

Unsocial Media: Cyberbullying, Sexting, and Regulating Communication in the Digital Age

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SEXTING

- Teen cell phone use is widespread and continues to grow.
 - 78% of teens have a cell phone.
- Studies show disturbing sexting behaviors.
 - 39% of all teens have **sent sexually suggestive pictures.**
 - 48% of all teens have **received sexually explicit pictures.**

SEXTING

- “Sexting” is the dissemination of nude or sexually explicit photographs of oneself or someone else by using cell phones, internet instant messaging, Facebook or similar technology.

LEGAL IMPLICATIONS

- Child Pornography Laws
- Child Abuse/DCF Referrals (mandatory reporting)
- Student Search and Seizure



CHILD PORNOGRAPHY

- Child pornography is outlawed everywhere in the United States.
- The laws often encompass **creation, possession, distribution.**



CHILD PORNOGRAPHY

- Because traditional child pornography statutes predate the sexting phenomenon, many of them do not create an exception for self-exploitation or sexting.
- In many states, if a teenage girl takes a sexually explicit photograph of herself and texts it to her teenage boyfriend, both parties could be held ***criminally liable***.

FEDERAL STATUTES

- 18 U.S.C. 2252 prohibits the production, distribution, reception, and possession of an image of child pornography.
- 18 U.S.C. § 2256 defines child pornography as **any visual depiction of sexually explicit conduct involving someone under 18 years old.**
- No exception for teenage sexting. Thus, **teenage sexting could constitute a federal crime.**

FEDERAL JUVENILE DELINQUENCY ACT

- FJDA provides that juveniles should be prosecuted in state—not federal—courts.
- Thus, while sexting could potentially lead to federal criminal charges, the case would most likely be handled under state law.



CONNECTICUT LAW

- Connecticut law specifically address sexting by minors (individuals under 18). The state revised the statute effective October 1, 2017 in an effort to keep up with changing technology.



CONNECTICUT LAW

- Under General Statutes § 53a-196h, it is a **Class A misdemeanor** for anyone under eighteen years of age to **knowingly possess any visual depiction of child pornography which was knowingly and voluntarily transmitted by means of an electronic communication device** and in which the subject of such visual depiction is a person under sixteen years of age.

CONNECTICUT LAW

- It is also a **Class A misdemeanor** for someone who is under sixteen years of age to **knowingly and voluntarily transmit by means of an electronic communication device** a visual depiction of child pornography in which such person is the subject of such visual depiction to another person who is under eighteen years of age.
- Punishable by up to one year in prison, a fine of up to \$2,000, or both.

EXAMPLES

- A 17-year old teen commits this crime if he receives a nude photo of his 15-year old girlfriend on his cell phone.
- If that girlfriend takes a nude photo of herself with her cell phone and sends it to her boyfriend, she also commits the crime.



LEGAL CONCERNS WHEN YOU SUSPECT A STUDENT OF SEXTING

- Search and seizure
- Mandatory reporting
- Avoiding personal criminal liability

SEARCH AND SEIZURE

- The Fourth Amendment of the U.S. Constitution provides:
 - The right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

SEARCH AND SEIZURE

- Article 1, Section 7 of the Connecticut Constitution contains an almost identical provision protecting individuals against unreasonable search and seizure.

SEARCH AND SEIZURE OUTSIDE OF SCHOOL

- Typically, law enforcement searches require "Probable Cause"
- Probable Cause is typically defined as
 - "Information sufficient to warrant a prudent person's belief that the wanted individual had committed a crime (for an arrest warrant) or that evidence of a crime or contraband would be found in a search (for a search warrant)."



EXIGENT CIRCUMSTANCES

- Police officers may conduct a warrantless search and seizure if they find that **exigent circumstances** exist and that they have probable cause.
- An exigent circumstance exists when an officer has a compelling need to take official action, but lacks the time needed to acquire a warrant.

SEARCH AND SEIZURE IN SCHOOL

- Unlike adults, students in school enjoy less protection of their privacy because a student's right to privacy in his or her belongings has been deemed secondary to concerns for students' overall safety and well-being.
- Schools act in place of a parent. Thus, "reasonableness" has a distinct definition for students in a school setting.

SEARCH AND SEIZURE IN SCHOOL

- Before a school official can perform a warrantless search of a student, the justification for **the search must be “reasonable at its inception” and “reasonable in scope.”** Most courts, however, will give school officials wide latitude in what is “reasonable,” given the realities of keeping schools safe.

NEW JERSEY V. T.L.O.

- High school teacher found two female students smoking in school lavatory and brought them to the assistant vice principal's office.
- One student denied that she had been smoking.
- Assistant vice principal demanded to see student's purse and found a pack of cigarettes and rolling papers.
- Further search found marijuana, a pipe, empty plastic bags, a substantial amount of money, an index card listing individuals who owed the student money and letters implicating the student in marijuana dealing.
- Student argued teacher's search of purse violated 4th Amendment.

NEW JERSEY V. T.L.O.

