responsibilities of entering the workforce to correspond with the benefit of being in control of the money the child earns. This proposal will also set a foundational protection for children that will, in the future, allow the legislature to adapt the law to best fit with the needs of children and the rights of their parents. This reform will strike a much-needed balance between protecting children from their parents and protecting children from themselves.

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Chapter 10
Protecting Youth's Relationships with Deployed Parents

Jessica Ans

Introduction

Since September 11, 2001 and the War on Terror, much has been required of United States servicemembers. Unprecedented levels of extended deployments and multiple deployments of active duty troops and reliance on Reserve and National Guard troops mobilization have taken servicemembers away from their homes. For example, from October 2001 to 2010 over 2.1 million servicemembers have deployed to Iraq and Afghanistan and, of those servicemembers, approximately 44 % are parents and 48 % of these parents have served at least two deployments (U.S. Department of Defense Report 2010, p. 1). Of over 2.2 million military servicemembers as of 2013, over 42.7 % (940,926) have children. In addition, 6.6 % (146,048) of servicemember parents are single, 33.8 % are married to a civilian (744,373), and 2.3 % (50,505) are dual-military couples (U.S. Department of Defense 2013 Demographic Profile 2013, pp. 111–112).

Unfortunately, parents in uniform often must fight wars on two fronts: they fight for the country they are sworn to defend on deployment and, they often need to fight for custody of their children they are losing because of their service (Gromek 2014, p. 875). The reason for this situation is two-fold. Servicemember parents' military service in general and the possibility and reality of their deployments are wrongly being considered as negative factors in child's best interest determinations in custody and visitation disputes, and the disputed custody and visitation cases fail to consider the benefits of military life (Hanes 2011, p. 5; Ayotte 2011, p. 668; Sexton and Brent 2008, p. 9). Custody and visitation orders are being modified in court by the other civilian parent or caregiver while the servicemember parent with joint custody rights is deployed (Jenkins 2013, p. 1026). As a result, servicemembers who were the primary physical custodians of their children at prede-

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R.J.R. Levesque (ed.), *Adolescents, Rapid Social Change, and the Law*,
Advancing Responsible Adolescent Development,
DOI 10.1007/978-3-319-41535-2_10

ployment have no procedural protection from their temporary custody arrangements based on postdeployment becoming permanent (Paquin 2011, p. 562). This causes servicemembers to become stressed and hampers concentration on their military orders when they learn that civilians are petitioning for custody of their children while on deployment (Privette 2015, p. 435). These practices have unconstitutionally infringed on dual-military and single servicemember parents' fundamental rights to rear their children and have disrespected their military commitment and sacrifices.

While a child's best interest is paramount in child custody litigation, the effects of the regimes outlined above do not serve the best interests of children of servicemembers (Hanes 2011, p. 13). Military children demonstrate high levels of resilience and maturity from living military lives and they apply these character traits in coping with their servicemember parents' deployments, thriving the despite challenges (Riggs and Cusimano 2014, p. 385; Lemmon and Stafford 2014, p. 346). Social science understandings of the impact of military life and deployment on military children are key to ascertaining what is in the best interest of the child of the servicemembers (U.S. Department of Defense Report 2010, p. 154). Researchers have invalidated the myths that military children are less well off than civilians (Hanes 2011, p. 16). Both parents are important for a child's emotional needs and development, which means that courts may be harming children by restricting their access to servicemember parents (Paquin 2011, 562). Social science research reveals that it often is in the best interests of military children to remain in the primary physical custody of their servicemember parents. Most importantly, children of servicemember parents must be accorded certain constitutional rights and protections detailed in case law or that case law has neglected to address.

This chapter suggests that family law courts tasked with determination or modification of child custody and visitation involving servicemember parents should strike a better balance between providing constitutional rights, special substantive and procedural rights, legislatively mandated protections, and other benefits to servicemember parents when they are required to be deployed and determinations of the best interests of the service members' children. This chapter begins by providing an overview of the current laws, regulations, policies, relevant case law, and legal responses and methodologies governing child custody and visitation as it relates to military parents. It then details the social science understandings of military children by looking at the impact of military life and deployment on children through research that informs the best interest of the child standard. This chapter concludes with reform proposals and general recommendations to increase legal protections in the child custody and visitation arena for servicemembers and their children that will give them the utmost respect and honor they deserve, derived from the findings in the chapter as a whole.

There are numerous terms that apply to this issue and this chapter specifically that warrant formal definitions. "Military service member" ("servicemember") means a member of one of the United State's uniformed services. "Uniformed services," "armed service," or "military" means the active and reserve components of the Marine Corps, Army, Navy, Air Force, Coast Guard, and the National Guard.

"Civilian" means a non-member of a uniformed service. "Parent" may refer to the biological or adoptive parent of a child. "Dependent child" or "military children" means a servicemember's biological or adopted child who is unmarried and is 18 years of age or less.

Most importantly, "deployment" means the movement or mobilization of a servicemember to a location for a period of longer than 60 days and not longer than 540 days pursuant to temporary or permanent official orders: (1) that are designated as unaccompanied; (2) for which dependent travel is not authorized; and (3) that otherwise do not permit the movement of family members to that location [Servicemembers Civil Relief Act 2014, 50 App. U.S.C.A. § 528(d)]. "Deployments" under this definition may include any of the following circumstances that require the servicemember to be absent: normative/routine deployments, combat/combat support deployments, peacetime deployments, deployments overseas, duties away from the home station, training exercises and field duties, schools, permanent changes of station, alerts, annual training, temporary duty assignments, unit training assemblies, active duty training, unaccompanied and remote tours, leave and non-duty time, transfers to combat zones or high-risk environments, and other military duty that requires short- or long-term absences. There are three phases identified in the course of deployment: predeployment, deployment, and postdeployment (U.S. Department of Defense Report 2010, p. 9). As these definitions reveal, deployed parents can experience very different situations, as could their families.

How the Law Has Responded to the Servicemembers' Families and Why It Fails

The federal government and the state government have struggled with how to properly aid servicemember parents and their children in navigating court systems when dealing with child custody and visitation issues. There are three significant instances in which the federal law has responded: (1) Congress enacted the Servicemembers Civil Relief Act; (2) the Executive branch, through the Department of Defense, passed Family Care Plan regulations; and (3) Congress attempted to pass laws limiting the simultaneous deployment of dual-military couples. There are two significant instances in which the states addressed situations of deployed parents: (1) the Uniform Deployed Parents Custody and Visitation Act; and (2) family courts' use of the best interests of the child standard.

How Federal Law Has Attempted to Enhance Legal Protection for Servicemember Families

The Servicemember Civil Relief Act. In 2003, the Servicemembers Civil Relief Act ("SCRA") was revised and revamped to protect servicemembers from civilian issues that caused legal or financial disadvantage and unduly distracted from their

orders [Douglass 2009, p. 350; 50 U.S.C.A. §§501–597(b) (2003, amended 2014)]. The legislative purpose of the SCRA is to allow servicemembers, "to devote their entire energy to the defense needs of the Nation," by temporarily suspending all judicial and administrative civil proceedings and transactions in which a servicemember is a party (50 U.S.C.A. §§501–597(b) (2003, amended 2014), §502). The Supreme Court held that the statute is to be "liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation" [*Boone v. Lightner*, 319 U.S. 561, 575 (1943) (referring to the SCRA's predecessor, the Soldiers and Sailors Relief Act)].

Section 521 prevents a court's entry of a default judgment against servicemembers when they are deployed and therefore do not make appearances to protect their rights or comply with the obligations in question (50 U.S.C.A. §§501–597(b) (2003), §521). Section 522 mandates that courts must grant a minimum ninety-day stay when: (1) a servicemember shows in his petition that his military duty materially affects his ability to appear, and the date when he can appear; and (2) when a commanding officer declares that military duties prevent the particular servicemember's appearance and he is not authorizing leave for the servicemember (50 U.S.C.A. §§501–597(b) (2003), §522). A servicemember may apply for an additional extended stay based on their continuing material effect of military duty on their ability to participate in the litigation [50 U.S.C.A. §§501–597(b) (2003), §§521, 522 (amended 2008)]. In 2008, Congress amended the SCRA by inserting "including any child custody proceeding" after "civil action or proceeding" in sections 521 and 522.

The problems with these two provisions by themselves are evident. First, a mandatory stay of only ninety-days, i.e., three months, is too short, considering that SCRA now defines deployments as a maximum of 540 days, i.e., one and a half years and deployments are typically extended (50 U.S.C.A. §§501–597(b) (2003), §528 (amended 2014); Hanes 2011, p. 7; Gromek 2014, pp. 884–885). Leaving discretion to the court to determine if a longer-than-three month stay is necessary would lead to duplicitous petitions and hearings and would divert the attention of the servicemember away from his orders every ninety-days, which makes the purported SCRA protections ineffective. Second, when weighing the state's best interests of the child standard against these SCRA provisions, civilian state courts ignore these SCRA provisions, maybe because of unfamiliarity with federal law, and declare that the state family law standard trumps, instead of balancing between the child's interests and the servicemember parent's interest (Privette 2015, pp. 441–42; *In re Marriage of Bradley*, 137 P.3d 1030, 1032 (Kan. 2006); Deployed Parents Custody and Visitation Act Summary). Courts end up sidestepping the SCRA by issuing temporary custody orders despite the mandatory stays [Gromek 2014, p. 885; *Lenser v. McGowan*, 191 S.W.3d 506, 507 (Ark. 2004)]. Third, petitioning for relief under these sections can be procedurally difficult and confusing for a servicemember (Paquin 2011, p. 547; Douglass 2009, pp. 351–52). Fourth, the SCRA does not apply to Reserve and National Guard servicemembers unless they are called to active duty service for a period of more than 30 consecutive days, when in reality, Reserve and National Guard servicemembers are often

working hours comparable to active duty service [50 U.S.C.A. §§501–597(b) (2003), §511 (amended 2004)].

