

**Title: The crime of sexting: A deconstructive approach.**

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**Keywords: sexting, mobile phones, Derrida, Ferraris, social ontology**

## **1. Introduction**

‘Sexting,’ understood as the consensual distribution of self-generated sexually explicit imagery through internet-connected mobile devices, <sup>1</sup> has come under severe scrutiny in the UK. This is because of the prevalence of sexting, its impact on the sexual lives of adolescents, and the illegality of the act when committed by them. However, the current legal analysis of sexting has thus far focused on the application of relevant law and the potential sanctions following a successful prosecution. However, there are important aspects of sexting which exist beyond the legality of the act which need to be considered. By shedding light on this other dimension, it may be possible to avoid future legislation falling into the same trap as the ill-fated and paradoxical legislative amendments responsible for the debacle surrounding adolescent sexting. To this end, this article offers an original philosophical investigation into sexting, its legal significance, and surrounding circumstances. This piece will be adopting a philosophical study of ontology to examine sexting and to offer insights into the significance of the social objects, created by mobile phones, which constitute this contemporary act.

On 1 May 2004 the majority of the Sexual Offences Act 2003 (SOA 2003) came into force. The Act contained an amendment which made it illegal to make, possess, or share indecent images of those under 18 years of age, whereas the law had previously only applied to images of those under 16 years of age. <sup>2</sup> The amendment also removed an exception which had been tabled by

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<sup>1</sup> Elizabeth C. Eraker ‘Stemming Sexting: Sensible Legal Approaches to Teenager’s Exchange of Self-Produced Pornography’ (2010) Vol.25(1) Annual Review of Law and Technology, Berkeley Technology Law Journal 555, at 557: ‘Note, the term “sexting” refers to the self-production and distribution by cell phone of sexually explicit images in the course of consensual, voluntary activity by teenagers.’

<sup>2</sup> See Sexual Offences Act 2003, s.45.

the Lords<sup>3</sup> whereby there would be no crime to answer for if a person of 16 or 17 years of age had consented to the taking of a such an image. But with the removal of the exception, s.45 of the SOA 2003 effectively raised the age of a ‘child’ from 16 to 18 years old.

Yet, during the final Commons Standing Committee drafting discussion which removed the exception and finalised the amendment, there was no mention of a digital technology which at the time was revolutionising the creation, storing, and sharing of images.<sup>4</sup> The technology noticeably absent from any discussion was the camera-equipped mobile phone – the first generation ‘smartphone’ – which at the time was undergoing an exponential growth in the UK to the number of tens of millions.<sup>5</sup> The uptake of this technology was so rapid that even before the amended law was in force, Kodak had already stopped selling 35mm cameras in the US and Western Europe, due to the pervasiveness of the camera-phone.<sup>6</sup>

As a consequence of the legislature’s lack of consideration of this new technology, when the SOA 2003 came into force in 2004, it was already drastically disparate from 21<sup>st</sup> century society. It failed catastrophically to coalesce with a society where smartphones were ubiquitous because neither the prevalence nor significance of this technology had been discussed. And in a society where ownership of this technology is pervasive, where this device is ‘in our hand, at a hand’s reach ... the absolute tool, the machine to end all the others because it sums them all up,’<sup>7</sup> it is the smartphone which creates, stores, and shares most of our images. Bernard Harcourt has argued that this technological revolution has led to ‘a new political and social condition that is

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<sup>3</sup> See the Sexual Offences Bill, as brought from the House of Lords on 18 June 2003, s. 47(3)(1): ‘It is not an offence under section 1(1)(a) for a person to take or make an indecent photograph of a child under aged 16 or over with the consent of the child.’ <<http://www.publications.parliament.uk/pa/cm200203/cmbills/128/2003128.pdf>> accessed 30 August 2017.

<sup>4</sup> See SC Deb (B) 18 September 2003, cols 247–258. This was, as it was then called, the Standing Committee debate which removed the exception tabled from the Lords. It featured discussions of uploading photographs to the internet but the word ‘internet’ was only featured three times. The words ‘digital,’ ‘mobile,’ ‘phone,’ or ‘text,’ are nowhere to be found in the debate.

<sup>5</sup> In the month prior to the Commons debate it was reported that by Christmas 2003 the UK was on course to have 55 million camera-phone users. See — ‘Camera phone sales set to rocket’ *BBC News* (19 August 2003) <<http://news.bbc.co.uk/1/hi/technology/3161251.stm>> accessed 30 August 2017.

<sup>6</sup> See — ‘R.I.P. 35mm camera’ *BBC News* (15 January 2004) <<http://news.bbc.co.uk/1/hi/magazine/3399529.stm>> accessed 30 August 2017.

<sup>7</sup> Maurizio Ferraris, *Where Are You? An Ontology of the Cell Phone* (Sarah De Sanctis tr, Fordham University Press, 2014), 46.

radically transforming our relations to each other, our political communities, and ourselves.’<sup>8</sup> He argues that through devices such as the smartphone:

we are not so much being coerced, surveilled, or secured today as we are *exposing* or *exhibiting* ourselves knowingly, many of us willingly, with all our love, lust, passion, and politics, others anxiously, ambivalently, even perhaps despite ourselves – but still, *knowingly* exposing ourselves.<sup>9</sup>

But given that the technology enabling this expository era was not given the requisite forethought during legislative drafting, the law relevant to sexting was predestined to be anachronous to life in the 21<sup>st</sup> century. In response to previous positivist legal engagements,<sup>10</sup> this article seeks to broaden our understanding of sexting by shedding light on the crucial, and yet neglected, object of the mobile phone. Through this analysis, the article aims to provide a more nuanced inquiry into sexting which pays heed to the social, technological, and philosophical significance of this millennial *tabula*.

Drawing on the deconstructive thought of Jacques Derrida and the related work of Maurizio Ferraris, this article deploys philosophy as its methodology because it allows for an insightful comment on what it means to use mobile digital technologies to ‘write’ ourselves *into* the digital world. Harcourt explains this world as follows: ‘[o]ver the past ten to fifteen years, our digital self – the subject’s second body – has taken on a life of its own and become more tangible than our analog self.’<sup>11</sup> Ferraris’ work is particularly apt in illuminating this digital world because in 2005, only a year after the SOA was in force, he published a book which Umberto Eco described as an “anthropology” of the mobile phone<sup>12</sup> and which allowed us to better understand this revolutionary device.<sup>13</sup> Such an understanding came via Ferraris’ ‘Derridean’<sup>14</sup> ontological

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<sup>8</sup> Bernard Harcourt, *Exposed: Desire and Disobedience in the Digital Age* (Harvard University Press, 2015), 15.

<sup>9</sup> *Ibid.* 18.

<sup>10</sup> For example, see Nigel Stone, ‘The “Sexting” Quagmire: Criminal Justice Responses to Adolescent’s Electronic Transmission of Indecent Images in the UK and the USA’ (2011) 11(3) *Youth Justice* 266.

<sup>11</sup> Harcourt (n 8), 253.

<sup>12</sup> Ferraris (n 7), vii. The book in question was Maurizio Ferraris, *Dove sei? Ontologia del telefonino* (Bompiani, 2005).

<sup>13</sup> Ferraris (n 7), ix.

<sup>14</sup> *Ibid.* vii: ‘...we shall see to what extent words like writing, recording and “inscription” prick up a Derridean’s ears.’

questioning of the mobile phone, meaning an interrogation into the ‘being’ or the ‘reality’ of the mobile phone. This inquiry led him to argue that ‘*the mobile phone is a writing machine*,’<sup>15</sup> and consequently a ‘formidable tool for constructing social reality.’<sup>16</sup> They achieve this by ‘writing’ a plethora of ‘social objects’ such as emails, SMS and MMS messages, social media posts, and other user-generated content, all of which are now utilised as the basis for sexting. Ferraris explained the philosophy behind these social objects by showing that ‘at the source of the construction of social objects there are social acts fixed by memory,’<sup>17</sup> as are found in the circuit boards of internet-connected mobile phones.<sup>18</sup> However, given that Ferraris’ book was only translated into English in 2014, this is the first English-language publication to apply this seminal work to legal issues arising from the use of mobile phones, in this instance sexting. As Ferraris prophetically wrote over 10 years ago: ‘It’s simple; *every* technical invention – from the club to the lever to the wheel, from the sail to gunpowder to sticky notes – changes people’s lives. But life remains situated in a world that has its laws and enforces them.’<sup>19</sup> And yet, despite mobile phones being *the* dominant causal technology behind sexting, they have not received the requisite attention to do justice to this issue. Until such a rigorous *philosophical* examination has taken place and the law is altered to adequately accommodate this technological epoch, the current law governing the sexual lives of adolescents will remain a relic in the 21<sup>st</sup> century.

Beyond this introduction, the article develops over five sections. The first explores the social setting of sexting, its legal position, and how authorities have responded to its everyday occurrence. The second section then provides an account of Derrida’s philosophy and his work on digital technology in the late 20<sup>th</sup> century. This then leads into the third section which engages with the Ferrari’s work as a continuation, and specialisation, of Derrida’s thinking, as applied to mobile phones in the 21<sup>st</sup> century, explaining how they ‘write’ our world. The penultimate

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<sup>15</sup> Ibid. 1

<sup>16</sup> Ibid. 6.

<sup>17</sup> Maurizio Ferraris, *Documentality: Why It is Necessary to Leave Traces* (Richard Davies tr, Fordham University Press, 2013), 165.

<sup>18</sup> Ferraris (n 7), 7: ‘[S]ocial ontology lies on a writing system, which can very well do without mobile phones (it already existed in the age of Sumerians and Pharaohs), but which mobile phones perfectly embody, allowing or promising the connection to all systems for oral or written communication; the access to all record circuits (writing, images, music); the possibility to check one’s bank account, to pay for bus or opera tickets and, if one wishes to, to download this book so as to read it on the train.’

<sup>19</sup> Ibid. 36.

section then re-examines sexting via the lens of the ‘writing’ emanating from the ever-connected, ‘wired, plugged in, online,’ mobile phone,’<sup>20</sup> which has outpaced society’s contemporary laws. The fifth and concluding section then looks to legislative developments in Australia which could point the way forward in terms of addressing the ill-fated law surrounding sexting.

## 2. Sexting: Statistics, law, and commentary.

### An introduction to sexting.

From the available quantitative and qualitative data on sexting – the consensual sharing of self-generated sexual imagery via internet-connected mobile technology – the prevalence of the act is significant.<sup>21</sup> Although quantitative studies are limited in accuracy, it is estimated that ‘about a third of teenagers’ in the United States are involved in the act.<sup>22</sup> In Britain, according to a 2016 investigation by *The Times* which dated back to 2012 and which covered 50 of the country’s biggest secondary schools, it was found ‘that 44,112 secondary school pupils have been caught sexting in the past three years.’<sup>23</sup> The report notes this is only a conservative estimate given that schools will not be aware of many cases. Another recent report notes that children as young as seven have been investigated by police with regards to sexting.<sup>24</sup> Finally, the ground-breaking

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<sup>20</sup> Harcourt (n 8), 19.

