



# HARASSMENT IN AN ONLINE WORLD

## Sexting, Cyberbullying and Cyber-harassment

by Felicia Farber



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With rapid advancements in technology and the growing popularity of social media platforms, electronic forms of harassment such as sexting, cyberbullying and cyber-harassment are becoming more prevalent. Unfortunately, what laws do exist related to these cyber-abuses are often outdated or inadequate, especially when they involve minors. The resultant consequences to the legal and due process rights of American citizens can be severe, varying at the state and federal levels.

The legal aspects of electronic harassment at the state and federal levels varies.

## **Sexting**

Sending, receiving, or forwarding sexually explicit material over cell-phones, computers or digital devices is referred to as sexting.<sup>1</sup> The sexual material does not necessarily have to be obscene, but may be suggestive, and includes nude or partially nude photos, videos, video links, texts, and messages.

In an online survey conducted by researchers at Drexel University, over 80 percent of respondents from age 18 to 82 admitted to sexting in the prior year.<sup>2</sup> With 95 percent of teens reporting that they have a smartphone or access to one,<sup>3</sup> it is not surprising that over half have engaged in sexting.<sup>4</sup> The high sexting rate continues into the 18-26 age bracket, with about half of young adults having sent nude or seminude photos of themselves to others and two-thirds having received sexually explicit photos of others.<sup>5</sup> Older adults, including the over-50 demographic, also partake in sexting.<sup>6</sup>

Although sexting is a common practice that has seeped into the culture, most teens and adults don't realize that sexting images of anyone underage, even with consent, is considered a sex crime that can be prosecuted under child pornography laws. In fact, merely viewing sexts of underage persons or showing them to others is risky behavior that can result in criminal offenses.

In New Jersey, it is illegal to create, possess, view, distribute, share, receive, photograph, or allow a person under the age of 18 to engage in sexually explicit conduct.<sup>7</sup> Although New Jersey's child pornography laws were intended to apply to adults who sexually exploit children, the broad reach of the laws can scoop up unknowing teenagers and adults found sexting. Charges of making or distributing child pornography can

carry serious penalties, even for minors, such as registering as a sex offender, probation, and incarceration.<sup>8</sup>

In order to address the growing problem of teen sexting, in April 2012 New Jersey enacted a diversionary program for juveniles criminally charged with sexting or posting sexual images.<sup>9</sup> Through this program, teens can avoid prosecution under the state's child pornography laws for their first sexting offense by participating in a remedial education or counseling program that teaches them the legal and non-legal consequences of sharing sexually suggestive or explicit materials.<sup>10</sup> Generally, only teens who are minors are eligible for this state-sponsored program.

A 2016 nationwide study of nearly 5,600 middle and high school students between the ages of 12 and 17 conducted by the Cyberbullying Research Center revealed that 17.5 percent were asked for explicit images of themselves.<sup>11</sup> Although there's no specific law in New Jersey criminalizing the act of asking for a nude photo, if the target is a minor it could fall under the second-degree crime of child enticement, punishable by fines and imprisonment.<sup>12</sup>

In 2018, in an effort to educate younger teens about the dangers of sexting prior to engaging in risky behavior, State Senator Teresa Ruiz sponsored a bill that requires school districts to instruct middle school students on the social, emotional, and legal consequences of distributing sexually explicit images through electronic means.<sup>13</sup> When Governor Phil Murphy signed the bill into law in Aug. 2018, Ruiz said it would "ensure schools educate students about sexting consequences and about how to prevent it in the future." Indeed, 59 percent of respondents in a study of undergraduates at a large northeast university reported that knowledge of legal consequences "would have" or "probably would have" deterred them from sexting.<sup>14</sup>

Because adolescents make up over 13 percent of the U.S. population<sup>15</sup>—approximately 42 million people between the ages of 10 to 19—the sexting acts of teens and their dangerous repercussions are of national concern. Currently, half the states in the U.S. have enacted sexting laws, which vary from state to state.<sup>16</sup> While some states have laws that distinguish sexting from child pornography, others do not.