On December 19, 2014, Congress successfully enacted child custody protections amendments to the SCRA that had been proposed eight times since 2006 (Privette 2015, p. 443; 50 U.S.C.A. §§501–597(b) (2003), §528 (amended 2014); H.R. 3979, 113th Cong. § 566 (2014); Levin and Howard 2014). In relevant part, the law provided the following:

(a) *Duration of temporary custody order based on certain deployments*—If a court renders a temporary order for custodial responsibility for a child based solely on a deployment or anticipated deployment of a parent who is a servicemember, the court shall require that the temporary order shall expire not later than the period justified by the deployment of the servicemember.
(b) *Limitation on consideration of member's deployment in determination of child's best interest*—If a motion or a petition is filed seeking a permanent order to modify the custody of the child of a servicemember, no court may consider the absence of the servicemember by reason of deployment, or the possibility of deployment, as the sole factor in determining the best interest of the child.
(c) *No Federal jurisdiction or right of action or removal*—Nothing in this section shall create a Federal right of action or otherwise give rise to Federal jurisdiction or create a right of removal.
(d) *Preemption*—In any case where State law applicable to a child custody proceeding involving a temporary order as contemplated in this section provides a higher standard of protection to the rights of the parent who is a deploying servicemember than the rights provided under this section with respect to such temporary order, the appropriate court shall apply the higher State standard (Servicemembers Civil Relief Act 50 U.S.C.A. §§501–597(b) (2003, amended 2014), §528).

Two reasons made Congress reluctant to pass this law and the Department of Justice was hesitant to enforce related regulations until 2014. They thought that federal legislation would be counter-productive at best and harmful at worst because it would force servicemembers to navigate through a federal system unfamiliar with family law (Jenkins 2013, pp. 1027–1028). They were also concerned that authority and jurisdiction over family law matters, like child custody and visitation, should remain with state courts, where it has traditionally always been (Jenkins 2013, p. 1027–1028).

However, the counter argument to the former criticisms is two-fold. First, it is no longer the case that states have the sole authority and jurisdiction over family law and the federal government has considerable authority to intervene (Hanes 2011, p. 18). There are thousands of federal laws governing family law, including but not limited to, laws on taxation, child support, campaign finance restrictions, workers' compensation benefits, health insurance, marriage (Obergefell v. Hodges 2015). Second, Supreme Court case law is steeped in protecting the rights of families and

children in the areas of privacy, capacities and competencies, sex, civil rights, the criminal justice system, child abuse and prevention, and child welfare (see Myer v. Nebraska 1923). It is absolutely no imposition or intrusion on states and federal courts to apply Section 528 because the priority must be ensuring deployed servicemembers and their children are given the legal attention and protection they deserve for their sacrifices and contractual obligations with the government.

Because this law is new, courts have not interpreted the reach of Section 528 and how it can be reconciled with existing family law (as discussed below) and law journals have not documented its effects in practice. Even though Section 528 rectified confusion, problems are still evident without this analysis. Notably, Reservists and National Guard servicemembers are still not protected. In addition, it does not provide for expedited hearings or electronic testimony. Similarly, it does not take into account the federal regulations governing Family Care Plans (as outlined next). Most significantly, it only states that the absence of the servicemember by reason of deployment, or the possibility of deployment, may not be used as the *sole* factor in a best interest analysis, not that it can *never* be used as a factor in a best interest analysis. Military service generally and military life is also excluded from any best interest analysis protection.

Department of Defense regulations, "*Family Care Plans.*" In addition to SCRA, federal Department of Defense ("DOD") regulations published in April 2010 play an important role in servicemembers' child custody issues in preparation of deployment. The DOD and the individual armed services require single parent servicemembers, dual-military couples with dependent children, divorced servicemembers with dependent children, married servicemembers with dependent children with an ex-spouse, and all other servicemembers without civilian adult dependents who have physical, custodial custody or joint custody of their children to create and submit a Family Care Plan document ("FCP") to their commanding officer (Department of Defense, Instruction No. 1342.19 (May 7, 2010); U.S. Department of Air Force, Air Force Instruction 36-2908; Department of Army, Reg. 600-20, 5-5; Department of Navy, Marine Corps Order 1740.13B; Department of Navy, Opnavinst 1740.4D).

FCPs protect the servicemember's custody rights and his child's best interests while he is deployed. The servicemember designates the individual who shall act as a temporary guardian and provide for the care, support, and custody of the dependent child when the servicemember is deployed (Department of Defense, Instruction No. 1342.19 (May 7, 2010), 6). FCPs outline the logistical, financial, medical, educational, religious, relocation, and legal arrangements and responsibilities, as well as ensure the servicemember's military facilities, services, benefits, and entitlements are accessible to the dependent child (Department of Defense, Instruction No. 1342.19 (May 7, 2010), 8). FCPs must also list all reasonably foreseeable situations and contingencies and be sufficiently detailed and systematic to provide for a smooth, rapid transfer of responsibilities to the temporary, civilian caregiver in the absence of the servicemember (Department of Defense, Instruction No. 1342.19 (May 7, 2010), 15). The servicemember must attempt, to the greatest extent possible, to obtain the consent of the non-custodial natural or adoptive parent

of any FCP that would leave her child in the custody of a third party (Department of Defense, Instruction No. 1342.19 (May 7, 2010), 8). Failure to complete a family care plan may be grounds for separation, disciplinary action, or administrative action (Department of Defense, Instruction No. 1342.19 (May 7, 2010), 8). Dual-military couples are required to develop and FCP (Department of Defense, Instruction No. 1342.19 (May 7, 2010), 1). Despite looking, acting, and talking like a contract or custody order, the FCP is not a binding legal document or source of legal authority in a dispute between a deployed servicemember and a non-custodial natural or adoptive parent or third party nonparent or nonrelative (Gromek 2014, p. 878). The best a servicemember can hope for is that his FCP will serve as supporting evidence at a hearing (Privette 2015, p. 438).

A servicemember often prepares the FCP without legal guidance because the regulations only mandate speaking to his commanding officer, not his judge advocate general (JAG officer) (Privette 2015, p. 437). There is nothing preventing the civilian non-custodial natural or adoptive parent or third party nonparent or nonrelative with legally enforceable custody or visitation rights from challenging the FCP (and the original custody order the FCP supplements) or dismissing it entirely while the servicemember is deployed (Privette 2015, p. 437; Ayotte 2011, p. 662).

The state courts that refuse to enforce FCP terms and conditions altogether declare that to hold otherwise would be to give the Secretary of Defense power to control family law (Paquin 2011, p. 548; Privette 2015, at 438; Tallon v. DaSilva 2005; Lebo v. Lebo 2004). Other state courts enter temporary custody orders that modify the FCP or permanently alter the terms and conditions of the original custody order the FCP supplements (Paquin 2011, p. 549). State courts often determine that the non-custodial parent: (1) has a superior right to exercise such care and control during the servicemember's periods of deployment and that the power of attorney specified in the FCP cannot constitute an extrajudicial modification of custody; and (2) should be favored over other third party guardians even though the servicemember intended to leave his child with a third party in the best interest of the child (Troxel v. Granville 2000; Lebo; Tallon).

These regimes fuel servicemembers' concerns that temporary changes implemented by the FCP during their deployment will become permanent when they return home from deployment (Sullivan 2014, p. 366). FCPs are a necessity for practical and regulatory reasons. But, they are not effective when needed the most. As one commentator concluded, they run the danger of, becoming nothing more than "documented wishes" of the servicemember to the disadvantage of what may be the best interest of the child (Ayotte 2011, p. 662).

Congressional attempts at limiting simultaneous deployments of dual-military couples. There also have been two recent Congressional attempts since September 11, 2001 to limit the simultaneous deployment to combat zones of dual-military couples who have dependent children [S. 1659, 110th Cong. (2007); H.R. 1540 112th Cong. (2011)]. One proposed statute held in relevant part:

(a) Authority to Obtain Deferment. In the case of a member of the Armed Forces with minor dependents who has a spouse who is also a member of the Armed Forces, and the spouse is deployed in an area for which imminent danger pay is authorized under Section 310 of Title 37, United States Code, the member may request a deferment of a deployment to such an area until the spouse returns from such deployment.
(b) Approval of Request. The Secretary of the military department concerned, and the Secretary of Homeland Security in the case of members of the Coast Guard, shall approve a request submitted by a member pursuant to subsection (a) [H.R. 1540 112th Cong. (2011)].

Neither statute was enacted; Congress instead enacted a requirement that the DOD adopt policies and plans for military family readiness (Department of Defense policy and plans for military family readiness, 2011).