<sup>21</sup> See Claire Perry, ‘Independent Parliamentary Inquiry into Online Child Protection: Findings and Recommendations’ (18<sup>th</sup> April 2012). This Inquiry, which found that between ‘10%-12% of young teenagers [are] involved in sharing intimate images of themselves’ (Ibid. 44) - notwithstanding the sharing of intimate images of others - led to Baroness Howe of Ilicote’s Private Members Bill from the House of Lords, entitled the ‘Online Safety Bill.’ See: <<http://services.parliament.uk/bills/2012-13/onlinesafety.html>> accessed 30 August 2017. See also Elena Martellozzo, Andy Monaghan, Joanna R. Alder, Julia Davidson, Rodolfo Leyva, and Miranda A.H. Horvath, “...I wasn’t sure it was normal to watch it...”: A quantitative and qualitative examination of the impact of online pornography on the values, attitudes, beliefs and behaviours of children and young people’ (15<sup>th</sup> June 2016). This study, drawing on online forums, focus groups, and surveys, found that of the ‘135 young people [that] had taken naked, and, or, semi-naked images of themselves,’ ‘[j]ust over half of them went on to share the images with others’ (Ibid. 11). For more information on the study’s findings on sexting, see particularly 46–52 <<https://www.nspcc.org.uk/services-and-resources/research-and-resources/2016/i-wasnt-sure-it-was-normal-to-watch-it/>> accessed 30 August 2017.

<sup>22</sup> L Lewis, R Skinner, L Watchirs-Smith, S Cooper, J Kaldor, and R Guy, ‘A Literature Review of Sexting Attitudes and Risk Factors’ (2013) Vol 89 (Suppl 1) Sexually Transmitted Infections A312. This academic literature review covered ‘seven studies,’ ‘most were cross-sectional, all were quantitative and conducted in the United States.’

<sup>23</sup> Alexi Mostrous and Elizabeth Rigby, ‘Schools hit by sexting epidemic’ *The Times* (London 12 March 2016) <<https://www.thetimes.co.uk/article/headline-here-0s8btlzlx>> accessed 30 August 2017.

<sup>24</sup> Michael Savage, ‘Police investigate seven-year-olds in sexting epidemic’ *The Times* (London 12 April 2017) <<https://www.thetimes.co.uk/article/police-investigate-seven-year-olds-in-sexting-epidemic-px77tbg73>> accessed 30 August 2017.

2012 study conducted by the Institute of Education, University of London, Kings College London, and the London School of Economics and Political Science for the NSPCC, reported that ‘12% of 11-16 year olds in the UK have seen or received sexual message online.’<sup>25</sup> From these accounts, which merely scratch the surface of this complex issue, it appears that J.G. Ballard’s premonition regarding sexual activity was correct:

Sexual intercourse can no longer be regarded as a personal and isolated activity, but is seen to be a vector in a public complex involving automobile styling, politics and mass communications.<sup>26</sup>

Emerging from these reports, and the Ballardian frontier of networked sexual intercourse, is a fear of an inextricable social ‘timebomb’ tied to sexting.<sup>27</sup> In September 2016, in response to this ‘timebomb,’ the UK Council for Child Internet Safety (UKCCIS), The Department for Education, and the NSPCC, issued updated joint-guidance for schools and educational establishments on how to deal with adolescent sexting. Of key concern was the clear message that ‘[m]aking, possessing and distributing any imagery of someone under 18 which is “indecent” is illegal. This includes imagery of yourself if you are under 18.’<sup>28</sup>

### Sexting and the law.

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<sup>25</sup> Jessica Ringrose, Rosalind Gill, Sonia Livingstone, and Laura Harvey, ‘A Qualitative Study of Children, Young People, and “Sexting”: A report prepared for the NSPCC’ (2012), 11. <<https://www.nspcc.org.uk/services-and-resources/research-and-resources/pre-2013/qualitative-study-sexting/>> accessed 30 August 2017. This figure drew on ‘The EU Kids Online’ project, which conducted ‘in home interviews with a nationally representative sample of UK children, asking about “sexting,” as part of a larger 25 country study.’ See Sonia Livingstone and Leslie Haddon, ‘EU Kids Online: Final report’ (2009) <<http://eprints.lse.ac.uk/24372/>> accessed 30 August 2017.

<sup>26</sup> J.G. Ballard, *The Atrocity Exhibition* (Fourth Estate/HarperCollins, 2006), 148.

<sup>27</sup> Elizabeth Rigby, ‘Teenagers’ sexting out of control, say Labour’ *The Times* (London 22 March 2016) <<https://www.thetimes.co.uk/article/teenagers-sexting-out-of-control-says-labour-qn90hv0rm>> accessed 30 August 2017. Ms. Powell, Labour’s Shadow Education Secretary, stated: ‘It’s hard to shake the feeling that this is all storing up trouble for young people - a ticking timebomb of issue after issue that the next generation have to try to navigate unsupported and on their own.’

<sup>28</sup> UK Council for Child Internet Safety (UKCCIS), ‘Sexting in schools and colleges: Responding to incidents and safeguarding young people,’ page 7. (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/551575/6.2439\\_KG\\_NCA\\_Sexting\\_in\\_Schools\\_WEB\\_1\\_.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/551575/6.2439_KG_NCA_Sexting_in_Schools_WEB_1_.PDF)> accessed 30 August 2017.

The law surrounding sexting has been commented upon widely: the illegality of the act has received attention from the mainstream press,<sup>29</sup> children’s charities,<sup>30</sup> and legal scholarship.<sup>31</sup> As per the full explanation in the UKCCIS guidance:

Much of the complexity in responding to youth produced sexual imagery is due to its legal status. Making, possessing and distributing any imagery of someone under 18 which is ‘indecent’ is illegal. This includes imagery of yourself if you are under 18. The relevant legislation is contained in the Protection of Children Act 1978 (England and Wales) as amended in the Sexual Offences Act 2003 (England and Wales).

Specifically:

- It is an offence to possess, distribute, show and make indecent images of children.
- The Sexual Offences Act 2003 (England and Wales) defines a child, for the purposes of indecent images, as anyone under the age of 18.<sup>32</sup>

As noted, the law of England and Wales prohibits the dissemination of indecent images of anyone under the age of 18, including the voluntary dissemination of self-generated images by the *subject* of the image. As commented by Alisdair Gillespie, this is because the SOA 2003 s.45 amended prior legislation and defined ‘a child’ as anyone under the age of 18:<sup>33</sup> ‘The principal change to the existing law is that s.45 of the SOA alters the definition of “a child” under s.1 of

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<sup>29</sup> As examples, see Damien Gayle, ‘Sexting could see teenagers branded as sex offenders’ *The Guardian* (London 4 May 2015) <<https://www.theguardian.com/uk-news/2015/may/04/sexting-teenagers-selfie-criminal-record-sex-offenders-register>> accessed 30 August 2017; Nadi Khomami, ‘Boy, 14, added to police database after sexting female classmate naked image’ *The Guardian* (London 3 September 2015) <<https://www.theguardian.com/uk-news/2015/sep/03/boy-14-added-to-police-database-after-sexting-female-classmate>> accessed 30 August 2017.

<sup>30</sup> See the NSPCC’s <<https://www.nspcc.org.uk/preventing-abuse/keeping-children-safe/sexting/>> and Childline’s <<https://www.childline.org.uk/info-advice/bullying-abuse-safety/online-mobile-safety/sexting/>> public guidance on the legal ramifications on sexting. Accessed 30 August 2017.

<sup>31</sup> See four works by Alisdair Gillespie: ‘The Sexual Offences Act 2003: (3) Tinkering with “child pornography”’ (2004) *May Crim LR* 361; ‘Indecent Images of Children: The Ever-Changing Law’ (2005) 14 *Child Abuse Review* 430; ‘Adolescents accessing indecent images of children’ (2008) *Journal of Sexual Aggression* 14(2) 111; and ‘Adolescents, Sexting and Human Rights’ (2013) 13:4 *Human Rights Law Review* 623.

<sup>32</sup> UKCCIS (n 28), 7.

<sup>33</sup> As per the Government’s ‘Explanatory Notes’ for this piece of legislation, ‘[t]his clause redefines a ‘child’ for the purposes of the Protection of Children Act 1978 (‘the 1978 Act’) as a person under 18 years, rather than under 16 years, of age. This change means the offences under that Act of taking, making, permitting to take, distributing, showing, possessing with intent to distribute, and advertising indecent photographs or pseudo-photographs of children will now also be applicable where the photographs concerned are of children of 16 or 17 years of age.’

the Protection of Children Act 1978 (“PoCA”) and s.160 of the Criminal Justice Act 1988 (“CJA”) from 16 to 18 (see s.45(1)).’<sup>34</sup>

The situation arising from this amendment has drawn commentary for several reasons.<sup>35</sup> One reason is the somewhat paradoxical role that the age of majority now plays within the law. As Gillespie notes ‘[i]n England and Wales the age of consent for sexual acts is 16 but this amendment ensures that whilst a 16-year-old can choose to undertake a sexual act, they cannot choose to be the subject of a pornographic photograph’; ‘If, as noted above, a child can legally partake in sexual activities, how can photographs of them be considered indecent?’<sup>36</sup> Another reason for comment is the severity of the sanction which relates to this criminal act, whereby those who commit it ‘are liable for a sentence of up to 10 years’ imprisonment and [would] become a registered sex offender with all the repercussions that this brings.’<sup>37</sup> A further reason for comment is the stance taken by authorities seeking to avoid prosecuting adolescents who fall foul of this – what could be argued to be illogical<sup>38</sup> – law. The illogicality of the law stems from its drafting without any consideration for the ‘mass adoption of the internet, mobiles and digital photography’<sup>39</sup> and anachronistic enforcement in an age when these technologies were

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<sup>34</sup> Gillespie (n 31, 2004), 361–362. See also, at 361, Gillespie’s explanation of the amendment’s implementation due to ‘international obligations,’ most likely referring to the European Framework decision [2001] O.J. C26E.

<sup>35</sup> See Nicola Henry and Anastasia Powell, ‘Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law’ (2016) *Social & Legal Studies* 25(4) 397, at 400–405 and Shaheen Shariff, *Sexting and Cyberbullying: Defining the Line for Digitally Empowered Kids* (Cambridge University Press, 2015), 36–98.

<sup>36</sup> Gillespie (n 31, 2004), 362. See also his further analysis of this paradox at 363: ‘However, if society is willing to accept that children aged over 16 are able to have sexual intercourse, will they find that a picture of a 17-year-old either nude or in a sexual pose is indecent?’ See also Shariff (n 35), 76: ‘[I]t is also important to point out that we are headed down the wrong path if we charge kids with child pornography offenses. And it is *essential* to emphasize that children are not child pornographers!’

<sup>37</sup> Gillespie (n 31, 2004), 364.