## **Federal Level**

It is a federal crime to promote or solicit sexually explicit material involving a minor.<sup>17</sup> Child pornography crimes under federal law can carry prison sentences of five to 40 years. Federal jurisdiction comes into play in child pornography cases whenever electronic images are distributed or downloaded across state lines, or if the material used to produce the images was brought across state lines. For example, if images were downloaded in New Jersey from a server in New York, federal jurisdiction would be invoked.

While there are no federal sexting laws *per se*, a bill is pending that has the potential to criminalize the behavior of millions of teens who engage in sexting, even if consensual. The Protecting Against Child Exploitation Act of 2017, introduced by Congressman Mike Johnson to amend Title 18 of the United States Code, would close a loophole in federal child pornography laws but leave sexting minors subject to criminal prosecution as sex offenders, including a 15-year mandatory minimum prison term.<sup>18</sup>

To address this outcome, Congressman Jackson Lee introduced an amendment to the aforementioned bill to guarantee minors could not be punished as sex offenders, saying on the House floor; "While the bill is well intended, it is overbroad in scope and will punish the very people it indicates it is designed to protect: our children." Lee's amendment

failed 180–238 on a near party-line vote, and the bill passed the House in May 2017. It has yet to be voted on in the Senate.<sup>19</sup>

### Cyberbullying

Cyberbullying—the electronic relative of bullying—is generally defined as repeatedly and intentionally harassing, mistreating, or making fun of another person through the use of computers, cellphones, or other electronic devices.<sup>20</sup> Given that over 89 percent of U.S. households have computers<sup>21</sup> and the vast majority of American teens engage in online activity—with 45 percent reporting they are online on a near-con-

worse than traditional face-to-face bullying. Combining the vast array of digital devices where people can view, contribute, and share content with the anonymity that technology affords, people who bully others online can be considerably more cruel while hiding behind their computers and phone screens. With the hurtful content reaching a wider audience and creating a permanent public record, the adverse impact of cyberbullying can last far longer and be extraordinarily damaging to those who experience it.

The statistics linking cyberbullying with increased likelihood of suicidal thoughts or attempts are alarming. Stu-

Act, an extension of the state’s original anti-bullying law first enacted in 2002.<sup>29</sup> The new act requires school faculty and staff to be trained in bullying and suicide prevention. It also requires schools—including higher education institutions—to promptly investigate complaints and provide prompt support for victims, prohibits retaliation for reporting, and outlines consequences for students who bully.<sup>30</sup>

All 50 states have adopted bullying legislation, and almost all refer to bullying via electronic means.<sup>31</sup> In 2007, New Jersey amended and supplemented its existing harassment, intimidation, and bullying (HIB) prevention policies to specifically include a provision for electronic communication.<sup>32</sup> Under this cyberbullying law, communications transmitted by means of electronic devices, including but not limited to telephones, cellphones, computers, and pagers, are covered under school districts’ HIB policies.<sup>33</sup> The majority of states have criminal sanctions for cyberbullying or electronic harassment,<sup>34</sup> and victims of cyberbullying can potentially bring civil suits to recover for emotional, psychological, and financial harm.

### Cyberbullying Via Social Media

Online social media platforms—used by nearly all teens age 13-17<sup>35</sup>—are common vehicles for cyberbullying. Some of the most popular social networking sites used by today’s teens are YouTube, Instagram, Snapchat, Facebook, Twitter, Tumblr, and Reddit.<sup>36</sup> Legal obligations and liabilities for the users and the sites themselves are still evolving, but under the Communications Decency Act of 1996, service providers are accorded immunity from liability relating to user-generated content. Specifically, Section 230 of the act provides: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>37</sup>

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stant basis—<sup>22</sup> it is no wonder that cyberbullying has become rampant. Nearly two-thirds (64 percent) of teens say they “often” or “sometimes” come across racist, sexist, homophobic, or religious-based posts in social media.<sup>23</sup>

In the 2016 cyberbullying research study referenced above, 33.8 percent of middle and high school students were cyberbullied in their lifetime, 16.9 percent in the last 30 days of the study.<sup>24</sup> The results of a 2013 National School Climate Survey revealed that cyberbullying victimization of LGBTQ students between the ages of 13 and 21 was much higher, at approximately 50 percent.<sup>25</sup> The types of cyberbullying reported include mean or hurtful comments, rumors, threats, online impersonations, hurtful pictures or videos, and creating mean web pages.<sup>26</sup>