The problem with such a law is that it interferes with military objectives during war and deployments (Lynch 2015, pp. 133–135). This may lead to servicemembers abandoning their conscious choice and duty to serve their country and disobey orders, which would hamper maintaining combat capability and unit cohesion–unacceptable in times of war (Lynch 2015, pp. 133–135). It is unfair to exempt servicemembers from service based on parenthood and discriminates against servicemembers with no children (Lynch 2015, pp. 133–135). The law may impose pressure on the spouse who is not deployed to defer deployment, which has the potential to set back the servicemember's career prospects. Relatedly, the impact of such legislation may have a de facto potential for violations of equality based on gender because they may reinforce gender roles. Finally, and for reasons described below, military life and deployment do not necessarily have as negative impacts on what would seem to be children's best interests.

The problem with all the federal laws and federal regulations cited in this section is that none of these laws protect the legal rights of the children of servicemembers. All the laws and regulations focus on protecting the rights of the servicemember parent in a child custody and visitation determination. None of the laws and regulations accurately reflects the social science understandings on the effect of military life and deployment on children of servicemembers.

How State Law Has Attempted to Enhance Legal Protection for Servicemember Families

Forty-seven states have enacted statutes addressing determination or modification of child custody and visitation involving deployed servicemember parents (Privette 2015, p. 449). These are important developments. Yet, these statutes do not adequately address all important issues facing servicemembers and their children and states vary considerably on procedural and substantive law protections (Deployed Parents Custody and Visitation Act Summary). Because of the mobility of military

service and the fact that a parent and her child will often live in or move to multiple states over the course of this service, custody and visitation issues for servicemembers almost always involve multiple states (Deployed Parents Custody and Visitation Act Summary). This reality makes it increasingly difficult for servicemember parents to resolve their disputes swiftly, predictably, and fairly, which subsequently "hurts the ability of deploying parents to serve the country effectively and interferes with the best interest of the children" (Privette 2015, p. 452).

The Uniform Deployed Parents Custody and Visitation Act. In July 2012, the National Conference of Commissioners on Uniform Law Commission approved the comprehensive Uniform Deployed Parents Custody and Visitation Act ("UDPCVA") for state legislatures to adopt and standardize child custody and delegation of custodial and visitation rights for deployed servicemembers [Unif. Deployed Parents Custody and Visitation Act (2012)]. The American Bar Association ("ABA") House of Delegates approved the UDPCVA for publication in February 2013 (Sullivan et al. 2015, p. 391).

Article 1 of the UDPCVA contains definitions and provisions related to military custody issues and prevents the court from using the servicemember's future or past deployment as a negative factor in determining the best interests of a child, "absent a significant impact" on the best interest of the child [Unif. Deployed Parents Custody and Visitation Act (2012)]. Article 2 instructs a servicemember and the other parent how to draft and negotiate their own out-of-court agreement using procedural and substantive provisions in the event of an impending deployment (Unif. Deployed Parents Custody and Visitation Act (2012), §§101–107). Article 3 provides the parties and the court with rules on how to litigate and adjudicate and mandates procedural protections, like expedited hearings and electronic testimony when the servicemember is deployed (Unif. Deployed Parents Custody and Visitation Act (2012), §§201–205). Article 3 also holds that no permanent custody order can be entered during deployment without the servicemember's consent (Unif. Deployed Parents Custody and Visitation Act (2012), §§301–311). Article 4 governs the termination of the temporary custody agreement after the servicemember returns home from deployment, with recognition that both parents are important for the child's emotional needs and development (Unif. Deployed Parents Custody and Visitation Act (2012), §§401–404). Article 5 lists an effective date provision, a transition provision, and boilerplate administrative provisions common to uniform acts (Unif. Deployed Parents Custody and Visitation Act (2012), §§501–504). It is important to note that courts may only enter an order if the court has jurisdiction pursuant to the Uniform Child Custody and Jurisdiction and Enforcement Act and declares that the deploying servicemember's residence does not change on account of the deployment itself (Unif. Deployed Parents Custody and Visitation Act (2012), §104).

Additionally, the UDPCVA allows the court, at the request of the servicemember deploying parent, to grant the servicemember's caretaking authority to an adult nonparent who is either a family member or with whom the child has a close and substantial relationship when it serves the child's best interest (Unif. Deployed Parents Custody and Visitation Act (2012), §§306–307). In Troxel v. Granville

(2000), the United States Supreme Court held that a Washington statute that allowed third parties to petition for visitation rights and allowed the court to order this visitation when the best interest of the child is served was unconstitutional. The Court found that a state may not interfere with the fundamental rights of parents to make child-rearing decisions concerning the care, custody, and control of their children (Troxel v. Granville 2000, p. 66). The presumption that fit parents act in the best interests of their children, the Court decided, must be accorded significant weight in child custody and visitation determinations (Troxel v. Granville 2000, p. 70). The UDPCVA is not unconstitutional under *Troxel* because it does not infringe on the servicemember's right as a parent to make temporary custody decisions (Deployed Parents Custody and Visitation Act Troxel Memorandum).

The main problem with the UDPCVA is that it is not federal law; therefore, if states choose not to follow it, the goal of uniformity and constituency will never be achieved. If they do not, servicemembers will be left letting their state of residence determine the outcome of a custody battle, when one federal law could protect all parties equally (Ayotte 2011, p. 676). Currently, only nine states have enacted the law, leaving servicemembers hoping and waiting for their states to legislate (Ayotte 2011, p. 676). The provision of the UDPCVA preventing courts from using deployment as a negative factor in determining the best interests of a child still does not fully prevent the court from still using its discretion because the hopeful rule only applies "absent a significant impact on the best interest of the child."

The "best interests of the child" standard. States use the "best interests of the child" standard in making child custody and visitation determinations. This standard requires judges to weigh a range of factors in making a child custody determination: (1) the reasonable wishes of the child as to his custodian; (2) the wishes of the child's parent(s); (3) the interaction and interrelationship of the child with his parent(s), siblings, and other persons who may significantly affect the child's best interests; (4) the child's adjustment to and his record with his home, school, and community; (5) the mental and physical health of all parties involved; (6) the health, safety, and welfare of the child; (7) the love, affection, and other emotional ties existing between the parties and the child and the capacity and disposition of the parties to give these emotions; (8) the capacity and disposition of the parties involved to provide the child with food, clothing, medical care, or other remedial care or material needs; (9) the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity; (10) the permanence as a family unit of the existing or proposed custodial home(s); (11) the willingness and ability of each of the parties to facilitate and encourage a close and continuing relationship between the child and the parents; (12) the history of domestic violence or abuse of all parties involved; (13) the habitual or continued illegal use of controlled substances or habitual or continued abuse of alcohol by any party; (13) the economic stability of all parties involved; (14) the desire to keep siblings together when necessary to the welfare of the child; (15) the practicability of distance and transportation of the child between the residences of all parties involved; (16) the existence of prior orders or agreements that would be appropriate to consider in light of the totality of the circumstances, including the reasonable

expectations of the parties and the extent to which they could have reasonably anticipated the events that occurred and their significance; and (17) any other factor considered by the court to be relevant to a particular child custody dispute (Unif. Marriage and Divorce Act § 402 (2014); Mich. Comp. Laws Ann. § 722.23 (West 2014); American Law Institute 2002). The general standard for modification requires an initial determination of substantially changed circumstances, followed by a determination that the change is in the best interest of the child (Hanes 2011, pp. 10–13).

The problem with the best interest standard in the military child custody context is that it is incredibly subjective, discretionary, open-ended and unpredictable. As stated above, servicemember parents' military service in general and the possibility and reality of their deployments are wrongly being considered as negative factors in child's best interest determinations in custody and visitation disputes and do not take into account the unique facets of military life (Hanes 2011, pp. 10–13; Ayotte 2011, p. 668; Sexton and Brent 2008, p. 5). Even courts agree with the biasing effects. A Hawaii family court judge similarly estimated that judges who have less military family experience are at greater risk of ascribing undue weight to military status (Seamone 2014, p. 486). In most cases, unless a nonmilitary parent is in a relationship with a drug abuser or has a mental disorder that poses greater risk to the child, the parents who deploy regularly are usually not awarded primary custody (Seamone 2014, p. 487).

Moreover, judges with frequent exposure to special operations servicemembers who have the fastest and longest deployments, do not award primary custody to these servicemember parents (Seamone 2014, p. 487). However, service members who belong to Special Operations units are not normally the parents who seek primary custody of their children because they have usually made the determination that their jobs will take priority and that their service is high risk (Seamone 2014, p. 487).

Like the problems with all the federal laws and regulations cited in the previous section, the laws and standards cited in this section also do not fully protect the legal rights of the children of servicemembers. While the best interests' standard comes close to respecting the rights of children, these laws still focus on protecting the rights of the servicemember parent in a child custody and visitation determination. Again, none of the laws accurately reflect the social science understandings on the effect of military life and deployment on children of servicemembers.

Relevant Supreme Court Case Law that Addresses the Constitutional Rights of Parents, Children, and Third Parties

Supreme Court cases that address the constitutional and legal rights of parents, children, and third parties must be given adequate consideration in addressing the issue of child custody and visitation involving servicemember parents.