<sup>38</sup> Authorities in England and Wales have repeatedly stated their reluctance to prosecute adolescents involved in sexting. See the Crown Prosecution Service’s April 2016 ‘Guidelines on Prosecuting Cases of Child Sexual Abuse,’ paras. 79 and 80: ‘However, care should be taken when considering any cases of ‘sexting’ that involve images taken of persons under 18’ ... ‘Whilst it would not usually be in the public interest to prosecute the consensual sharing of an image between two children of a similar age in a relationship, a prosecution may be appropriate in other scenarios.’ The guidance then refers to the NSPCC guidance mentioned at (n 32).

<[http://www.cps.gov.uk/legal/a\\_to\\_c/child\\_sexual\\_abuse/](http://www.cps.gov.uk/legal/a_to_c/child_sexual_abuse/)> accessed 30 August 2017. The Crown Prosecution Service has also produced legal guidance relating to ‘Indecent Images of Children,’ although this document does not refer to sexting. See also, with regard to the decision of The National Police Chiefs Council to not actively pursue prosecutions, Karen McVeigh, ‘Police chiefs draw up sexting guidance for schools’ *The Guardian* (London June 14 2016) <<https://www.theguardian.com/society/2016/jun/14/police-chiefs-sexting-guidance-schools>> accessed 30 August 2017.

<sup>39</sup> UKCCIS (n 28), 8.



commonplace. Two legal sources have commented on the law's illogicality, the first being the Chairman of the Criminal Bar Association, Mark Fenhalls QC:

Politicians must ensure that laws are logical and consistent. If they do not, the law will be considered an ass and public confidence in the rule of law will be damaged. It is legal for 16-year-olds to have sex with each other and yet illegal for 17-year-olds to take and keep naked pictures of each other. This makes no sense. This area of criminal law requires urgent review and reform. <sup>40</sup>

Fenhalls comments that if the law permits 16-year olds to engage in sexual intercourse with each other, then 'it makes no sense' that the law would simultaneously prohibit 17-year olds, or indeed 16-year olds, from taking and keeping naked images of each other. Similarly, the Crown Prosecution Service (CPS) is also clearly aware of the law's illogicality. In October 2016 the CPS released new guidance for the prosecution of offences, such as sexting, which have been committed 'by the sending of a communication via social media.'<sup>41</sup> With respect to sexting, the CPS has noted that 'care should be taken when considering any cases of "sexting" that involve images taken of persons under 18,' explaining that 'it would not usually be in the public interest to prosecute the consensual sharing of an image between two children of a similar age in a relationship.'<sup>42</sup> Consequently, despite it being an illegal act when images of those below 18 years of age are created, stored, and distributed consensually by adolescents, the CPS has publicly stated that there is no public interest in prosecution.

'Revenge pornography.'

However, the matter is entirely different if the image is shared *without* the consent of the subject involved. 'Revenge pornography' is illegal as per s.33 of the Criminal Justice and Courts

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<sup>40</sup> See Mark Fenhalls, 'Review "sexting" law; Letters to the Editor' *The Times* (London September 5 2015) <<http://www.thetimes.co.uk/tto/opinion/letters/article4547884.ece>> accessed 30 August 2017.

<sup>41</sup> The Crown Prosecution Service: 'Guidelines on prosecuting cases involving communications sent via social media': <[http://www.cps.gov.uk/legal/a\\_to\\_c/communications\\_sent\\_via\\_social\\_media/](http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/)> accessed 30 August 2017. Note that 'social media' refers to 'the use of electronic devices to create, share or exchange information, ideas, pictures and videos with others via virtual communities and networks. For the purposes of these guidelines, this includes emails and texts and other forms of electronic communications.'

<sup>42</sup> Ibid.

Act 2015 (CJCA 2015).<sup>43</sup> This act differs from sexting because whereas sexting involves consensual self-distribution by the subject of the image in question, revenge pornography involves distribution which is executed neither by the subject of the image nor with their consent: as per s.33 CJCA 2015, revenge pornography occurs ‘*without* the consent of an individual who appears in the photograph’<sup>44</sup> and ‘*with* the intention of causing that individual distress.’<sup>45</sup> As noted in the government’s commentary, outlawing revenge pornography aimed to protect individuals from actions done to them without their consent: ‘This amendment, although it applies both online and offline, reflects the government’s ongoing commitment to protecting people from bullying, exploitation and harassment on the internet.’<sup>46</sup> Here, the law’s approach to the distribution of sexually explicit material is antithetical to the approach involving sexting because the law relating to revenge pornography was implemented with due attention paid to the cultural and technological context of the day. The legislation specifically aimed to ‘target the growing issues caused by the technological advances’ which could lead to ‘the sending of sexually explicit content, primarily via mobile technology.’<sup>47</sup> From the origins of this law – as an amendment to the CJCA 2015 from the Lords – it is evident that its implementation followed a conscious account of the technology enabling revenge pornography: mobile, camera-wielding, internet-connected, smartphones:

My Lords, the term “revenge pornography” refers to the publication, usually but not always, on the internet, of intimate images of former lovers without their consent. ... Obtaining such images has become more common and much easier with the prevalence, popularity and sophistication of smartphones, with their ability to take or record high quality images, still and video, instantly and simply, with accompanying sound in the case of video. It is set to become even easier to take such

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<sup>43</sup> See Criminal Justice and Courts Act 2015 s 33, which came into force 13 April 2015:

‘Disclosing private sexual photographs and films with intent to cause distress.’

(1) It is an offence for a person to disclose a private sexual photograph or film if the disclosure is made-

(a) without the consent of an individual who appears in the photograph or film, and

(b) with the intention of causing that individual distress.

<sup>44</sup> See Criminal Justice and Courts Act 2015 s 33(1)(a). Emphasis added.

<sup>45</sup> See Criminal Justice and Courts Act 2015 s 33(1)(b). Emphasis added.

<sup>46</sup> See ‘Criminal Justice and Courts Act 2015: Overarching Impact Assessment’:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/441655/overarching-enactment.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/441655/overarching-enactment.pdf)  
accessed 30 August 2017.

<sup>47</sup> Andy Phippen and Jennifer Agate, ‘New social media offences under the Criminal Justice and Courts Act and Serious Crime Act: the cultural context’ (2015) *Entertainment Law Review* 26(3) 82, at 82. See also, at 84:

‘[s]exting as a cultural phenomenon is very much in the public eye and a precursor to the attention paid to revenge porn.’

images with the advent of cameras installed in glasses and yet further improvement in high definition video cameras in phones. 48

This 21<sup>st</sup> century law on sexual relations is a ‘well thought out, effectively debated statute,’ 49 which addresses a pressing issue of the day. 50 However, the current prohibition of consensual adolescent sexting cannot be described in the same way because this anachronous law was not implemented with the requisite attention paid to the technological context of the day. 51

In order to engage with this illogical law the legal analysis offered in this article concentrates on *the* sole causal reason behind the spike in the occurrence of sexting: the incredible proliferation of internet-connected mobile smartphones equipped with powerful digital cameras. This approach aims to avoid repeating the mistake made during the legislative process, where not enough requisite forethought was given to this technological development which was unfurling simultaneously to the legal drafting. 52 In early 2003, months prior to the legislation’s finalisation, mainstream news was reporting that the exponential growth of camera-equipped smartphones was already changing society’s understanding of digital images: ‘All camera phones allow images to be instantly sent to other phones, copied to a website or e-mailed to others.’ 53 Thus, it was already becoming apparent that ‘camera phone owners are showing off indiscreet pictures taken without the subject’s knowledge.’ 54 Yet, when drafting the SOA 2003 to govern sexual relations in the 21<sup>st</sup> century, the legislature failed to make it representative of its time and place. The requirement for the law to be adaptive to societal change is absolutely

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48 Taken from the Daily Hansard transcript of the House of Lords Committee: 2<sup>nd</sup> sitting for the Criminal Justice and Courts Act 2015 – House of Lords 21<sup>st</sup> July 2014: Column 969, as per Lord Marks of Henley-on-Thames.

<<https://publications.parliament.uk/pa/ld201415/ldhansrd/text/140721-0002.htm>> accessed 30 August 2017.

49 Phippen and Agate (n 47), 84.

50 However, the crime of revenge pornography was prosecutable under various pre-existing pieces of legislation: ‘namely the Obscene Publications Act 1959, the Malicious Communications Act 1988, the Communications Act 2003 s 127 (limitation period extended to 3 years) and the Protection from Harassment Act 1997.’ See Alec Samuels ‘The Criminal Justice and Courts Act 2015’ (2015) *Criminal Lawyer* 225 2, at 4.

51 Consequently, on this point, this author does not agree with the following comment from Phippen and Agate (n 47), 84): ‘With the older laws [referring to the SOA 2003], further complexity resides in the fact that the laws were put into place in a time before the phenomenon of self generation was technologically possible.’

52 See SC Deb (B) 18 September 2003, cols 247–258.

53 See — ‘Furtive phone photography spurs ban’ *BBC News* (4 April 2003) <<http://news.bbc.co.uk/1/hi/technology/2916353.stm>> accessed 30 August 2017.

54 See — ‘Phone users become picture savvy’ *BBC News* (12 February 2003) <<http://news.bbc.co.uk/1/hi/business/2752113.stm>> accessed 30 August 2017.

crucial for its adequate existence in the world. As Peter Fitzpatrick has argued: ‘Law cannot be purely fixed and pre-existent if it is to change and adapt to society, as it is so often said that it must.’<sup>55</sup> And he notes further, if law does *not* do ‘everything,’ if law is *not* ‘ever responsive to change,’ then ‘law will eventually cease to rule the situation which has changed around it.’<sup>56</sup> It seems that it may now be the case that because it did not adapt in a responsive manner to the technological changes occurring around it, the law governing sexting has now ceased to adequately rule the 21<sup>st</sup> century world it finds itself in.

To avoid repeating the mistake of the legislature, this piece aims to contribute to our understanding of sexting by locating it within its unique social context. For today, nearly a decade and a half after the coming into force of the law, Ofcom’s 2016 ‘Communications Market Report’ states that 90% of UK 16–24 year olds and 91% of UK 25–34 year olds own a smartphone:<sup>57</sup> the smartphone is truly ubiquitous. The explosion in this technology has now ensured that the mobile, near-instantaneous, creation and dissemination of digital content across borders and oceans via the internet is a completely banal act of the third millennium.<sup>58</sup> Yet, due to the law’s inability to comprehend this era, sexting remains incompetently accounted for. With this problematic made clear, the next section of this article moves to conduct an investigation into the significance and philosophical resonance of the mobile phone, the ‘formidable tool for constructing social reality.’<sup>59</sup>

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<sup>55</sup> Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001), 71.

<sup>56</sup> *Ibid.*

<sup>57</sup> Ofcom, ‘The Communications Market Report’ (4<sup>th</sup> August 2016) 190: ‘Adults under 55 were more likely to own a smartphone in 2016, compared to the UK overall. The difference in the ownership of smartphones between younger and older age groups is stark: twice as many 16–24s and 25–34s owned a smartphone (90% and 91% respectively) than over-55s (42%). Over-55s were less likely than adults in the UK overall to own a smartphone (42% vs. 71%).’ For the methodological explanation behind Ofcom’s data see, *Ibid.* 2.