Due to the unique aspects of virtual interactions and electronic platforms, cyberbullying has the potential to be far

dents who experienced either school-based or online bullying were 1.6 times more likely to report suicidal thoughts, while students who reported being bullied in school *and* online were over five times more likely to report suicidal ideations and more than 11 times as likely to attempt suicide compared to those who had not been bullied.<sup>27</sup>

Cyberbullying has led to a number of incidents of teenage suicide, one of the most well known being the suicide of Rutgers University freshman Tyler Clementi in 2010. At 18 years of age, Clementi jumped to his death from the George Washington Bridge the day after learning his roommate streamed video of his sexual liaison with another man in his dorm room.<sup>28</sup> The incident rekindled public awareness of bullying and the need to protect youth.

The New Jersey Legislature responded in 2011 by unanimously passing the New Jersey Anti-Bullying Bill of Rights

Immunity under Section 230 is, however, not absolute, and there are exceptions, such as for federal criminal liability, intellectual property claims, and sex trafficking laws. In a recent Ninth Circuit opinion, the breadth of the section's coverage was called into question.<sup>38</sup> In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, the Ninth Circuit found that the defendant's website qualified as an information content provider and was, therefore, not immune under Section 230(c) for the questions it asked in its dropdown menus.<sup>39</sup> As a result of this decision, online service providers who publish third-party content have to be careful not to engage in conduct that could transition them into information content providers and risk them losing their Section 230 protections.

It is important to be aware that users of social networking are not protected by any of the Section 230 immunities granted to the sites. Users enter dangerous waters when they post objectionable or defamatory content. Without statutory immunities to shield them, if they are found to have used the sites as outlets for harassment, posted defamatory content, or crossed the line between legitimate expression of opinion and hateful/threatening speech, users can be found liable even if the sites can escape liability under Section 230.

Social media sites have taken affirmative steps to combat cyberbullying, providing guidelines to users and employing online tools and technologies to recognize and counter bad behavior. YouTube, for example, employs a harassment and cyberbullying policy that states: "Content or behavior intended to maliciously harass, threaten, or bully others is not allowed on YouTube."<sup>40</sup> Facebook has a bullying prevention hub with tools, tips, and strategies to handle bullying problems.<sup>41</sup> Twitter encourages users to block and report abusive posts and people.<sup>42</sup> Instagram employs filters

to remove language intended to harass or bully.<sup>43</sup> Snapchat has policies instructing users not to send any snaps that are mean or illegal, including pornography, nudity, or sexually suggestive content involving minors, threats, harassment, impersonation, and bullying.<sup>44</sup>

### Federal Level

There are currently no federal laws directly addressing cyberbullying, and any remedies for cyberbullying victimization are found under applicable federal civil rights laws.<sup>45</sup> Although a bill was proposed in 2008 to amend Title 18 of the United States Code entitled the Megan Meier Cyberbullying Preven-

tion Act, it was not enacted.<sup>46</sup> The bill was named after a 13-year-old from Missouri who killed herself after being cyberbullied by an adult woman who posed as a teenage boy.<sup>47</sup>

Unlike federal laws in the United States, the European Court of Justice ruled, in 2014, victims of cyberbullying have the right to petition search engines to have certain content removed from the internet.<sup>48</sup> This "right to be forgotten" online allows victims of cyberbullying to have humiliating or harmful images, videos, and comments taken down.<sup>49</sup>

Although the U.S. has nothing comparable, two states have taken action. In February of this year, New York became the first state in the nation to pass legislation that, as part of its new revenge porn law, allows judges to order websites or social media platforms to take down victims' images.<sup>50</sup> California, to protect

the privacy of minors, enacted an "online eraser" law that allows residents under the age of 18 to request the removal of personal information posted on online servers.<sup>51</sup>