Children's rights are constantly limited based on the presumption that parents control the rights of their children, under a parent's constitutional right to family privacy banner. The Supreme Court has a long history of ruling that affirm parents' rights in making child-rearing decisions, but neglect to recognize a child's right such important liberties as privacy, education, and religion (Myer v. Nebraska 1923; Pierce v. Society of Sisters 1925; Wisconsin v. Yoder 1972). On one hand, servicemember parents must have a right to privacy and the right to rear their children in what they consider to be the child's best interests because the government should not be making these decisions for the parent, as exemplified below. On the other hand, children of servicemember parents also should be entitled to a constitutional right of privacy in decisions involving their family relationships, especially in the context of custody and visitation and social science understandings as seen below.

As stated above, in *Troxel v. Granville*, the Supreme Court held that the presumption that fit parents act in the best interests of their children must be accorded significant weight in child custody and visitation determinations (Troxel v. Granville 2000). This case failed to recognize a constitutional right for children to have an input on the child custody and visitation determination. This would be especially important in the case of servicemember children where one of their parents is a servicemember and the other parent is a civilian, so the child should be able to have input on whether they want to lead a military lifestyle.

Finally, in Mississippi Band of Choctaw Indians v. Holyfield (1989), the Supreme Court held that, under the Indian Child Welfare Act, the Indian child's tribe has jurisdiction to determine what is in the best interest of the child in child custody and visitation determinations. Arguably, just as the Supreme Court in this case valued Native American culture over the rights of the parents, so should military culture be valued over the rights of the non-servicemember parent or in dual-military couple cases. That argument has not been made, perhaps because Native American parents and children are differently situated than other parents in the United States. But, the point is that there is precedent for offering special protections to groups of people when the federal government is directly involved in their lives.

Social Science Understandings of the Impact of Military Life and Deployment on Military Children

The Effects of Child Custody Litigation on Children

Custody order and modification litigation is psychologically harmful to children. Child psychiatrists have argued that assigning primary physical custody to a "fit" parent should not be subject to modification, except in cases where the child is at risk of being imminently harmed (Wexler 1985, p. 817). A long and bitter custody

dispute may further impair psychological development or spark regression to less mature behavioral patterns (Wexler 1985, p. 791). Children who are repeatedly forced to assume the roles of mediator, weapon, pawn, bargaining chip, trophy, go-between, or spy between their parents experience emotional trauma (Elster 1987, p. 24). The use of experts and witnesses who degrade the character of the other parent in re-litigation has harmful effects on children (Bartlett 1999, p. 471). Considering the nature of a servicemember's military service and changing orders and the problems the law has attempted to respond to as seen above, continual litigation of initial custody determinations is not surprising. However, it would be psychologically damaging to the dependent child if litigation commenced every time the servicemember parent received deployment orders.

The Impact of Military Life on Military Children

The "military family syndrome," which was a theory linking stressful aspects of military life–authoritarian fathers and depressed mothers–to undisciplined and behaviorally troubled children, is not only not supported by research but also refuted repeatedly (Park 2011, p. 68). Significant empirical evidence challenges frequent assertions that military life has a negative impact on military children and invalidates other myths and assumptions about a military child's needs (Hanes 2011, pp. 14–16).

Military children demonstrate high levels of resilience (Riggs and Riggs 2011, p. 385). Resilience occurs when an individual successfully adapts to a significantly adverse, traumatic, or stressful situation by interacting with environmental factors (Fergus and Zimmerman 2005). In the case of children, these factors usually include a child's personal characteristics, positive parent–child relationships, and community-level support from neighborhoods and schools (Condly 2006). Most military-connected children thrive, and even excel, despite the challenges faced by military families over the last 12.5 years of war (Lemmon and Stafford 2014, p. 346).

On average, active duty military families move every two to three years within the United States or overseas. This movement does disrupt schooling, activities in the community, and social networks (Finkel et al. 2003). These frequent and often sudden movements and relocations for military children, however, actually tend to make them more resourceful, adaptable, responsible, and welcoming of challenges (Hall 2008).

Moving does not significantly factor in their psychological adjustment (Finkel et al. 2003). In a study of 608 US Army and Air Force families, with children 10–17 years of age, children's resiliency relative to frequent moves indicated good physical and mental health, wellbeing, academic achievement, optimism, internal locus of control, and a sense of mastery (MacDermid et al. 2007). Military families develop expert-level abilities to navigate the military moving system, packing up and moving with very short notice, and as a result demonstrate effective,

problem-focused coping and perceived self-control over the moving process (Riggs and Riggs 2011, p. 385). Military children themselves believe that moves helped them develop the ability to make friends easily and research shows that they have a greater likelihood of knowing and befriending someone who is "different" (Lemmon and Stafford 2014, p. 349). Many military children get to live in, and integrate into, diverse geographical areas of the world, which contributes to their becoming more open-minded and tolerant of other cultures, races, classes, and religions (Lemmon and Stafford 2014, p. 349).

Military children are less likely to have personality and behavioral disorders (Hanes 2011, p. 14). In the 1960s, psychologists found that military children were likely to have behavioral disorders and less likely to commit juvenile delinquent acts compared to civilian children (Kenny 1967, pp. 57–60). In the 1980s, a study conducted comparing military children with civilian children, where 59 % of the military children surveyed had experienced a separation from their military parent that was for six months or more, found that military children were 50 % less likely to abuse drugs and alcohol, 11 % less likely to smoke cigarettes, as well as less likely to exhibit personality disorders or hyperactivity (Morrison 1981, p. 354). Another 1980s study conducted on military children ages 13–18 concluded that even growing up in an environment in which frequent adjustments must be made because of military necessities and demands, the military adolescent is able to develop a healthy self-image, a strongly positive body image, are sexually conservative, and possess exceptional impulse control and social skills when compared to civilian teenagers (Watanabe 1985, p. 106). In the 1990s, military psychiatrists concluded that military children between the ages of six and twelve were "at or below national norms" for behavioral health problems and psychopathology (Jensen et al. 1991, p. 102). Military children engage in fewer risky behaviors, exhibit greater self-control, and show lower levels of impatience, aggression, and disobedience (Hutchinson 2006; Watanabe 1985; Manning et al. 1988). Instead, military children show higher levels of competitiveness, have a greater respect for authority, report high optimism and satisfaction with life, are engaged in their school and community, and have good peer relationships (Manning et al. 1988).

Research demonstrates that military children succeed academically (Hanes 2011, p. 15). A 2002 six-year study of adults raised as military children, greater than 95 % competed a year of post-secondary education, 29 % possessed graduate school degrees, and 81 % spoke a language other than English attributable to their military upbringing (Ender 2002). In national standardized tests of eighth graders from 1992 to 2009, military students who attended military base DOD schools surpassed the national average every year (U.S. Department of Education 2009, pp. 16, 32). Military children also have higher median IQs than do their civilian counterparts (Jensen et al. 1991).

Military culture holds, and expects military families to adopt, the beliefs and values of sacrifice, honor, loyalty, teamwork, service to country and community, and a sense of purpose, pride, and cohesion (Riggs and Riggs 2011, p. 384). These beliefs and values contribute to the military child's resilience and enable her to later manage more difficult aspects of military and civilian life (Riggs and Riggs 2011, p. 384). Because of this immersion in military culture, children receive frequent

reinforcement that the work that their servicemember parent does is meaningful. As a result, on a very real as well as on an existential level, they see their parents' work as a means to serve other people and a devotion to something greater than oneself, which impacts how children will seek employment as adults and other opportunities (Lemmon and Stafford 2014, pp. 349–350). Many military children grow up and join their servicemember parent in the military (Lemmon and Stafford 2014, p. 350). Military culture also fosters discipline (Park 2011, p. 67). Further, the military has a predominantly authoritarian leadership style, and military children, like most children, will likely benefit from an authoritative (or balanced) parenting approach that actually is encouraged by military culture (Lemmon and Stafford 2014, p. 350; Baumrind 1966).

Finally, the military community and servicemember benefits and services available to the dependent child provide for military children's basic needs and mitigate the challenging facets of military life (Hanes 2011, p. at 15; Lemmon and Stafford 2014, p. 349). "The military service provides a relatively close-knit 'family' atmosphere, in which job, social, school, and medical components touch one another at more points than may be true in the civilian community" (Morrison 1981, p. 354). Military children, especially those who live on a military base, have anecdotally expressed an enhanced sense of physical security (Lemmon and Stafford 2014, p. 349). Military bases provide comprehensive family resources, supports, and readiness centers with excellent child-care, after-school youth programs and partnerships with youth development organizations, recreational facilities, and other military life programs for military children and their families (U.S. Department of Defense Report 2010, pp. 10–11). Military schools are more likely to employ teachers and counselors who themselves are the spouses of deploying servicemembers and provide more adaptive training based on deployment phases and moving-related transitions, which enhances the family atmosphere (Rand National Defense Research Institute 2004, pp. 23, 105).

It is difficult to play down the very tangible benefits that come to the children of servicemembers, and how they support development until the end of adolescence. Even in times of financial insecurity, military children, as dependents of servicemembers that receive regular, predictable income for their service, have access to free and readily accessible health care and medication prescriptions, discounted and tax-free food and commodities at post exchanges and commissaries, free housing on military bases or tax-free housing allowances in civilian off-base housing (Lemmon and Stafford 2014, p. 350). Military children receive their parents' benefits until they are 21 years old unless they are enrolled as full-time students in which case they receive them until age 23 (Lemmon and Stafford 2014, p. 350).