<[http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr16/uk/CMR\\_UK\\_2016.pdf](http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr16/uk/CMR_UK_2016.pdf)> accessed 30 August 2017. See also Deloitte, ‘There’s no place like phone: Consumer usage patterns in the era of peak smartphone (Global Mobile Consumer Survey 2016: UK Cut)’ (2016) 4: ‘In a mere nine years the smartphone has had a massive impact on UK society. Collectively, UK citizens look at their smartphones over a billion times a day. Four out of five adults now have one. Among 18–44 year olds, adoption is higher still at 91 per cent – equivalent to 21 million people.’ This data collection was ‘based on a nationally representative sample of 4,000 UK consumers aged 18–75. The sample follows a country specific quota on age, gender, region, working and socio-economic status.’ <<http://www.deloitte.co.uk/mobileuk/assets/pdf/Deloitte-Mobile-Consumer-2016-There-is-no-place-like-phone.pdf>> accessed 30 August 2017.

<sup>58</sup> This essentially completes the vision of Web 2.0, first conceived in 1999. This will be referred to below. For the origin of this concept, see Darcy DiNucci, ‘Fragmented Future’ (1999) *Print Magazine* April 1999.

<sup>59</sup> Ferraris (n 7), 6.

### 3. Deconstruction and Digital Technology.

In order to examine the mobile phone's philosophical significance, it is first necessary to explain this article's methodology. Accordingly, the next two sections of this article are related explanatory sections. The first part explains the work of Jacques Derrida, firstly in general and then with regards to digital technology. The second part then moves to explain Ferraris' Derridean philosophy and its application to the mobile phone via his seminal book *Where Are You? An Ontology of the Cell Phone*.

Jacques Derrida: an introduction.

Jacques Derrida (1930–2004) is most well-known for his philosophical theory of 'deconstruction' and its ground-breaking effect on the humanities.<sup>60</sup> His work involved a radical rethinking of writing, in which he argued that Western philosophy had incorrectly viewed writing as 'a secondary and instrumental function,' or a 'translator' of 'speech that was fully present.'<sup>61</sup> In retort, Derrida posited an 'enlarged and radicalized'<sup>62</sup> account which more accurately represented the technology, or *techné*,<sup>63</sup> of writing in the late 20<sup>th</sup> century: this was the argument in his 1967 book *De la Grammatologie*,<sup>64</sup> published in English as *Of Grammatology* in 1976. Therein Derrida argued that our modern 'enlarged' understanding of writing refers to 'all that gives rise to an inscription in general.'<sup>65</sup> This meant that writing

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<sup>60</sup> For commentary on Derrida's influence on the humanities see Tom Cohen (ed), *Jacques Derrida and the Humanities: A Critical Reader* (Cambridge University Press, 2001), Mary Caputi and Vincent J. Del Casino, Jr (eds), *Derrida and the Future of the Liberal Arts: Professions of Faith* (Bloomsbury, 2013), and Michael Peters and Peter Trifonas (eds), *Deconstructing Derrida: Tasks for the New Humanities* (Palgrave Macmillan, 2005). For a tribute to Derrida's life and works see Costas Douzinas (ed), *Adieu Derrida* (Palgrave Macmillan, 2007). Citations to Derrida's work run into hundreds of thousands and can be viewed using Google Scholar's algorithm programme: <[https://scholar.google.co.uk/citations?user=0A\\_I02UAAAAJ](https://scholar.google.co.uk/citations?user=0A_I02UAAAAJ)> accessed 30 August 2017.

<sup>61</sup> Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak tr, John Hopkins University Press, 1976), 8. For such an account of writing, see Plato, 'Phaedrus' in Edith Hamilton and Huntington Cairns (eds) *Plato: The Collected Dialogues including the Letters* (Princeton University Press, 1961).

<sup>62</sup> Derrida (n 61), 10.

<sup>63</sup> *Techné* refers to the process of 'the revealing that brings forth truth into the splendour of radiant appearance.' See Martin Heidegger, 'The Question Concerning Technology' in David Farrell Krell (ed) *Martin Heidegger: Basic Writings – Revised and Expanded Edition* (David Farrell Krell tr, Routledge, 1993), 339. See also 319: 'Thus what is decisive in *techné* does not at all lie in making and manipulating, nor in the using of means, but rather in the revealing mentioned before. It is as revealing, and not as manufacturing, that *techné* is a bringing-forth.'

<sup>64</sup> Jacques Derrida, *De la Grammatologie* (Les Editions de Minuit, 1967).

<sup>65</sup> Derrida (n 61), 9.

encompasses ‘not only the physical gestures of literal pictographic or ideographic inscription, but also the totality of what makes it possible.’<sup>66</sup> In short, the technology of writing is, and encompasses, any process which produces inscriptions; inscriptions are marks ‘on a physical substrate whatsoever, from marble to neurons, passing through paper and computers,’<sup>67</sup> which allow for entities to survive the passing of time. ‘[C]inematography,’ ‘choreography,’ and ‘pictorial, musical, [and] sculptural “writing”’ are all examples of writing because they produce inscriptions which survive the passing of time.<sup>68</sup> Further examples include inscriptions ‘found on a piece of paper or in a computer file’<sup>69</sup> or what a biologist may refer to as the ‘writing and *pro-gram*’ found in ‘the most elementary processes of information within the living cell.’<sup>70</sup> Derrida argued that this understanding of writing accounted for the existence of all entities from the “non-living” up to “consciousness,” passing through all levels of animal organization.’<sup>71</sup> Finally, he used the term ‘texts’ to refer to all the grounds and planes of existence which contain written inscriptions: a text is a ‘fabric of signs.’<sup>72</sup> This led to, perhaps, Derrida’s most famous philosophical maxim: ‘*There is nothing outside of the text* [there is no outside-text; *il n’y a pas de hors-texte*].’<sup>73</sup> This maxim asserts that because a ‘transcendental signifier’<sup>74</sup> does not exist, that is a phenomenon existing without reference to another signifier, the consequence is that inscriptions only ever refer to other inscriptions, within ‘texts,’ in an infinite cycle of reference. This is Derrida’s critique of metaphysics: ‘the process of signification which orders the displacement and substitutions for this law of central presence.’<sup>75</sup> In summary, Derrida argued

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<sup>66</sup> Ibid.

<sup>67</sup> Maurizio Ferraris, ‘Social Ontology and Documentality’ in Giovanni Sartor, Pompeu Casanovas, Maria Angela Biasiotti, and Meritxell Fernández-Barrera (eds) *Approaches to Legal Ontologies: Theories, Domains, Methodologies* (Springer Dordrecht, 2011), 91.

<sup>68</sup> Derrida (n 61), 47. See also Ferraris (n 17), 176: ‘The cinema, which is strangely opposed to the book, is a registered and repeatable object, essentially like writing, and these days is often recorded on the same media used for writing.’

<sup>69</sup> Maurizio Ferraris, ‘Documentality, or Europe’ (2009) Vol.92(2) *The Monist: An International Quarterly Journal of General Philosophical Inquiry* 286, at 295.

<sup>70</sup> Derrida (n 61), 9. See also Ferraris (n 67), 91: ‘I do not consider obnoxious the idea that also brain processes are to be described in terms of a sort of writing, since they manifest to us exactly in those terms, as it is revealed also by the fact that the mind has always been described as a *tabula rasa*, i.e. a writing table.’

<sup>71</sup> Derrida (n 61), 47.

<sup>72</sup> Ibid. 14. See also 65.

<sup>73</sup> Ibid. 158.

<sup>74</sup> See Jacques Derrida, ‘Structure, Sign and Play in the Discourse of the Human Sciences,’ in Jacques Derrida, *Writing and Difference* (Alan Bass tr, Routledge, 2001), 354: ‘The absence of the transcendental signified extends the domain and the play of signification infinitely.’

<sup>75</sup> Ibid. 353.

that the technology of writing is unsurpassed because it produces the inscriptions which allow entities to survive the passing of time, whilst housed within unlimited fields of referentiality.

The later years of Derrida's work saw him explicitly address the developing digital technologies of the late 20th century, including multimedia consumer electronics, email, and the internet. But given his death in 2004, he did not experience the ubiquity of high-end laptops, smartphones, and high-speed mobile internet connections. Consequently, his work on this dawning era of this technology consisted of proto-philosophical musings regarding how 'writing' would be taken up in the digital era: <sup>76</sup> 'we still need inscriptions, and no one, apart from Derrida, realised this.' <sup>77</sup> Yet, little could Derrida have known that the mobile phone would soon house all the technological advances he witnessed and much more. And during this period, in an almost uncanny anticipation of the future, Maurizio Ferraris was heavily involved in Derrida's work, thought, and writing. The following section outlines some of Derrida's key reflections on digital technology and thereafter moves to elucidate Ferraris' own work on the mobile phone.

#### The mid-1990s: deconstruction and digital technology.

Turning to Derrida's deconstructive engagement with 'digital writing' technologies, the following section explains what it means to 'write' in a digital world and how this causes legal difficulties surrounding sexting. This section briefly covers four points of engagement from Derrida's work: content creation ('Web 2.0'), email, digital as compared to analogue writing, and the law's engagement with technology.

#### *Web 2.0 and content creation.*

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<sup>76</sup> Note that Derrida's philosophy did have a significant impact on early media theory. See particularly the following work which was originally written in 1985: Friedrich Kittler, *Discourse Networks, 1800/1900* (Michael Metteer with Chris Cullens trs, Stanford University Press, 1990).

<sup>77</sup> Ferraris (n 7), 112.

In 1993 Derrida's thoughts on the philosophy of writing led him to posit that developing digital mediums, such as multimedia devices and the internet, would soon allow the 'electronic larger public' to write digital content for themselves: <sup>78</sup>

The technical development to which you allude confirms it ... You will be less and less able to convince citizens that they should be content with national production once they have access to a global production from the outset by themselves. <sup>79</sup>

Derrida's claim was significant for two reasons. Firstly because he foresaw, six years ahead of its mainstream realisation, what Darcy DiNucci would (in 1999) call 'Web 2.0.' <sup>80</sup> This term refers to the development of the internet from a platform of 'typical brochure-like displays of Times or Arial text' <sup>81</sup> to a platform akin to a 'transport mechanism, the ether through which interactivity happens.' <sup>82</sup> This version of the internet would host and connect multimedia to a multitude of devices, from 'TV sets' to 'car dashboard[s],' and from 'hand-held game machines' to 'cell phone[s],' <sup>83</sup> and perhaps most crucially it would 'also open the market to third-party publishers – leading to a profusion of content that would in turn sell more [mobile] phones.' <sup>84</sup> This leads to the second significance of Derrida's claim because he noted that this transformation would radically affect what was recognised as 'the market,' and the 'consumers' and 'addressees' in it. <sup>85</sup> The public's ability to produce their own content, as third-party publishers, would transform the idea of a 'consumer' in the market because *everyone* would be able to produce their own content: '[i]t is precisely the concept of the addressee that would have to be

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<sup>78</sup> Jacques Derrida and Bernard Stiegler, *Echographies of Television: Filmed Interviews* (Jennifer Bajorek tr, Polity Press, 2002), 53.