### Cyber-harassment

Cyberbullying can rise to the level of cyber-harassment and be prosecuted under New Jersey law if certain elements exist. Specifically, the offense must include communications that take place in an electronic format with the intent to emotionally harm the victim or place them in fear of physical or emotional harm.<sup>52</sup> Examples of cyber-harassment are sending threatening messages to

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Cyberbullying charged under the New Jersey Cyber-Harassment law is considered a crime of the fourth degree and carries fines up to \$10,000, up to 18 months in prison, or both.<sup>53</sup> If the perpetrator is 21 or older at the time of the offense and impersonates a minor for the purpose of cyber-harassing a minor, it becomes a crime of the third degree.<sup>54</sup> Repeated acts of cyberbullying can rise to the level of stalking if they cause a reasonable person to fear for his or her safety or the safety of a third person or suffer other emotional distress. Stalking is a crime of the third degree carrying fines up to \$15,000, three to five years in prison, or both.<sup>55</sup>

In March 2018, a bill was sponsored by Assemblywoman Valerie Vainieri

Huttle to restrict internet access for cyberbullying offenders convicted of harassment of a minor, cyber-harassment, or stalking, and to upgrade the crime of harassment under certain circumstances.<sup>56</sup> The bill has been referred to the Assembly Women and Children Committee.<sup>57</sup>

### **Revenge Porn**

Revenge porn, known as nonconsensual pornography (NCP), is the distribution of sexually explicit images or video of individuals without their consent and

ened with NCP than men.<sup>62</sup> Not surprisingly, those who reported having had their sexually explicit image(s) shared without their consent at least once had significantly worse mental health outcomes and higher levels of physiological problems than non-victims.<sup>63</sup> But, most interestingly, 79 percent of NCP perpetrators claimed they didn't intend to hurt the person when they shared a sexually explicit image or video of them without their consent.<sup>64</sup>

Given the lasting damage to a person's reputation and severe emotional

sure of their private, intimate images without consent.<sup>68</sup> Since most states have only criminal laws relating to these cyber abuses, the UCRUDIAA would create a civil cause of action along with uniformity among the states.<sup>69</sup> Colorado was the first state to enact the UCRUDIAA, in April of this year.<sup>70</sup>

### **Conclusion**

The online world is rapidly evolving, presenting a myriad of contemporary challenges. With technological progress outpacing laws, it is important to be proactive in protecting the legal and due process rights of citizens, especially children. The author believes that adolescents caught sexting should not be swept into the same category as child pornographers, and that until there is universal recognition that teen sexting is not child porn, teens are legally vulnerable.

With respect to cyber-abuses on online forums and social media platforms, the author believes state and federal laws need to continue to evolve to reflect today's technology and provide uniform legislation with appropriate protections and remedies for victims. ♪

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for no legitimate purpose.<sup>58</sup> It is a burgeoning form of digital sexual violence that is especially disturbing because the sexually graphic images are typically made by a partner of an intimate relationship. Forty-three states and Washington, D.C. have enacted revenge porn laws.<sup>59</sup> In New Jersey, revenge porn falls under the invasion of privacy statute of the New Jersey Code of Criminal Justice and is a crime of the third degree.<sup>60</sup>

According to the 2017 Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration conducted by the research team at the Cyber Civil Rights Initiative, 12.8 percent of all participants reported having been victims of NCP (having had a sexually explicit image of themselves shared without their consent) or having been threatened with NCP.<sup>61</sup> Women were 1.7 times more likely to report having been victims of NCP or having been threat-

distress a single sext can cause, another type of NCP victimization, called sextortion, has become prevalent. Sextortion is an online exploitation crime where someone threatens to expose/distribute a sexual image or private, sensitive material if their demands are not met, which typically involve sexual content, money, or sexual favors.<sup>65</sup> Studies show that sextortion incidents occur with middle and high school students as well as adults.<sup>66</sup>

To address the increasing numbers of revenge porn and NCP incidents and help victims, the Uniform Law Commission (a/k/a the National Conference of Commissioners on Uniform State Laws) promulgated legislation entitled the Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act (UCRUDIAA) in 2018.<sup>67</sup> The act aims to provide victims of revenge porn and NCP with civil remedies for the disclo-

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