The Impact of Deployment on Military Children

It is not disputed that military children of deployed servicemember parents experience greater levels of stress and increased mental health and behavioral difficulties when parents are deployed (Chandra et al. 2009). Children's reactions to

deployment-related parental absence vary by age, developmental stage, and other individualized family factors: young children are likely to exhibit externalizing behaviors such as anger and attention difficulties; school-age children demonstrate more internalizing behaviors, like increased levels of anxiety and fear, sensitivity to media coverage, and reduced school performance (U.S. Department of Defense Report 2010, p. 1). Infants and preschoolers are still most impacted by parental deployment, and recent studies have indicated that adolescent girls were more likely to encounter more challenges with deployment than boys (U.S. Department of Defense Report 2010, pp. 16–23). Specific scenarios that negatively impact children of deployed parents include when the servicemember parent returns home wounded, injured, or physically or mentally ill; when the servicemember parent is killed on deployment; and when children of servicemember parents have preexisting psychological conditions (U.S. Department of Defense Report 2010, pp. 31–48).

The majority of military children, nonetheless, demonstrate a high level of resilience to successfully cope with parental deployments (U.S. Department of Defense Report 2010, p. 1). Studies often maintain that separation due to deployment does not cause lasting harm in military children (Blount et al. 1992). Almost 60 % of military children self-reported that they coped with deployments "well" or "very well" (U.S. Department of Defense Report 2010, p. 27). The impact of deployment on children differs between combat deployments versus routine deployments and the length of deployment versus the quantity of deployment (U.S. Department of Defense Report 2010, pp. 8–9). Overall, deployments affect every military family differently and adjustment to deployment greatly depends on attitudes, experience, support, and coping styles unique to the family (Park 2011, p. 71; Riggs and Riggs 2011, p. 386).

The non-deployed parent or legal guardian's psychological health is positively associated with children successfully coping with deployment-related stress (U.S. Department of Defense Report 2010, p. 1). Evidence suggests that family preparedness for deployment leads to better adjustments during the deployment phases (Riggs and Riggs 2011, pp. 386–87; Park 2011, p. 67; Chandra et al. 2009). Relatedly, military children demonstrate remarkable positive adjustment in response to subsequent deployments (Riggs and Riggs 2011, p. 390). Recent studies have even found no association between the number of deployments and adverse effects on the child's level of upset (U.S. Department of Defense Report 2010, p. 26).

The historical strength of the military family serves as a source of strength to get through deployment (Park 2011, p. 68). When a servicemember deploys, the structure of the family system changes and forces each family member to change or adopt new roles, renegotiate boundaries within and surrounding the family system, and develop routines that all will keep the family relatively stable amidst the deployment transition (Riggs and Riggs 2011, p. 338). The resilience achieved from military life, as described above, mitigates the deployment phase stresses and

improves adjustment throughout the deployment phases (Park 2011, p. 68). Throughout the deployment phases, children have the opportunity to take on more responsibilities around the house, which correlates to independent, confident, and flexible responses to unpredictable environments (Riggs and Riggs 2011, p. 388; Park 2011, p. 68). Research finds that children respond more positively when given these chances to be independent during a deployment (Hall 2008). The difficult life experience of deployment, not unlike family illness or a house fire, can foster maturity, provide opportunities to acquire new skills, encourage independence, and build new relationships (Siegel and Davis 2013).

During the deployment, parents report that their children are closer to family and friends and they have an increased camaraderie and family pride (Chandra et al. 2009). Attachment to the non-deploying parent is an influential factor in military children's adjustments (Riggs and Riggs 2011). Relatedly, most children who enjoyed secure, positive attachment bonds with their deploying servicemember parents before their deployments will eventually adapt and resume a positive relationship with them when they return home (Riggs and Riggs 2011). For example, military children who maintained the servicemember's psychological presence during deployment with phone calls and e-mail contact, and frequently talked about and mentioned the deployed parent in the home, were likely to exhibit more flexibility in accommodating the returned parent (Riggs and Riggs 2011, p. 390). Separating the servicemember parent and the child only compounds the problem of separation, so continuing servicemember parent/child contact and interaction are essential to restore or repair an attachment bond (Riggs and Riggs 2011, p. 394). It should also be noted that parents of servicemembers are more likely than any other family members to be asked to provide care for their grandchildren or take care of grandchildren full time or for an extended period of time during deployment (U.S. Department of Defense Report 2010, p. 25).

As detailed above, the military community and structure, social support, servicemember housing and financial benefits, and services available to the dependent child together provide for military children during all deployment phases (U.S. Department of Defense Report 2010, pp. 10–11). Department Defense Supportive environments surrounding military children—such as extended family members, schools, neighbors, and their local community—can mitigate deployment-related anxiety and stress (U.S. Department of Defense Report 2010, p. 24). Equally importantly, a positive perception of parental military service and a belief that America supports the war contributes to the children's ability to cope effectively with parental deployment (U.S. Department of Defense Report 2010, p. 24).

Finally, it should be noted that no study has specifically focused on the effects of deployment on the dependent children of dual-military couples. More research and data analyses are necessary to understand the unique needs and challenges that this subgroup of military family experiences (U.S. Department of Defense Report 2010, p. 25). It also remains unclear how this group may be different in terms of custodial and visitation issues that may arise.

Reform Proposals and General Recommendations

Reform proposals and general recommendations derived from the findings and problems identified in this chapter will enable family law courts tasked with determination or modification of child custody and visitation involving servicemember parents. They can help them strike a better balance between (1) protecting constitutional rights, special substantive and procedural rights, and benefits to servicemember parents' deployed as required by their service to the country; and (2) protecting the legal rights of children in custody and visitation decisions by appropriately determining the best interests of military children impacted by military life and deployments.

The individual contributions the SCRA, FCPs, the UDPCVA, and the best interest standard have made should be combined into one piece of federal legislation that all states should then enact (like the Federal Rules of Evidence or Federal Rules of Civil Procedures). The purpose of preferring a federal law, as opposed to state laws, is similar to why Congress created federal jurisdiction historically: (1) federal courts have specialized expertise in interpreting federal law over state courts and both Article I and Article II of the Constitution exclusively confer authority of overseeing the armed forces and exercising military power on Congress and the President, respectively; (2) federal law is uniform law over the entire country that all states should abide by and cannot and should not be able to override, especially in the context of military issues; (3) diversity litigants are more likely to get fairer and less biased treatment from federal courts than state courts, considering that the law has accorded military families and military parties unique procedural domicile and residence exceptions; and (4) the participants—military personnel and their families—engage in national activities with considerable national interests at stake.

In accordance with civil procedure jurisdiction, federal jurisdiction, and conflict of laws analyses, state family law courts should hear and adjudicate cases under the federal legislation. Section 528(c) should be amended, so that the new legislation explicitly confers a judicially enforceable right of action under §1983 and a right of action in non Article III military tribunals/courts martial, which will eliminate ambiguity and ensure that the rights of servicemember and their children are protected (Suter v. Artist 1992).

First, the new legislation should adopt the language that the military subscribes to by adopting definitions and terminology specified earlier in this chapter, as well as additional definitions as terms included in other military and servicemember-related legislation. The definition of "deployment," as outlined in section 528 of SCRA, should be enacted, which is the movement or mobilization of an servicemember to a location for a period of longer than 60 days and not longer than 540 days pursuant to temporary or permanent official orders: (1) that are designated as unaccompanied; (2) for which dependent travel is not authorized; and (3) that otherwise do not permit the movement of family members to that location. Furthermore, the statute should also list all the

circumstances that fall under deployment as contemplated earlier in this chapter in anticipation of state family law court confusion.

Second, the new legislation should include SCRA-like protections for both active duty *and* reserve and National Guard components of the military, no matter how long they are called to active duty or not. As highlighted in the DOD Demographics Report and the DOD Report on the reserve and National Guard components of the military not only make huge and significant contributions to the military's goal of defending, protecting, and fighting for America, but more importantly are parents of children, like active duty servicemembers. Children of reserve and National Guard servicemembers are impacted by military life and deployments, like active duty servicemembers' children, and their interests should not be ignored. Therefore, these servicemembers and their children should be afforded the same child custody and visitation protections as active duty servicemembers and should not be discriminated against.

Third, the new legislation should contain the SCRA sections 521 and 522, as amended in 2003 and 2008. These statutes' stay provisions should be further amended to reflect a mandatory state provision for the *entire* duration of the servicemember's deployment orders. This will accommodate long and extended deployments and eliminate duplicitous litigation. Only after the duration of the servicemember's entire deployment, should the court be able to exercise discretion in granting additional, extended stays. This will allow the servicemember to concentrate on her mission and provide peace of mind that any permanent or temporary child custody or visitation order will not be rendered or modified during their deployment. This also will spare children from the negative psychological effects of drawn out litigation.