<sup>79</sup> Ibid.

<sup>80</sup> DiNucci (n 58), 32: 'The first glimmerings of Web 2.0 are beginning to appear, and we are just starting to see how that embryo might develop. ... The Web will be understood not as screenfuls of text and graphics but as a transport mechanism, the ether through which interactivity happens. It will still appear on your computer screen, transformed by video and other dynamic media made possible by the speedy connection technologies now coming down the pike. The Web will also appear, in different guises, on your TV set (interactive content woven seamlessly into programming and commercials), your car dashboard (maps, Yellow Pages, and other traveller info), your cell phone (news, stock quotes, flight updates), hand-held game machines (linking players with competitors over the Net), and maybe even your microwave (automatically finding cooking times for products).'

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid. 222

<sup>85</sup> Derrida and Stiegler (n 78), 53–55.



transformed.’<sup>86</sup> Said differently, Derrida commented that ‘those who were previously in the position of consumer-spectators can intervene in the market.’<sup>87</sup> And now, with twenty-five years’ worth of hindsight, Derrida’s prediction has been proved correct as the ubiquitous ability to instantly create, disseminate, and consume digital media has revolutionised the world. It was this liminal moment in the development of the internet and multimedia devices, most of all the mobile phone, which provided the bedrock for the sexting epidemic.<sup>88</sup>

Lastly, Philip Armstrong has commented that Derrida’s work also enabled conceptualisations of digital subjectivity, such as ‘netizens, cybercitizens, or virtual communities,’ as well as ‘cyberculture and cyberpolitics.’<sup>89</sup> And sexting now finds itself embroiled in questions of both digital subjectivity and cyberpolitics because if this act is – as has been argued – ‘merely an expression of teen sexuality in a digital age,’<sup>90</sup> then the abilities afforded by content creation, mass instant communications, and the privacy of mobile phones, have irreparably transformed adolescent sexuality into a ‘digital sexuality’ of the third millennium which needs to be accounted for in law.<sup>91</sup>

*Email: ‘dromology.’*

By 1996 Derrida was prioritising email over all other technological developments because its communication of digital written text was nearly *instantaneous*. He opined that ‘even more than

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<sup>86</sup> Derrida and Stiegler (n 78), 55.

<sup>87</sup> Ibid. 54.

<sup>88</sup> Frances Perraudin, ‘Boy of five among nearly 400 sexting cases dealt with by police’ *The Guardian* (12 July 2017) <<https://www.theguardian.com/society/2017/jul/12/sexting-boy-five-400-police-children-explicit-pictures>> accessed 30 August 2017. This article reports that a 10 year-old boy used an application (an ‘app’) called ‘Oovoo’ to send an explicit image. ‘Oovoo’ describes itself as follows: ‘We’re a global social media platform for connecting with friends and family via high quality video chat, video messaging and rich, collaborative video stories.’ See <<https://www.oovoo.com/about.html>> accessed 30 August 2017.

<sup>89</sup> Philip Armstrong, *Reticulations: Jean-Luc Nancy and the Networks of the Political* (University of Minnesota Press, 2009), 76.

<sup>90</sup> Eraker (n 1), 563.

<sup>91</sup> Armstrong (n 89), 78: ‘When and wherever a television is switched on, when and wherever a phone call is made, when and wherever an Internet connection is established, the question of “critical culture, of democracy, of the political, of deterritorialization erupts”, whether this situation also implies the relatively simple procedures of using a mobile phone, going online, or analyzing how the techno-artistic production of film and television now possesses the ability, unprecedented in the history of humanity, to find itself almost immediately plugged into a global market.’ The quote in Armstrong’s passage is taken from Derrida and Stiegler (n 78), 65.

the fax, [email] is on the way to transforming the entire public and private space of humanity.’<sup>92</sup> Email’s importance lay in its ‘unprecedented rhythm’ and ‘quasi-instantaneous’ delivery of information,<sup>93</sup> which we now see as the lynch-pin of sexting. Whereas the prior generations of adolescents ‘who took provocative self-portraits faced the hurdle of developing the film at a photo lab, and distribution was limited by the numbers of copies purchased,’<sup>94</sup> in today’s digital world ‘camera phones and broadband connections enable instantaneous production and distribution’ of the very same provocative self-portraits.<sup>95</sup>

The study of speed, ‘dromology,’ had been at the core of French theorist Paul Virilio’s work since the late-1970s.<sup>96</sup> In 1977 Virilio stated: ‘Western man has appeared superior and dominant, despite inferior demographics, because he appeared *more rapid*.’<sup>97</sup> And in 1998,<sup>98</sup> four years after Derrida’s comments on email, Virilio commented that email represented the development of a ‘*cyber-acceleration*’<sup>99</sup> leading to ‘the instantaneity of the real-time image.’<sup>100</sup> In Derrida’s work on the revolutionary capabilities of email, he sought to convey the ‘geo-techno-logical shocks’ which would have been felt by previous generations if they ‘had had access to ... computers, printers, faxes, televisions, teleconferences, and above all E-mail.’<sup>101</sup> Such ‘geo-techno-logical-shock[s]’ relating to the speed and instantaneity of sexting are partly responsible for the contemporary problems in legislating for this act but such difficulties caused by the instant communications of mobile phones need to be recognised and accounted for, not ignored, as Derrida illustrated.

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<sup>92</sup> Jacques Derrida, *Archive Fever: A Freudian Impression* (Eric Prenowitz tr, The University of Chicago Press, 1996), 17.

<sup>93</sup> Ibid. See also Carsten Strathausen, ‘The Philosopher’s Body: Derrida and Teletechnology’ (2009) *CR: The New Centennial Review* 9(2) 139, at 145: ‘In other words, what separates writing from teletechnologies is the latter’s unprecedented speed of recording, distributing, and reconstituting images and other information. It is a quantitative difference: electronic media move too fast.’

<sup>94</sup> Eraker (n 1), 563.

<sup>95</sup> Ibid.

<sup>96</sup> See Paul Virilio, *Vitesse et Politique* (Édition Galilée, 1977). English translation: Paul Virilio, *Speed and Politics: An Essay on Dromology* (Mark Polizzotti tr, Semioext(e), 2006).

<sup>97</sup> Virilio (n 100, 2006), 70.

<sup>98</sup> Paul Virilio, *La Bombe informatique* (Édition Galilée, 1998).

<sup>99</sup> Paul Virilio, *The Information Bomb* (Chris Turner tr, Verso, 2000), 120.

<sup>100</sup> Ibid. 72.

<sup>101</sup> Derrida (n 92), 16.

*Digital and analogue writing.*

Derrida's engagement with digital writing also focused on some of the technologies shaping writing's future, including home computers and the writing programmes featured on them. <sup>102</sup> Derrida engaged with the thought of the German philosopher Martin Heidegger regarding the 'authenticity' of writing produced by methods beyond the hand and the pen. Heidegger's renowned pessimism for technology was not shared by Derrida <sup>103</sup> but Heidegger's work offers an interesting point of note regarding sexting. Heidegger argued that a type of pragmatism associated with the hand – from the Greek word 'πράγμα' <sup>104</sup> – would be lost due to technological advances. Significantly, his famous case-study for this point focused on the difference between writing by hand and writing via a typewriter:

The typewriter veils the essence of writing and of the script. It withdraws from man the essential rank of the hand, without man's experiencing this withdrawal appropriately and recognizing that it has transformed the relation of his Being to his essence. <sup>105</sup>

Heidegger argued that 'inauthentic' technology wrought the decline of pragmatism, or '*Handlung*' in German, in which 'thing and activity are thought in the unity of a *Handeln* governed by the essence of the hand.' <sup>106</sup> He commented: 'The essence of modern technology lies in enframing. Enframing belongs within the destining of revealing ... The destining of

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<sup>102</sup> See Jacques Derrida, 'The Word Processor' in Jacques Derrida, *Paper Machine* (Rachel Bowlby tr, Stanford University Press, 2005), 19–32, and Jacques Derrida, 'Paper or Me, You Know ... (New Speculations on a Luxury of the Poor)' in Jacques Derrida, *Paper Machine* (Rachel Bowlby tr, Stanford University Press, 2005), 41–65. See also Ferraris (n 17), 176–177: 'The instrument that has made most of an impact on the world of today, the computer, was first thought of as a calculating apparatus and then used for registering writing; only later did it evolve, just as happened to the ancient scripts, into a means of communications.'

<sup>103</sup> Jacques Derrida, 'Geschlecht II: Heidegger's Hand' in John Sallis (ed) *Deconstruction and Philosophy: The Texts of Jacques Derrida* (University of Chicago Press, 1987), 172. Here Derrida remarks that Heidegger's thought operates as a failed 'artisanalist protest against the hand's effacement or debasement in the industrial automation of modern mechanization.' And see at 173, where Derrida labels Heidegger's account of the hand as 'seriously dogmatic' because 'Heidegger takes no account of a certain "zoological knowledge"' regarding the 'animality' he pejoratively casts upon those who are without hands.

<sup>104</sup> See Martin Heidegger, *Parmenides* (André Schuwer and Richard Rojcewicz tr, Indiana University Press, 1992), 84: 'We translate *πράγμα* as "action" [*Handlung*]. This word, however, does not mean human activity (*actio*) but the unitary way that at any time things are on hand and at hand, i.e., are related to the hand, and that man, in his comportment, i.e., in his acting by means of the hand, is posited in relation to the things.'

<sup>105</sup> Ibid. 85.

<sup>106</sup> Christopher Fynsk, *Language and Relation: ...that there is language* (Stanford University Press, 1996), 105.

revealing is in itself not just any danger, but *the* danger.’<sup>107</sup> The dangerous technology of the typewriter would no doubt extend to the computer, the laptop, and certainly to the mobile phone. Timothy Campbell comments that Heidegger’s work on technology is ‘thanatopolitical,’ meaning that technology is presented as a phenomenon inextricably linked with controlling and driving life towards death.<sup>108</sup> Heidegger’s work presents a ‘deep association of improper writing’ with ‘a technologically rendered revelation that places mankind at risk,’<sup>109</sup> and further his work also operates ‘in the knowledge that where technology is augmented, (human) beings can be dominated.’<sup>110</sup>

One wagers that Heidegger would view that the aforementioned sexting ‘timebomb’ is due the damaging prevalence of the mobile phone in today’s world.<sup>111</sup> And perhaps Heidegger’s most relevant account of the damage being done comes from his warning of technology’s ability to ‘captivate,’ ‘bewitch,’ and ‘dazzle’ to the point where it ‘come[s] to be accepted and practiced as *the only* way of thinking.’<sup>112</sup> In our contemporary world there seems to be little beyond, or little which surpasses, the ubiquity, power, borderless-reach, and instantaneity of the mobile phone.

### *Law in the digital age.*

The final point to take from Derrida’s work on digital technologies concerns his thought on how law would inevitably have to adapt to such technologies. Beginning with a reflection on the 1991 Rodney King police-brutality case in Los Angeles,<sup>113</sup> Derrida remarked that as a consequence of a world in which consumer electronics, email, and the internet would soon

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<sup>107</sup> Heidegger (n 63), 330, 331.