- United States Supreme Court held that the search had been reasonable and there was no Fourth Amendment violation
- The Court held that reasonableness is based upon a two-prong test:
 - Is the search **justified at its inception?**
 - School must suspect that a search will turn up evidence that the student has violated law or school rules; and

NEW JERSEY V. T.L.O.

- Is the search **reasonably related in scope to the circumstances** that justified the interference in the first place?
 - In other words, the manner in which the search is performed must be reasonably related to the objectives of the search. It cannot be excessively intrusive in light of age and gender or student and nature of the infraction. The greater an individual's expectation of privacy, the more intrusive a search is that violates that privacy.

NEW JERSEY V. T.L.O. AND SEXTING

- Searches of cell phones are governed by the same rules.
- Do not let technology unnecessarily cloud your judgment.

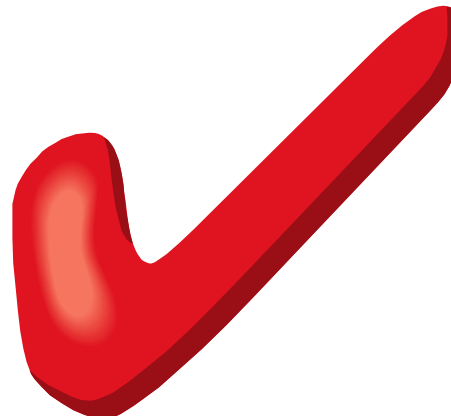


SEXTING SEARCH AND SEIZURE HYPOTHETICAL

- A teacher observes several students gathered around a cell phone and laughing. One student approaches the teacher and tells him that they are looking at an inappropriate photograph of another minor student.
- The teacher confiscates the phone and brings it to the vice principal. The vice principal searches the phone and finds a text message containing an inappropriate photograph of a female student.
- Was the search legal?

WAS THE SEARCH LEGAL?

- Yes – the teachers suspicion that the student's cell phone contained illegal material was reasonable under the circumstances.



CELL PHONE SEARCH AND SEIZURE HYPOTHETICAL

- Joe has a long history of disciplinary infractions: tardiness, fighting in the locker room, walking out on a meeting with his school's prevention coordinator and more.
- This morning, he was caught sending text messages in class and school officials took his cellphone.
- Can the school officials read his text messages?



CELL PHONE SEARCH AND SEIZURE HYPOTHETICAL

- **No!**
- This is the same fact pattern as G.C. v. Owensboro Public Schools.
- “A search is justified at its inception if there is reasonable suspicion that a search will uncover evidence of further wrongdoing or of injury to the student or another. Not all infractions involving cell phones will present such indications.”



CELL PHONE SEARCH AND SEIZURE HYPOTHETICAL

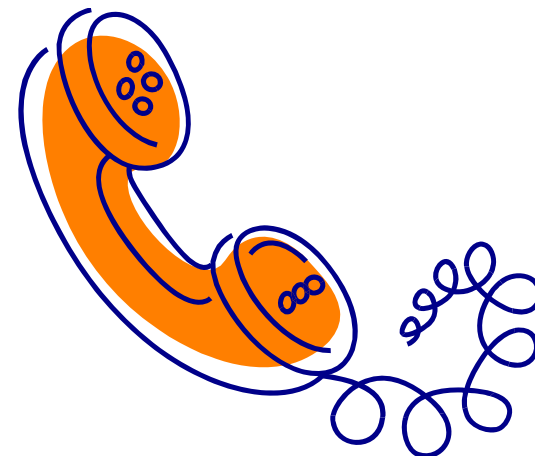
- Remember the second prong of the Supreme Court's two-prong test in T.L.O.:
- Is the search **reasonably related in scope to the circumstances** that justified the interference in the first place?

RILEY V. CALIFORNIA AND U.S. V. WURIE

- In 2014, the United States Supreme Court decided in two cases that police must first obtain a warrant to search the contents of a cell phone absent exigent circumstances. The Court emphasized that, because of the different kinds of data that can be stored on a cellphone, searching a cellphone could provide police with even more information about an individual's life than they could get from searching his or her home.

MANDATED REPORTING

- General Statutes §17a-101a - Mandated reporters are required to report when they have reasonable cause to suspect or believe that a child under the age of 18 has been abused, neglected or is placed in imminent risk of serious harm.
- General Statutes §46b-120 -This includes sexual exploitation.



HOW TO REPORT?

- Mandated reporters must report orally to either the Department of Children and Families' ["DCF"] Hotline or a law enforcement agency **within 12 hours** of suspecting that a child has been abused or neglected and must submit a written report (DCF-136 form) to DCF **within 48 hours** of making the oral report.
- School staff must also provide written notification to the head of the facility or institution where the alleged victim is enrolled or registered.



MANDATED REPORTING

- The failure of a mandatory reporter to report suspected abuse or neglect **is a crime.**
- The obligation to report is equally applicable to all staff and merely reporting it to one's superior – such as a teacher to a building administrator – **is not legally sufficient.**

TIPS FOR SCHOOL PERSONNEL TO AVOID CRIMINAL LIABILITY

- When a potential in-school sexting issue arises, and you have **a reasonable, individualized suspicion** that a student's cell phone contains evidence of sexting, confiscate the cell phone and have an appropriate administrator search the phone's contents.