Fourth, the legislation should incorporate the DOD and the individual armed services regulated FCPs as legally binding documents and sources of legal authority in custody and visitation disputes, as long as the FCP was prepared by a lawyer, the FCP affects only those children that the servicemember has primary physical custodial authority over, and the FCP does not alter or contradict a previous court ordered custody or visitation agreement. The civilian non-custodial natural or adoptive parent or third party nonparent or nonrelative with legally enforceable rights also should be given notice of the FCP and should consent to the FCP, or reasonable efforts should have been made to fulfill the notice and consent requirements. The statute should emphasize that the FCP is only a temporary plan and is enforceable only during the duration of the servicemember's deployment. Upon the servicemember's return from deployment, the servicemember's original primary custody and visitation order will take immediate effect. The fundamental rights of parents to privacy and decision making will therefore not be interfered with or infringed upon when intending and making these temporary arrangements and military children will not lose military life benefits that support their healthy development.

Fifth, to accommodate dual-military couples and protect them from laws that would restrict simultaneous deployment to combat zones, the legislation should allow dual-military couples 90 days together between deployments to reunite as a

family with their children (Bethea 2007). This mandatory provision would relieve children of deployment-related stresses while at the same time enable both parents to continue serving their country and obey orders. Again, it should be noted that no study has focused exclusively on the impact of military life and deployment on dependent children of dual-military couples, so this provision would be subject to change when more research has been conducted, especially with respect to potential gender effects.

Sixth, all articles of the new legislation should be incorporated into the federal statute. This provision pays homage to the incredibly comprehensive efforts of the Uniform Law Commission (Unif. Deployed Parents Custody and Visitation Act 2012). It is specifically worth mentioning the inclusion of detailed procedures for expedited hearings and the allowance for electronic testimony; and, at the request of the servicemember deploying parent, the ability to grant caretaking authority to an adult nonparent who is either a relative or whom the child has a close and substantial relationship. This also provides for the parent's fundamental right to liberty regarding privacy and decision making and also respects the best interests of the child standard and the child's constitutional rights to have an input in these cases.

Seventh, the legislation should amend Section 528(c) by enacting a provision stating that no court may ever consider the servicemember's honorable military service in its entirety, military lifestyle, deployment, or the possibility of deployment as negative factors in determining the best interest of the child. As exemplified by the social science understandings referenced above, military life and deployments, while challenging, have numerous benefits that weigh in favor of the best interests of a child. However, the legislation should acknowledge the potential difficulties and serious effects that long deployments have on military children. The legislation should use this social science knowledge to incorporate a best interest of the child analysis (incorporating the best interests factors above), specifically tailored to addressing military life and deployment considerations special to military families (Riggs and Riggs 2011, p. 391; Table 2 Key Considerations in Current and Retrospective Custody Evaluations for military families). State family law courts should approach each military family's custody and visitation proceeding as unique. This will require very different examinations and arrangements, but it will ultimately have the effect of reducing or eliminating litigation stress on servicemembers and their dependent children. Additionally, in cases in which one parent is a servicemember and the other parent is a civilian, the child should be appointed a guardian ad litem attorney so that the child's input will always be considered in these cases.

Eighth, the legislation should incorporate some aspects of *Mississippi Band of Choctaw Indians v. Holyfield*. In that case, the Supreme Court supported federal law's consideration of Indian culture in custody and visitation determinations. While that case is distinguishable from contexts involving the military, federal legislation still could consider factors such as the specific servicemember's military branch's culture and lifestyle. This evidence could be had, for example, through the servicemember's commanding officers or sergeant commanders. The recommendations of the servicemember's commanding officers or sergeant commanders

regarding the servicemember's child custody and visitation determination should be mandatory in dual-military servicemember cases, but could be optional, like an amicus curiae brief, in single servicemember cases on the side of the servicemember. These recommendations would provide courts with the type of information needed to ensure appropriate consideration of military life on the parent and their families.

Conclusion

Military servicemembers sacrifice security, physical and emotional health, luxuries, sleep, recreation, relations, and ultimately their lives to defend their country. Military servicemembers' families sacrifice stability, relations, recreation, and interacting with the person they love the most to support their mission. In return, the government must afford servicemembers and their children the respect and honor they deserve by providing them enhanced legal protections. The reform proposals and general recommendations derived from the findings and problems identified in this chapter will enable family law courts tasked with determination or modification of child custody and visitation to strike the right balance between providing constitutional rights, protections, and benefits to servicemember parents' deployed as required by their service to the country and respecting the rights of children impacted by military life and deployments.

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Chapter 11
Protecting Youth from Trafficking

Ellen Fredbeck

Introduction

Until recent decades human trafficking was a little-known and overlooked crime. Fortunately, a global effort has emerged to stop this egregious human rights abuse; however, the problem persists—and some would even argue that it is increasing. This chapter will address human trafficking affecting minors, or adolescents under age 18. Minors create a population especially vulnerable to victimization. Special considerations are needed when helping child victims and in efforts to prevent minor trafficking in the first place.

Human trafficking refers to "the act of recruiting, harboring, transporting, providing, or obtaining a person for compelled labor or commercial sex acts through the use of force, fraud, or coercion" (U.S. Department of State 2014, p. 29). Trafficking can include, but does not require, movement of persons. The fraud, force, or coercion element is not required for minor victims to prove the offense of trafficking, without exception (U.S. Department of State 2014). No cultural or socioeconomic considerations change the analysis; children who are prostituted are trafficking victims under federal law. This is an important accommodation for minor victims because sometimes victims start out as willing participants in a labor contract, or even in international smuggling, but later are exploited. This exploitation turns a voluntary arrangement into illegal trafficking.

This chapter will examine current approaches to child trafficking prevention and treatment of child victims. The terms "child" or "minor" will be used rather than adolescent because this area of law and advocacy refers to adolescents as children. The discussion will first address how the nature of the crime makes it both difficult to apprehend perpetrators and identify and serve victims. Then, international, federal, and state laws will be discussed and critiqued. Finally, the chapter will

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R.J.R. Levesque (ed.), *Adolescents, Rapid Social Change, and the Law*,
Advancing Responsible Adolescent Development,
DOI 10.1007/978-3-319-41535-2_11

provide suggestions for reform, including the necessary societal mindset shift to better assist minor victims, an increased emphasis on prevention of trafficking, creation of a fair trade-type system for consumer products, and removal of criminal penalties for prostitutes.

What Fuels Human Trafficking and Why It Persists

Human trafficking is not a "one size fits all" crime. This multifaceted crime can take the form of international trafficking, in which a victim is transported from one country to another, or domestic trafficking, where typically a runaway or homeless minor is exploited in her own country. Data collection on trafficking victims is very difficult due to the clandestine nature of the crime, but we do have a basic understanding of how the crime occurs and who is most vulnerable to victimization. As stated by the federal government itself, "The United States is a source, transit, and destination country for men, women, and children—both U.S. citizens and foreign nationals—subjected to sex trafficking and forced labor, including domestic servitude" (U.S. Department of State 2014, p. 397). In the United States, labor trafficking victims are primarily transported to the United States from foreign countries, while sex trafficking victims are typically domestically trafficked. Children who are trafficked for one form of labor are often subsequently sold into another, for example a girl might be recruited to do domestic work then sold into a brothel (Rafferty 2008). Impoverished people are those most likely to be targeted for any type of trafficking or exploitation.

Labor trafficking affects more men and boys than sex trafficking does, although boys can certainly be victims to either (NHTRC 2015). In 2014, at least 63 % of suspected labor trafficking cases in the United States involved minor victims (NHTRC 2015). Child labor trafficking in the United States occurs in many industries including agriculture, domestic servitude, begging rings, traveling sales crews, beauty services, and the restaurant industry (NHRTC 2015).

Sex trafficking disproportionately affects women and children. Surprisingly, the vast majority of confirmed sex trafficking victims found in the United States—83 % to be exact—are United States citizens, and 40 % of these cases involve children (Epstein and Edelman 2013). A different data collection project recorded 54 % of sex trafficking victims as under age 18 and 85 % under age 25 (Parsons et al. 2014). Another disturbing report showed that the average age a minor is first used for commercial sex is between 12 and 14 years old (Kuzma 2013a, b). No matter whose statistics are used, the data shows that minors are highly likely to be affected by this egregious crime.

Many characteristics of trafficking make it an incredible challenge for governments to eliminate. First, it is a low-risk, high-yielding crime for the perpetrators—both for international traffickers who exploit foreign children and pimps who exploit domestic children. For example, the number of believed trafficking victims around the world is incrementally higher than the number of victims actually

identified. In the US specifically, the Department of Justice estimates that between 14,500 and 17,500 foreign nationals are trafficked into the states each year, but a mere 2617 trafficking victims were certified by the Department of Health and Human Services between 2001 and 2010 (Bhaba 2014). These statistics show, first, that most victims are not identified and, second, that most traffickers will escape punishment for their crimes. Even if a victim is identified and assists law enforcement in the investigation, this does not necessarily lead to a conviction.

Victim identification is difficult because victims are typically removed from their communities and placed in an isolated, supervised environment by their exploiters to minimize any chance of seeking help (Kuzma 2013a, b). While some victims are kidnapped, some exploiters at first treat victims nicely and entice them to leave home with promises of lucrative employment or romance (Kuzma 2013a, b). The trafficker will take this time to learn about the victim's life and family, and later use it as a means to manipulate, threaten, and control the victim (Kuzma 2013b). Traffickers will not stop at mere lies to control victims; they may use extreme forms of psychological abuse and physical abuse to prevent victims from escaping (U.S. Department of Justice, U.S. Department of Health and Human Services, U.S. Department of Homeland Security, and President's Interagency Task Force to Monitor and Combat Trafficking in Persons 2014).