<sup>108</sup> For perhaps the most famous originary work on ‘thanatopolitics’ see Michel Foucault, *The Will to Knowledge: The History of Sexuality, Vol. 1* (Robert Hurley tr, Penguin Books, 1998), 137: ‘entire populations are mobilized for the purpose of wholesale slaughter in the name of life necessity: massacres have become vital.’ For a recent application of thanatopolitics, see Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen tr, Stanford University Press, 1998).

<sup>109</sup> Timothy Campbell, *Improper Life: Technology and Biopolitics from Heidegger to Agamben* (University of Minnesota Press, 2011), 17. See in general 1–30.

<sup>110</sup> *Ibid.* 30.

<sup>111</sup> Rigby (n 27).

<sup>112</sup> Martin Heidegger, *Discourse on Thinking* (John M. Anderson and E. Hans Freund trs, Harper and Row, 1966), 56.

<sup>113</sup> Derrida and Stiegler (n 78), 90: ‘In the Rodney King case, in California, it just so happened that a witness, equipped with a videocamera that his parents had given him, was there when police officers beat up Rodney King. Thus there was a live image of the event.’

become prevalent, legal systems would have to evolve: ‘the entire axiomatic of law or, in any case, of the Western law we’re talking about, clearly has to be and will have to be transformed and relaborated in view of the technological mutations we’re talking about.’<sup>114</sup> Although blunt, Derrida’s thesis was nevertheless correct: juridical systems did have to accommodate the technological revolutions of the digital age and the abilities they provided for legal testimony, evidence, and the more general practice of law.<sup>115</sup> Following this remark, Derrida then made a nuanced observation which we can transpose onto the 21<sup>st</sup> century problematic of sexting.

Derrida’s observation referred to the capabilities afforded by ‘Web 2.0.’ He stated: [N]ot only is all regulation in the form of state law, all cultural protection decided by a nation-state dangerous in itself, but it is outdated from a technical standpoint.<sup>116</sup> Referring to the imminent explosion of content creation, Derrida made it clear that law was already out of date ‘from a technical standpoint’ because it could not accommodate a future in which *individuals* created content. Instead, law was premised upon state-created content which was already outdated due to developments where, for example, ‘rock bands have appropriated what are called “samplers” for treating the sound archive, and a new music has appeared, produced primarily through archive manipulation.’<sup>117</sup> With hindsight, this observation speaks volumes regarding the contemporary world in the third millennium in which taking a photo on a mobile phone, or posting to social media, is a banal and everyday common occurrence. And in the case of sexting, this development has not been accounted for in law and consequently, just as Derrida warned, the law is ludicrously outdated from a technical standpoint.

### Derrida, technology, deconstruction.

In summarising Derrida’s thoughts on digital technology, a few key points can be made: he envisioned an age in which digital writing would allow the global public, through new software

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<sup>114</sup> Ibid. 93.

<sup>115</sup> For a recent and insightful account of the how developments in digital and audio-visual mediums have impacted upon the juridical process see Elizabeth G. Porter, ‘Taking Images Seriously’ (2014) 114(7) Columbia Law Review 1687, especially 1711–1740. Also, for a now famous article on how late 20<sup>th</sup> century digital technology affected law – published the year prior to Derrida’s interview with Stiegler – see Ronald K.L. Collins and David M. Skover, ‘Paratexts’ (1992) 44(3) Stanford Law Review 509.

<sup>116</sup> Derrida and Stiegler (n 78), 53.

<sup>117</sup> Ibid.

and devices, to write and instantaneously distribute their own digital content over numerous social planes as ‘addressors’ instead of ‘addressees.’<sup>118</sup> With hindsight, we can note the blistering speed with which Derrida’s vision of writing was achieved:

Facebook was only founded in 2004. YouTube only started in 2005. Twitter was only launched in 2006. Email only got going in the mid-1990s, and mobile phones only became popular around 2000. The rich digital life that we live today only really began around the third millennium.<sup>119</sup>

Today, as a result of the exponential growth of Web 2.0, content creation and distribution via the mobile phone is the writing device for a growing percentage of the global population. As Ferraris commented in 2005, it is plain to see ‘the huge change of the last thirty years, in which we have witnessed an explosion in the systems of registration and of writing, from computers to mobile phones and the Web.’<sup>120</sup> And as if by way of evidencing this, during the time of writing Facebook announced that it now hosts 2 billion monthly users across the globe.<sup>121</sup> This leads to Derrida’s final comment, made in 1996, on how everyday life of the future would be affected by ‘the Web’:

Think about the “addiction” of those who travel day and night in this WWW. They can no longer do without these world crossings, these voyages by sail, or veil, crossing or cutting through them in its turn.<sup>122</sup>

In describing the ‘addiction’ felt amongst early internet users, Derrida was prophetically commenting on a symptom of internet usage which, in the 2010s, has become a well-known issue.<sup>123</sup> A Nielsen study in 2017 found that adults in the U.S., aged 18–34 years old, spend

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<sup>118</sup> Derrida and Stiegler (n 78), 55.

<sup>119</sup> Harcourt (n 8), 131.

<sup>120</sup> Ferraris (n 17), 4.

<sup>121</sup> Christopher Ingraham, ‘If Facebook were a religion, it would be the second largest in the world’ *The Washington Post* (Washington, 30<sup>th</sup> June 2017) <<https://www.washingtonpost.com/news/wonk/wp/2017/06/30/if-facebook-were-a-religion-it-would-be-the-second-largest-in-the-world/>> accessed 30 August 2017.

<sup>122</sup> Derrida (n 102, 2005, ‘The Word Processor’), 27–28. Note that about two years later Derrida stated: ‘I don’t “surf” the internet, even though it is something I use as a theoretical topic, in teaching or elsewhere.’ See Derrida (n 102, 2005, ‘Paper or Me, You Know...’), 64.

<sup>123</sup> Jonah Engel Bromwich, ‘Generation X More Addicted to Social Media than Millennials, Report Finds’ *The New York Times* (New York, 27<sup>th</sup> January 2017) <<https://www.nytimes.com/2017/01/27/technology/millennial-social-media-usage.html>> accessed 30 August 2017.

nearly 27 hours a week connected to some form of audio-visual media: a quarter of that media, over 6 hours' worth, is internet-connected social media and 78% of that social media is accessed via a smartphone. <sup>124</sup> Even J.G. Ballard, when questioned about this issue in 2003, answered that his girlfriend 'lives on the internet' <sup>125</sup> and that 'I observe the Internet over [her] shoulder; I don't want to get too close because it might *suck me in*.' <sup>126</sup> The importance of describing this scale of internet usage, as well as the tremendous amount of content which is written into it, must be recognised when it is recalled, once again, that the current law on sexting does not have any comprehension of this medium and its significance in the 21<sup>st</sup> century.

In now moving to the work of Ferraris, it is important to contextualise this move. During the period of his engagement with digital technology, 1993 to 1996, Derrida was a friend of, interlocutor to, and writing partner with Maurizio Ferraris. This relationship culminated in a co-written book between the two philosophers published in Italian in 1997 and translated into English in 2001 as *A Taste for the Secret*. <sup>127</sup> The book serves as a marker of not only Ferraris' 'Derridean education,' <sup>128</sup> but also the subject matter via which Ferraris became acquainted with deconstruction, because during the writing of the book Derrida was analysing the technologies of home computers, email, and the internet. It was no doubt this which then led Ferraris to investigate the technology, and create a philosophy, of the mobile phone.

#### **4. Maurizio Ferraris: An ontology of the mobile phone.**

Ferraris' project.

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<sup>124</sup> Nielsen, '2016 Nielsen Social Media Report – Social Studies: A Look at the Social Landscape' (Report) January 2017, page 6 <<http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2017-reports/2016-nielsen-social-media-report.pdf>> accessed 30 August 2017.

<sup>125</sup> 'J.G. Ballard and V. Vale' in V. Vale (ed), *J.G. Ballard: Conversations* (RE/Search Publications, 2005), 78.

<sup>126</sup> 'J.G. Ballard and Graeme Revell' in V. Vale (ed), *J.G. Ballard: Conversations* (RE/Search Publications, 2005), 63.

<sup>127</sup> See Jacques Derrida and Maurizio Ferraris, *Il Gusto del Segreto* (Laterza and Figli Spa, 1997), and Jacques Derrida and Maurizio Ferraris, *A Taste for the Secret* (Giacomo Donis tr, Giacomo Donies and David Webb eds, Polity Press, 2001). The book consisted of an essay by Ferraris and a collection six interviews between the two philosophers spanning the period between July 1993 and January 1995.

<sup>128</sup> Maurizio Ferraris, *Introduction to New Realism* (Sarah De Sanctis tr, Bloomsbury, 2015), 9. Also, at 4, Ferraris refers to Derrida as 'one of my great teachers.'

In 2001 Ferraris and Derrida were discussing mobile phones. Ferraris claimed they were ‘stupid machines,’ limited to producing ‘stupid texts,’ whilst computers were ‘intelligent,’ able to produce ‘intelligent essays.’<sup>129</sup> But Derrida’s work from the 1990s led him to argue that soon ‘mobile phones were going to centralize all the functions of a computer with the addition of the one feature that computers were lacking: being with us at all times.’<sup>130</sup> Spurred on by this interjection<sup>131</sup> Ferraris wrote on mobile phones, under Derrida’s influence, and in 2005 published the book *Dove sei? Ontologia del telefonino*, translated into English in 2014 as *Where are you? An ontology of the cell phone*. Ferraris’ book provides the reader with a philosophical, specifically ontological, account of the mobile phone: ‘ontology as the theory of objects is among the most ancient philosophical specialities.’<sup>132</sup> This account answers the question of what this device ‘is’ in our contemporary lives: ‘the mobile phone becomes a great constructor of social reality; this is the theoretical point I wish to call to your attention to.’<sup>133</sup> Ferraris’ work presents the mobile phone to the reader as a machine for writing, which creates our social ontology via a theory of ‘weak textualism.’ The following section engages with Ferraris’ book, to then relate his work to the contemporary act of sexting.

Mobile phones: writing machines of the ‘hand.’

Ferraris argues that understanding the mobile phone follows from knowing what it *does*. Despite hatred of the device by some, including Ferraris’ peer in Italian contemporary philosophy Giorgio Agamben,<sup>134</sup> it cannot be denied that because of what the device does it has

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<sup>129</sup> Ferraris (n 7), 1.

<sup>130</sup> Ibid. 2. Note that as early as 2001 Derrida was using his mobile phone as a device to provide him with news. See Nicholas Royle, *In Memory of Jacques Derrida* (Edinburgh University Press, 2009), 105: ‘He [Derrida] said good morning to us and then: “Bin Laden may have a nuclear device.” There was nothing about this in the British newspapers in the hotel that morning. He had heard about it via his mobile phone from Paris.’