TIPS FOR SCHOOL PERSONNEL TO AVOID CRIMINAL LIABILITY

- Assess the evidence: Are the images sexually explicit? Do the images show potential sexual exploitation.
- Determine reporting obligations: Is it a matter that needs to be reported to DCF (Are the images sexually explicit?)

TIPS FOR SCHOOL PERSONNEL TO AVOID CRIMINAL LIABILITY

- If a student cell phone search or an internet search reveals evidence of sexting **do NOT attempt to make copies, or electronically transfer or record the images!!!**

TIPS FOR SCHOOL PERSONNEL TO AVOID CRIMINAL LIABILITY

- Do **not** take photographs of the images.
- Do **not** download them to the school server or transfer them to your own device.
- Do **not** destroy the images.
- Do **not** spend an inordinate amount of time studying them.

TIPS FOR SCHOOL PERSONNEL TO AVOID CRIMINAL LIABILITY

- Keep in mind that these images have the potential to be to you what Green Kryptonite is to Superman.



EXAMPLE OF CRIMINAL PROSECUTION FOR INVESTIGATING SEXTING

Ting-Yi Oei, the assistant principal of Freedom High School in Virginia, was arrested in August 2008 on charges of possession of child pornography and failure to report child abuse. The arrest came about after Oei was instructed to investigate rumors of students circulating nude photos of female classmates via their mobile phones. After finding the photo, Oei had the photo transferred to his mobile phone and onto his school computer to secure a record of the offence and to preserve the evidence.



EXAMPLE OF CRIMINAL PROSECUTION FOR INVESTIGATING SEXTING

- “Aug. 20 was the first day for teachers to report back to school. An hour into the morning, the school's police officer called me out of a meeting. In my office, he told me that he had to arrest me. I was unnerved and started trembling so badly that I couldn't button my shirtsleeves. After letting me call Diane, the officer led me out to his police car, handcuffed me and drove me to the county jail. Several hours later, I was released on my own recognizance.
- “The same day, The Washington Post ran [a story online](#), accompanied by a huge mug shot of me. Within a few hours, the Web site [BadBadTeacher.com](#) had also posted a photo and article. The next morning, after breakfast, a local Fox News reporter showed up at our door with an accompanying sound truck. Microphone in hand, she knocked and asked me to talk. Shaken, I closed the door. The witch hunt was on in full force. “

CYBERBULLYING

- In 2008, the Connecticut General Assembly enacted Public Act 11-232: “An Act Concerning the Strengthening of School Bullying Laws” to address bullying issues. General Statutes § 10-222d.

WHAT IS CYBERBULLYING?

- Under Connecticut law:
- “Cyberbullying” means **any act of bullying** through the use of the Internet, interactive and digital technologies, cellular mobile telephone or other mobile electronic devices or any electronic communications.”

WHAT IS CYBERBULLYING?

Under Connecticut law, bullying is defined as:

(A) the repeated use by one or more students of a written, oral or electronic communication, such as cyberbullying; or

(B) a physical act or gesture by one or more students repeatedly directed at another student.

WHAT IS CYBERBULLYING?

That causes:

1. Physical or emotional harm to the other student;
2. Damage to the other student's personal property;
3. The other student to experience a hostile school environment;
4. An infringement on the other student's right to attend school;
5. Substantial disruption of the educational process or the orderly operation of the school.

AN ACT CONCERNING THE UNLAWFUL DISSEMINATION OF AN INTIMATE IMAGE

- In October 2015, Connecticut criminalized what some have referred to as “revenge porn” (the dissemination of a consensual nude or explicit image beyond the intended recipient) by making it a class A misdemeanor punishable by up to one year in prison, a fine of up to \$2,000, or both.
- General Statutes § 53a-189c.



DISCIPLINING STUDENTS FOR OFF CAMPUS CONDUCT

- Section 10-233d of the Connecticut General Statutes permits a school board to expel a student for out-of-school conduct if the conduct both (1) is “seriously disruptive of the educational process” **and** (2) violates a publicized school board policy. In deciding whether conduct seriously disrupts the educational process, the law allows a board to consider whether, among other things, (1) the incident happened close to a school; (2) other students from the school or a gang were involved; (3) the conduct involved violence, threats of violence, or illegal use of weapons; (4) injuries occurred; or (5) alcohol was used.

DISCIPLINING STUDENTS FOR OFF CAMPUS CONDUCT

- The United States Court of Appeals for the Second Circuit has held:
- “[A] student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct ‘would foreseeably create a risk of substantial disruption within the school environment,’ at least when it was similarly foreseeable that the off-campus expression might also reach campus.”

DISCIPLINING STUDENTS FOR OFF CAMPUS CONDUCT

- The Second Circuit further held:
- “[O]ff-campus conduct of this sort ‘can create a foreseeable risk of substantial disruption within a school’ and that, in such circumstances, its off-campus character does not necessarily insulate the student from school discipline.”

WHEN IN DOUBT – CONSULT WITH YOUR LEGAL COUNSEL!!!

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