Foreign victims are especially easy to control. A major reason is that they often do not speak English (Richard 2000). In addition, traffickers will confiscate victims' identification and immigration documents (Richard 2000). Also, traffickers will regularly move victims from one city to another to keep them disoriented and unfamiliar with their surroundings (Richard 2000). Some victims may have been manipulated to believe that their trafficker has their best interest in mind, while others rightfully fear that going to the police would result in their arrest or deportation (Kuzma 2013a, b).

Another factor that makes trafficking easy for perpetrators is that vulnerable children are easy to find and victimize. Minors in impoverished communities are those most at risk—in both the US and abroad; traffickers tend to prey on those who are poor, living in an unsafe situation, or who are in search of a better life (U.S. Department of Justice, U.S. Department of Health and Human Services, U.S. Department of Homeland Security, and President's Interagency Task Force to Monitor and Combat Trafficking in Persons 2014). Girls who have experienced sexual abuse or other types of violence during childhood are more prone to be trafficked for the sex trade (Bhaba 2014). Finally, in some cases, family members may even agree to send children away with traffickers. Parents may truly believe that they are sending the child toward opportunity and a better life, but some know they are essentially selling the child, perhaps for selfish financial gain but more likely out of desperation (Bhaba 2014).

The final factor to explain why trafficking persists is the demand by consumers that drives the traffickers to continue, and the ease with which consumers can find

and purchase children for their personal use. While several law enforcement agencies are "cracking down" on trafficking, it has only been in recent years that agencies train officers or assign personnel to this specific issue. Despite the occasional break-up of small trafficking rings, it is still incredibly easy for a consumer to access trafficking victims without consequence. This is more easily demonstrable with minor sex trafficking.

Even though purchasers of commercial sex, or "johns" are an important part of the problem, these key actors almost always go unpunished (Gregorio 2015). Worse yet, while higher penalties for soliciting minor prostitutes do exist, johns who buy commercial sex with victims of trafficking face no worse charges than those who purchase sex from voluntary prostitutes[1] (Gregorio 2015). Though most people might think the typical solicitation is an interaction on the street, the Internet is now the most-used medium to facilitate sex trafficking and to advertise sex with minors (Smith and Vardaman 2011). The demand for sex with minor or close to minor age is apparent: a study conducted in Georgia showed that advertisements with language like "young" and "barely legal" were 150 % more popular than advertisements that did not mention age (Smith and Vardaman 2011). Using websites like Backpage.com to search for "escorts" or other advertisements with code language for underage prostitutes, purchasers remain anonymous and free of worry (Kuzma 2013a, b).

The United States Legal Response to Trafficking of Minors

United States Responses to International Laws Affecting Minors

Two major international laws regarding children's rights are the *Protocol to Suppress and Punish Trafficking in Persons, Especially Women and Children* (The Palermo Protocol), added to the *Convention Against Transnational Crime* in the year 2000, and the *United Nations Convention on the Rights of the Child*, first entered into force in 1990 (Women's Commission for Refugee Women and Children 2007). The *Convention on the Rights of the Child* is praised by some as the most widely ratified human rights treaty in history, and even as one of the most effective human rights documents written to date (Kohm 2009). Out of 197 member states and parties, the United States is the only nation that has not ratified the treaty —recently left behind as the single holdout when Somalia and South Sudan ratified in 2015 (Middleton 2016). However, the United States did ratify the relevant *Optional Protocol on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography* in 2002.

[1]This is assuming that truly voluntary prostitutes do exist, a debatable assertion.

The *Convention on the Rights of the Child's* focus includes nondiscrimination, adherence to the best interests of the child, and respect for the views of the child (Kohm 2009). Critics of the United States' decision not to ratify the full *Convention* claim that it demonstrates the country's failure to address child welfare. Others claim that ratifying the *Convention* would not make a difference in the fight against child trafficking anyway. Despite the *Convention's* explicit prohibition on trafficking, signatory countries do not show a leg-up on efforts to abolish the crime (Kohm 2009). In fact, in the 2009 Central Intelligence Agency list of countries where trafficking in persons was a "major criminal problem," 34 had previously ratified the *Convention* (Kohm 2009, p. 69).

The United States did ratify the other major law affecting child trafficking, the *Palermo Protocol* (Women's Commission for Refugee Women and Children 2007). This protocol introduced the "3Ps" that signatory nations should focus on to end human trafficking: prevention, victim protection, and prosecution (Heinrich 2010). A common critique of the *Protocol* noted by Heinrich is that, despite the protection prong, it was written from a law enforcement rather than human rights perspective. As a result, while the *Protocol* expresses good ideas for prosecuting traffickers, the language directed at serving victims of trafficking is weak. For example, language that parties should "consider" implementing victims' services programs, and that return of a victim to his or her own country "shall preferably be voluntary," requires essentially nothing of signatory nations (Heinrich 2010). One scholar argues that the *Palermo Protocol's* exclusive focus on law enforcement actually makes that enforcement more difficult: an enforcement-focused system with barebones victims' services hinders victim identification because victims fear arrest or deportation (Heinrich 2010). This, in turn, hampers the prosecutions mandated by the *Protocol* simply because victims stay hidden since they have no reason to trust law enforcement.

In sum, international laws regarding child trafficking have at the very least started a global dialogue. Signatory countries have shown a nominal commitment to solving the problem of child trafficking. The *Palermo Protocol's* "3Ps" approach is theoretically good, but needs considerable modification in its overall approach and specific applications.

United States Federal Law Regarding Child Trafficking

While it is not directed solely at children, the most relevant United States law is the *Trafficking Victims Protection Act*, which addresses trafficking of persons into and now within the United States (Trafficking Victims Protection Act of 2000). First enacted in 2000, it was reauthorized with revisions in 2003, 2005, and 2008; in 2013 it was reauthorized as part of the *Violence Against Women Reauthorization Act* (Violence Against Women Reauthorization Act of 2013). The Act continues the *Palermo Protocol's* prosecution, prevention, and protection approach.

The Act comprehensively criminalizes all forms of trafficking, and induces sentences anywhere from 20 years to life in prison for traffickers. The law also makes it clear that any minor who is forced to perform commercial sex acts or who is put in a forced labor situation need not prove force, fraud, or coercion (U.S. Department of State 2014). Additionally, any prostituted minor is by definition a victim of sex trafficking because they are deemed incapable of consent for such an act (U.S. Department of State 2014). This differs from the standard for adults, as adults would have to prove that they were forced, defrauded, or coerced into the prostitution (U.S. Department of State 2014).

One celebrated accomplishment of the Act is the creation of the T-Visa. These visas provide temporary immigration relief to foreign-born victims of trafficking, and were created—at least in part—to encourage victims to stay in the area, cooperate with law enforcement, and testify against their traffickers (Adelson 2008). While up to 5000 T-Visas are available each year, to date nowhere near the allotted 5000 have been used in a given year (Bhaba 2014).

This Act, especially before the most recent version, along with the *Palermo Protocol* elicited criticism that its law enforcement perspective overshadows the victim protection and prevention goals. For example, victims must have suffered a "severe form" of trafficking in order to be eligible for federal and state services. Foreign-born victims must be officially certified as a victim of trafficking before avoiding deportation through a T-Visa.

Despite maintaining high standards for government assistance and immigration relief, the 2013 reauthorization made strides to improve efforts to eliminate trafficking, both in the United States and abroad. To begin with, the law encourages cooperation between federal actors, local actors, and private sector entities (Violence Against Women Reauthorization Act of 2013). It also allows for child protection compacts between the United States and countries that support policies and programs to build effective systems to fight and prevent child trafficking. The reauthorization expands its grant program, which includes not only grants to local law enforcement agencies for training, but also to eligible entities that have a multidisciplinary plan to better assist victims of minor sex trafficking. These eligible entities would need proposals that included efforts such as providing housing, rehabilitative services, and mental health services for minor victims. Importantly, these grants will only be given if the entity agrees that it will not require victims to cooperate with law enforcement in order to receive services funded by the grant.

State Laws Catered to and in Contradiction with Fighting Child Trafficking

Each state in the United States has at least some type of anti-trafficking law (U.S. Department of State 2014). In 2014, 42 states had passed laws that align with the federal law requiring no proof of force, fraud, or coercion for child victims of sex

trafficking (U.S. Department of State 2014). However, a mere 18 provide an automatic safe harbor that formally identifies children under 18 as victims, and only 32 states provide designated victim services as part of their anti-trafficking approach (U.S. Department of State 2014). This shows a lack of focus on the "protection" ideal, a key component of any government's fight against child trafficking.

All 50 states additionally prohibit prostitution of children, and have done so since before the federal *Trafficking Victims Protection Act*. However, despite a legal framework that should theoretically treat child prostitutes as victims, too many states continue to treat them as criminals themselves, at times actually prosecuting a victim of minor sex trafficking. This dichotomy results in the same child being viewed as a victim by one agency, but a criminal by another, all based on the geographic location of the child (Birkhead 2011).