<sup>131</sup> Note that Ferraris aimed to organise a conference with Derrida to take place, in 2005, titled ‘Seeing, Understanding, Learning in the Mobile Age.’ However due to Derrida’s death in 2004 this never came to fruition. See Ferraris (n 7), 2.

<sup>132</sup> Ibid. 37.

<sup>133</sup> Ibid. 4.

<sup>134</sup> Giorgio Agamben, *What is an Apparatus? and Other Essays* (David Kishik and Stefan Pedatella trs, Stanford University Press, 2009), 15–16: ‘For example, I live in Italy, a country where the gestures and behaviours of individuals have been reshaped from top to toe by the cellular telephone (which the Italians dub *telefonino*). I have developed an implacable hatred for this apparatus, which has made the relationship between people all the more abstract.’



changed ‘the gestures and behaviours’ of its users. <sup>135</sup> The behaviour of mobile phone users is dictated by the fact that ‘the mobile phone constitutes an eminent social object, just like credit cards and documents.’ <sup>136</sup> It is the combination of a wireless telephone, the utilities found in ‘agendas and address books, watches and alarm clocks, cameras and recorders,’ <sup>137</sup> and an entertainment device for ‘images, videos, films, [and] music.’ <sup>138</sup> And all these features, as well as the ability to instantaneously share user-generated content across borders, are housed in a small wireless device which concentrates its operation to our hand, as Heidegger noted was so important for an authentic human experience: ‘The kind of Being which equipment possesses – in which it manifests itself in its own right – we call “*readiness-to-hand*” (*Zuhandenheit*).’ <sup>139</sup> Ferraris argues that because the mobile phone is a ‘handy and hand-sized,’ <sup>140</sup> ‘handy and palm-sized,’ <sup>141</sup> ‘a hand-sized object,’ <sup>142</sup> it replaces the computer at ‘the center of everything: intentions and intuitions, writing and images, affects, [and] instrumental communication.’ <sup>143</sup> The mobile phone is *the* quintessential object of the 21<sup>st</sup> century and is the ‘writing machine’ of our age, as the culmination of Derrida’s deconstructive analysis of digital technology. <sup>144</sup> And, more pertinently concerning sexting, it is ‘the specific features or affordances of mobile phones, social networking sites and other communication technologies’ which allow for the ‘creation, exchange, collection, ranking and display of images.’ <sup>145</sup>

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<sup>135</sup> Ibid. 15.

<sup>136</sup> Ferraris (n 7), 29.

<sup>137</sup> Ibid. 10.

<sup>138</sup> Ibid. 11.

<sup>139</sup> Martin Heidegger, *Being and Time* (John Macquarrie and Edward Robinson trs, Blackwell Publishing, 1962), 98. See also 95–122 (§§15–18) generally.

<sup>140</sup> Ferraris (n 7), 64.

<sup>141</sup> Ibid. 62.

<sup>142</sup> Ibid. 65. Of note here is that the relationship between the size of the mobile phone’s screen and the hand’s reach, flexibility, and dexterity, is already a major concern to manufacturers. See Yu-Cheng Lin, ‘The Relationship between Touchscreen Sizes of Smartphones and Hand Dimensions’ in Constantine Stephanidis and Margherita Antona (eds), *Universal Access in Human-Computer Interaction: Applications and Services for Quality of Life* (Springer, 2013), 643.

<sup>143</sup> Ferraris (n 7), 64.

<sup>144</sup> Ibid. 44. See also 59: ‘[the mobile phone] unifies in a limited space *all* of the functions listed so far [telephone, email, internet], thus constituting the *absolute device*, and because it is mobile, it also presents itself as the effect of writing and teleportation. It is a gigantic and yet pocket-size archive that one day will incorporate all kinds of the data about us.’

<sup>145</sup> Ringrose, Gill, Livingstone, and Harvey (n 25), 8.

In context, this quintessential device is used by adolescents ‘every second of the day’: ‘If I am not using it I feel a bit weird.’<sup>146</sup> And their use ‘from waking up in the morning to going to sleep at night’<sup>147</sup> is partly encouraged by the privacy the device affords, which in turn allows adolescents to experiment with sexualised content, such as sexting, away from prying eyes:

With your Blackberry like with my phone, my parents don’t really check my phone yeah. That is why most people hide their stuff in their Blackberry. But on Facebook yeah like it is normal for your parents or you family to have Facebook, and they will check it.<sup>148</sup>

The personal nature of the mobile phone has led to an unprecedented connection between the sexual lives of adolescents and the digital world: ‘[k]ids can access the technologies anywhere and there are so many of them.’<sup>149</sup> And such privacy to conduct digital sexual relationships is shaping their lives at a rapid pace: ‘The prevalence of mobile internet technologies in young people’s lives was dramatically reshaping modes of communication, peer intimacy, and even romantic relationships.’<sup>150</sup> But as Ferraris’ work illustrates the significance of the mobile phone does not end with its status as the ultimate writing machine and the bridge for digital-sexuality, because it also has ontological ramifications regarding the social world and ‘weak textualism.’ These ramifications lead to another crucial insight into why neglecting the mobile phone in legislating against sexting is a catastrophic error because the mobile phone writes real, significant, and powerful social objects into our world which must be accounted for.

‘Weak textualism’: the ontology of the mobile phone.

Following the account of the mobile phone as the ultimate device, Ferraris then moves to illustrate its ontological significance through his own philosophy – ‘I propose a *theory of writing*’<sup>151</sup> – which is influenced by, and yet critical of, Derrida’s thought. Ferraris’ ontology is critical of Derrida’s famous maxim ‘[t]here is nothing outside of the text,’<sup>152</sup> which declared ‘the

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<sup>146</sup> Ibid. 26. This is the transcript of a school girl 13-14 years old taken from the interview contained in the report.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid. 27. This is part of the same transcript referred to in (n 146).

<sup>149</sup> Shariff (n 35), 97.

<sup>150</sup> Ringrose, Gill, Livingstone, and Harvey (n 25), 27.

<sup>151</sup> Ferraris (n 7), 5.

<sup>152</sup> Derrida (n 61), 158.

nonexistence of a reality independent from our interpretations, the language we use, and the theories through which we refer to it.’<sup>153</sup> Derrida’s declaration comes from his lack of belief in a ‘transcendental signifier.’<sup>154</sup> Yet Ferraris argues this is a ‘transcendental fallacy’<sup>155</sup> on Derrida’s behalf because it is *not* the case ‘that reality, including physical objects, depend[s] on our conceptual schemes.’<sup>156</sup> As Ferraris puts it, ‘mountains and rivers are what they are all on their own,’ and thus exist independently of what Derrida would call ‘texts.’<sup>157</sup> Given this, Ferraris argued *only* certain types of objects in the world which are dependent on ‘texts,’ things he refers to as ‘social objects’:

My claim, then, is that “there is nothing *social* outside the text” and not “there is nothing outside the text,” since the constitutive role of social objects is Object = Inscribed Act.<sup>158</sup>

The claim that ‘there is nothing outside the text’ only applies, for Ferraris, when referring to ‘social objects.’ These are but one kind of object within a range of three classifiable kinds.<sup>159</sup> First there are ‘physical objects’ such as ‘mountains, chairs, tabernacles,’ ‘Mont Blanc,’ or any other ‘objects [which] do not depend on subjects.’<sup>160</sup> These objects ‘exist in space and time, and are independent from subjects knowing them.’<sup>161</sup> Secondly there are ‘ideal objects,’ like ‘the properties of a triangle,’ ‘an arithmetic operation,’ or ‘the principle of noncontradiction,’ which ‘are discovered and not invented.’<sup>162</sup> These differ from ‘physical objects’ because an ‘ideal object’ does not exist in space and time yet it does require the interaction of a subject ‘in the phase of their socialization: I discover a theorem and publish the outcome.’<sup>163</sup> Thirdly and most importantly for Ferraris, are ‘social objects’ such as ‘a promise, a bet, a federal state, a football

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<sup>153</sup> Ferraris (n 7), 138.

<sup>154</sup> Derrida (n 74), 354: ‘The absence of the transcendental signified extends the domain and the play of signification infinitely.’

<sup>155</sup> Ferraris (n 17), 60.

<sup>156</sup> Ibid. See also Ferraris (n 128), 7: ‘Yet when my teacher Derrida wrote “there is nothing outside the text” he implied that even heartbeats and breathing are socially constructed. Such a thesis is excessive and means everything and nothing, exposing one to easy criticism.’

<sup>157</sup> Ferraris (n 17), 130.

<sup>158</sup> Ibid. 159–160.

<sup>159</sup> Ferraris (n 67), 91: ‘Objects come in three kinds.’

<sup>160</sup> Ferraris (n 7), 41.

<sup>161</sup> Ferraris (n 67), 91.

<sup>162</sup> Ferraris (n 7), 41.

<sup>163</sup> Ibid.

team, or an epic poem.’<sup>164</sup> These objects ‘do not exist *as such* in space, since their physical presence is limited to [an] inscription,’<sup>165</sup> thus they only exist when ‘they exit from the mind of one person, are made manifest, and are then inscribed in the external world,’ in what Derrida would call a ‘text.’<sup>166</sup> These ‘texts’ can consist of ‘an *inscription* on paper, magnetic memory, or a person’s mind.’<sup>167</sup> And social objects, such as ‘legal writings,’ ‘ID cards,’ and ‘credit cards,’ are now becoming inscribed due to ‘simply *blips* in the computer.’<sup>168</sup> Here it becomes clear why Ferraris’ ontology is so pertinent for sexting: the ‘sext’ is a social object:

Social objects follow from the registration of acts that involve at least two persons and that are inscribed on any kind of physical medium, from marble to neurons, by way of paper and the world of the web.<sup>169</sup>

Consequently, as a social object the sext is the *only* type of object for which Ferraris would agree with Derrida that there is ‘*nothing outside of the text.*’<sup>170</sup> This means that even though Ferraris’ ‘viewpoint derives directly from Derrida’s philosophy,’ which itself ‘offers the basis for a very powerful social otology,’<sup>171</sup> there are nevertheless key ‘corrections’ which Ferraris makes to Derrida’s work. For example: ‘In short, triangles exist even without an inscription, but contracts do not, and Derrida confused triangles with contracts.’<sup>172</sup>

Ferraris’ theory is named ‘weak textualism’: it accounts for the process through which ‘social objects are constructed by idiomatic inscriptions’ and then exist thereafter within ‘texts.’<sup>173</sup> This theory is a ‘weakening of Derrida’s thesis’ because it reduces ‘[*t*]here is *nothing outside of the text*’ into ‘there is nothing *social* outside the text.’<sup>174</sup> Weak textualism provides the social ontology in Ferraris’ work, ‘allow[ing] him to understand, and make us understand, mobile

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<sup>164</sup> Ferraris (n 17), 30.

<sup>165</sup> Ferraris (n 67), 91.

<sup>166</sup> Ferraris (n 17), 30.

<sup>167</sup> Ferraris (n 7), 42.

<sup>168</sup> Ibid. 113.

<sup>169</sup> Ferraris (n 17), 159.

<sup>170</sup> Ferraris (n 7), 138–139. And see Derrida (n 60), 158.