Suggested Legal Reform and Improvements to Systems Affecting Child Trafficking Victims

The two primary forms of trafficking—labor and sex—are both egregious but are distinct and therefore the United States must tailor approaches to suit each type. The first step toward reform, however, is a theoretical shift that affects both types of minor trafficking victims. United States' statutes along with Supreme Court doctrine have treated minors' rights as something that actually belongs within parental rights. For example, in *Myer v. Nebraska*, when the Court invalidated a law prohibiting teaching foreign languages to students not yet in high school, the Court was concerned with the parents' right to educate their children, not the child's right to learn (Myer v. Nebraska 1923). The Court continued this mindset nearly 50 years later in *Wisconsin v. Yoder*, where Amish parents' right to religious freedom was recognized in exempting Amish children from mandatory schooling for minors until age 16 (Wisconsin v. Yoder 1972). This approach remains, as parents generally retain the right to control the development of their children.

The engrained mindset and legal doctrine that children's rights actually belong to parents must be set aside when it comes to minor victims of trafficking. Homeless and runaway youth along with migrant children are incredibly vulnerable to victimization. In these situations, a child victim likely either has a poor relationship with his or her parents or no relationship at all. While victims of trafficking do need to be recognized as victims, the system should also seek to empower children and start the rehabilitative process rather than treat them as less than human and reduce their autonomy after all that they have been through.

Changes to Approaching Child Labor Trafficking

Increase Trainings Throughout Federal, State, and Local Systems

Foreign-born victims of trafficking already might receive federally provided services and immigration relief in the form of a T-Visa.[2] However, children who enter the country undocumented, even if trafficked, are still removable until proven otherwise (Bhaba 2014). Furthermore, very few of the 5000 T-Visas allotted each year are even utilized—according to one author, an annual average of 219 T-Visas have been assigned since they were created in 2000 (Bhaba 2014). This 219 average refers to recipients of all ages, meaning that a miniscule number of children actually receive a T-Visa in any given year.

Measures must be taken to ensure that minor victims of labor trafficking are not automatically removed. This can be done by creating a better screening process for minors in immigration proceedings, and by providing better training to federal employees and others who have a chance of coming in contact with a victim. The federal government's *Federal Strategic Action Plan* states that training within federal agencies will be expanded, but it still will not be required for all agencies. (Department of Justice, Department of Health and Human Services, Department of Homeland Security and the President's Interagency Task Force to Monitor and Combat Trafficking in Persons 2014).

Government training should prioritize a victim-assistance approach and reach as many employees as possible. The Action Plan mentions including a victim-centered approach in trainings given to federal, state, territorial, tribal, and local agencies. This is a positive step, but the plan does not speak about how many officers will go through these trainings. Given that so many victims of trafficking go unidentified, the United States government should strive to train every single law enforcement officer and immigration official about international and domestic minor trafficking. Trainings should emphasize a victim-centered approach, and should include a checklist for factors that can point to a trafficking victim.

Provide Private Industries with Incentives to Avoid Exploited Labor

Labor trafficking can be fueled by both businesses and individuals seeking inexpensive or cost-free labor. One way to deter the business sector from using trafficked individuals for labor is to instate a rating or certification system. This would

[2]This is relevant to the labor section, as most children trafficked for labor in the U.S. are foreign nationals; see Introduction.

notify consumers when qualifying companies did not benefit from trafficking in making its product. Fair trade labeling has been suggested as a way to accomplish this (Baradaran and Barclay 2011). Even though a majority of people would be appalled by victims' stories and statistics on child trafficking, it is easy to suppress those thoughts as we continue to live out our normal routines. Using product labels could help raise awareness about child labor trafficking, and would help consumers make informed purchasing decisions that align with their values. Labels on food in the grocery store or in the description of an online store's product would remind people that their actions can affect the trafficking industry for the better or for the worse.

Instead of using government resources to regulate and implement fines, voluntary labeling allows the consumer market to reward or punish corporations based on their compliance. This system could apply to a variety of products; labels could be placed on everything from local produce to designer handbags. Even better, fair trade systems help alleviate the root cause of labor trafficking: poverty. Communities involved with fair trade "benefit from higher pay, improved working conditions and standards of living, and more importantly, significantly decreased (or virtually nonexistent) instances of forced child labor" (Baradaran and Barclay 2011, p. 62). The fewer impoverished communities, the harder it is for traffickers to profit from the crime.

Changes to Approaching Child Sex Trafficking

State Laws Should Reflect Federal Protections for Victims

Despite increased awareness of what sex trafficking really is, one terrible misconception persists: that teenage or underage prostitutes are complicit participants rather than victims. While all states have harsh sentences for sexual abuse of a minor in a noncommercial setting, they might not have equally harsh sentences for soliciting an underage prostitute. Even worse, some states still impose criminal penalties on child prostitutes, even though federal law automatically deems them victims of exploitation.

At a minimum, all states should enact a "safe harbor" law. In this context, the law would automatically classify minors as victims and eliminate any criminal penalties for minor prostitutes[3] (U.S. Department of State 2014). Furthermore, states should allow victims of sex trafficking to petition to vacate any prior prostitution-related convictions that were a result of trafficking.[4]

[3]United States Department of State (2014). *Trafficking in Persons Report*, p. 399 (18 states had done this at the end of the reporting period).

[4]United States Department of State (2014). *Trafficking in Persons Report*, p. 399 (14 states had done this at the end of the reporting period).

Modify the Criminalization of Prostitution Regardless of Age

The above suggestion helps victims once they are found, but it does little to prevent trafficking in the first place. While prostitution is already illegal, this clearly does not deter customers or traffickers. Changing the way we criminalize prostitutes of all ages would help minor victims of sex trafficking since so many women are forced into the industry long before their eighteenth birthday.

Different models have been suggested for decriminalizing prostitution. One removes criminal penalties for both consumers, or "johns," as well as prostitutes. The other removes penalties for prostitutes but maintains criminal penalties for johns. The United States should opt for the latter approach.

Certain theorists claim that legalizing prostitution would decrease or even eliminate sex trafficking. The idea is that since criminal penalties for prostitutes do not deter traffickers, we should bring the industry out into the open where it can be regulated (Lee and Persson 2015). Some of these proponents suggest that a black market for commercial sex could be eliminated by requiring licenses for prostitutes, and by instating severe criminal penalties on consumers who engage unlicensed prostitutes. They believe that if prostitution were legal, the stigma against sex workers would dissipate and enough women would choose to prostitute to meet the demand, therefore putting traffickers out of business (Lee and Persson 2015). They hope that even though the commercial sex industry as a whole would increase due to more demand, trafficking would not also increase to meet the demand. This simply is not so. Legalizing prostitution has been proven to worsen the problem (Cho et al. 2013).

A better option is to eliminate criminal penalties for prostitutes, but preserve criminal penalties for johns. This would avoid the increase in demand and the increase in trafficking that would inevitably result from the prior model. Removing penalties for prostitutes might mean that a victim is more likely to go to the police for help. A huge disincentive for victims now is fear of arrest and deportation. Though pimps and traffickers can lie to victims, an optimistic view is that eventually all people would learn that one cannot be arrested or penalized for prostitution. With victim identification one of the biggest obstacles to ending child trafficking, even just a small increase in the likelihood of victims coming forward would be worth changing our laws regarding commercial sex. Decriminalizing prostitutes would also help start a mindset shift for our society to stop treating child prostitutes as criminals.

Increase Prevention Programs for At-risk Youth

Minor sex trafficking can be prevented if would-be victims are educated about their susceptibility to trafficking. One excellent project, which could serve as a model for other areas, is the My Life, My Choice Project started in Boston (Birkhead 2011).

The project aims to teach staff at group homes, schools, juvenile detention centers, and community-based agencies about the manipulative strategies utilized by pimps and ways to identify victims of sex trafficking. The project also works with adolescent girls to give them the "knowledge, skills, and shift in attitude necessary to decrease the likelihood of entering the commercial sex industry" (Birkhead 2011, p. 1106). Specifically, the program emphasizes education about the tactics of the recruitment process used on young girls and the brutal realities of life as a teenage prostitute. It also addresses the importance of recognizing one's own vulnerabilities as a prevention tool. The *My Life, My Choice Project* is a concrete example of a prevention strategy that can be implemented in any type of community.

Conclusion

This chapter outlined the best next steps for the United States' fight against minor trafficking. For labor trafficking, the federal government should improve and increase federal employee training, and instate a fair trade-type labeling system that informs consumers about child labor trafficking. For sex trafficking, states should enact legislation that matches the federal sentiment that child prostitutes are victims, not criminals. An even better option is to remove criminal penalties for all prostitutes in an attempt to continue deterring consumers while incentivizing victims to seek help. Finally, we should address the root cause of the problem: poverty. While major economic inequality ultimately needs to be solved, educational programs for at-risk youth prone to victimization are a good place to start. Child trafficking will not cease overnight, but with legal changes to benefit potential victims, increased education for prevention, and a shift in societal mindset, trafficking can be addressed much more effectively.

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R.J.R. Levesque (ed.), *Adolescents, Rapid Social Change, and the Law*,
Advancing Responsible Adolescent Development,
DOI 10.1007/978-3-319-41535-2