<sup>171</sup> Ferraris (n 17), 159.

<sup>172</sup> Ferraris (n 7), 139.

<sup>173</sup> Ibid. 138.

<sup>174</sup> Maurizio Ferraris, *Manifesto of New Realism* (Sarah De Sanctis tr, State University of New York Press, 2014), 56. See also Ferraris (n 17), 128, for his comment that Derrida’s thesis was ‘too strong.’

phones,’<sup>175</sup> because it explains that through the writing which they enable, there is a ‘world in which the mobile phone exists but which, rather paradoxically, seems also to exist *in* the mobile phone.’<sup>176</sup> As Harcourt comments:

For many of us, our digital existence has become our life – the pulse, the bloodstream, the current of our daily routines. For adolescents and young adults especially, it is practically impossible to have a social life, to have friends, to meet up, to go on dates, unless we are negotiating the various forms of social media and mobile technology.<sup>177</sup>

Here it becomes even clearer how and why Ferraris’ work vividly resonates with act of sexting. The mobile phone dominates in creating a very particular type of philosophical object and a world thereafter, in which sexting resides. Said differently, if the mobile phone is ‘an absolute object precisely in that it is, so to speak, a mouse that needs no computer,’<sup>178</sup> then it is the culmination of all digital writing technology and is at the forefront of writing our social ontology: this is what we learn initially from Derrida’s, and then Ferraris’, philosophy of writing. Weak textualism is shown to be at its most pertinent when one asks the question ‘what is there inside the computer?’: ‘An enormous mass of registration and inscription, just as there is in your mobile phone and in so many other gadgets. I think it would be harder to find a stronger proof of weak textualism.’<sup>179</sup> Thus, Ferraris’ work on both the mobile phone as a device, and weak textualism as an ontological theory, explains the social and ontological grounding for sexting.

Turning to sexting, given that adolescents’ ‘habitual use of and reliance of digital technology as an essential means of peer networking’ is at an all-time high,<sup>180</sup> the mobile phone reigns in creating social objects. These include SMS, MMS, and platform hosted messages (‘WhatsApp,’ ‘Snapchat,’ etc), as well as emails, and what have been defined as ‘web 2.0 activities’<sup>181</sup> which

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<sup>175</sup> Ferraris (n 7), ix.

<sup>176</sup> Ibid. 120.

<sup>177</sup> Harcourt (n 8), 18.

<sup>178</sup> Ferraris (n 7), 38.

<sup>179</sup> Ferraris (n 17), 159.

<sup>180</sup> Stone (n 10), 267.

<sup>181</sup> Ringrose, Gill, Livingstone, and Harvey (n 25), 9.

include social media posts. <sup>182</sup> Ferraris noted this in 2009 whilst writing a book which would be translated into English in 2013 as *Documentality: Why It Is Necessary to Leave Traces*. <sup>183</sup> Because in 2009 all his projections from 2005 had been proved correct, by the release and exponential success of the Apple iPhone in 2007: ‘...the iPhone. What is futuristic about this? ... the only speed that is used to measure its efficiency is that of its connection ... it is more convenient for writing and registering.’ <sup>184</sup> Indeed, as per Professor John Naughton in 2016:

The iPhone was the first real smartphone and it changed the world because it changed the way people connected to the net. It began the inexorable drift away from desktop and laptop computers as our gateways to the internet. In the next 10 years or so, another 5 billion of our fellow citizens will get internet connectivity, and almost all of them will acquire it via a smartphone. Which means that – as network infrastructure improves – people will be online for most of their waking lives. <sup>185</sup>

This revolutionary moment attached to the most successful smartphone model signals the fruition of Ferraris’ theory on mobile phones and his ontology of weak textualism. It also serves to highlight what is at stake in understanding and then successfully legislating the behaviour associated with these devices, a task which the article now revisits.

## 5. Sexting re-examined: social ontology and law.

This section uses Derrida’s and Ferraris’ works on digital technology and mobile phones to provide a nuanced assessment of sexting. Their works will be used to illustrate the technological developments, philosophical implications, and cultural resonances behind sexting, in order for the law surrounding this act to be made more representative of the world it aims to govern. This is an alternative methodology to the current positivist frameworks applied to this issue which, as aforementioned, tend to only focus on the, nevertheless significant, difficulties regarding whether

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<sup>182</sup> Recall the Nielsen study (n 124) referred to above, in which it was found (at 6) that of the 27 hours a week that adults in the U.S. aged 18–34 years old spend connected to audio-visual media, 78% spent of the time on social media is via a mobile phone.

<sup>183</sup> Originally published in Italian in 2010 as Maurizio Ferraris, *Documentalità: Perché è Necessario Lasciare Tracce* (Laterza & Figli Spa, 2010).

<sup>184</sup> Ferraris (n 17), 180.

<sup>185</sup> John Naughton, ‘2007, not 2016, is the year the world turned upside down’ *The Guardian* (London 27 November 2016) <<https://www.theguardian.com/commentisfree/2016/nov/27/2007-not-2016-year-world-turned-upside-down-rapid-technological-change>> accessed 30 August 2017.

the acts in question should be prosecuted or not. <sup>186</sup> However, as noted by Nicola Henry and Anastasia Powell, attention needs to move beyond positivist accounts to investigate wider issues such as ‘service providers of online communities and social media networks’ <sup>187</sup> because these technological pathways and means allow for sexting to occur.

### Writing social objects.

The works referred to above offer profound reflections on what is currently happening in a world in which mobile phones are ubiquitous. At an unprecedented speed, hundreds – if not thousands – of millions of people are creating social objects via mobile writing machines and are weaving those objects into the ‘text’ of the internet. This ontological act is now occurring on an epic scale. The ‘Pew Research Center’ in Washington D.C. estimates that in late 2016, of the 86% of Americans who use the internet, 79% of those use Facebook: <sup>188</sup> approximately 220 million users. And of those 220 million users who are active on the world’s largest social media website, 77% of them own a smartphone: approximately 170 million people. <sup>189</sup> These figures are just from the United States, whereas it is estimated that globally there are 2 billion monthly Facebook users and the fastest growing proportion of those users use a mobile phone. <sup>190</sup> Turning to the app which is perhaps most infamous for sexting, ‘Snapchat,’ <sup>191</sup> this specifically mobile-based platform hosts 158 million daily users who create 2.5 billion ‘snaps’ everyday. <sup>192</sup> This is an example of what Derrida hypothesised in 1993, whereby the addressee has become the addressor, <sup>193</sup> and exactly as Ferraris had hypothesised in 2005 whereby the world ‘rather

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<sup>186</sup> See Stone (n 10), 273–278.

<sup>187</sup> Henry and Powell (n 35), 411.

<sup>188</sup> See Shannon Greenwood, Andrew Perrin, and Maeve Duggan, ‘Social Media Update 2016’ *Pew Research Center* (Washington DC 11 November 2016) <<http://www.pewinternet.org/2016/11/11/social-media-update-2016/>> accessed 30 August 2017.

<sup>189</sup> See — ‘Mobile Fact Sheet’ *Pew Research Center* (Washington DC 11 November 2016) <<http://www.pewinternet.org/fact-sheet/mobile/>> accessed 30 August 2017.

<sup>190</sup> See — ‘Facebook Stats’: ‘2.01 billion monthly active users of June 30, 2017’ (2017) <<https://newsroom.fb.com/company-info/>> accessed 30 August 2017.

<sup>191</sup> Snapchat is perhaps the app which is most associated with sexting because once an image is sent using the app it self-erases after a designated time, increasing the user’s experience of sexual immediacy and erasing evidence of the taboo act of self-exposure.

<sup>192</sup> See Edward Helmore, ‘Snapchat shares soar 44% to value loss-making company at \$28bn’ *The Guardian* (London 3 March 2017) <<https://www.theguardian.com/technology/2017/mar/02/snapchat-ipo-valuation-evan-spiegel-bobby-murphy-snap-inc>> accessed 30 August 2017.

<sup>193</sup> Derrida and Stiegler (n 78), 55.

paradoxically, seems also to exist *in* the mobile phone.’<sup>194</sup> There are now billions of social objects created every day and to ignore this truth in developing legislation is lunacy, if the law wishes to be adequately representative of the society it is supposed to govern, as is shown with the CJCA 2015’s prohibition of revenge pornography.

An understanding of contemporary digital culture illustrates that the third millennium is responsible for the creation of an entirely new world, in which the digital self is gathering prominence over the limited analogue self:

...our lived experience is gravitating dramatically from the analog to the digital. The digital self, the second body of today’s liberal democratic citizen, is overtaking his analog physical existence and becoming far more permanent, durable, tangible, and demonstrable.<sup>195</sup>

This new digital world, which Ferraris shows *is as* a real world as one occupied by rivers and mountains, has now drastically ‘outpaced both the law and technological limitations of prior generations.’<sup>196</sup> And in a time where ‘the societal veil cloaking teenage sexuality has been lifted entirely and budding libidos have escaped from dim basements into cyber space,’<sup>197</sup> the SOA 2003 produces three consequent failures by ignoring this.<sup>198</sup> They relate to those ‘born digital,’ the legal boundaries attached to sexual behaviour, and the significance of age.

### Three flaws of the current law.

#### *1. Those ‘born digital.’*

The first failure relates to the adolescents who were ‘born digital.’<sup>199</sup> These adolescents do not know a world without the internet and consequently their interactions with this omnipresent

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<sup>194</sup> Ferraris (n 7), 120.

<sup>195</sup> Harcourt (n 8), 236.

<sup>196</sup> Eraker (n 1), 556.

<sup>197</sup> Julia Halloran McLaughlin ‘Crime and Punishment: Teen Sexting in Context’ (2010) Vol.115(1) *Peen State Law Review* 136, at 137.

<sup>198</sup> See SC Deb (B) 18 September 2003, cols 247–258. Once again, to be noted here is that in this debate of raising the age of an ‘adult’ to 18 years of age regarding the distribution of sexual imagery, the words ‘digital,’ ‘mobile,’ ‘phone,’ or ‘text,’ were nowhere to be found.

<sup>199</sup> Eraker (n 1), 560.



network are starkly different to those from previous generations. For example, ‘most major aspects of their lives are mediated by digital technologies, from social interactions to academics to hobbies and entertainment.’<sup>200</sup> Moreover, the ‘born digital’ generation experience life in which ‘digital technology is breaking down whatever semblance of boundaries existed ... between the state, the economy, and private existence, between what could be called governing, exchanging, and living.’<sup>201</sup> In this new epoch in which there is an increasing blur between work and play, public and private, exposition and intimacy, it is nonsensical to demarcate the internet as something ‘other’ than a real and tangible aspect of an individual’s personal life. Rather, ‘[t]hese technologies are loved and felt to be central to life, and to young people’s sense of self. Indeed, life could be unthinkable without them.’<sup>202</sup> This is Ferraris’ point when he states that the ‘social objects’ which inhabit these digital technologies, such as the sexual image sent in a sext, ‘possess an autonomy and a hard, obtrusive, cutting and sometimes even dramatic consistency, which makes them very different from shadows or dreams’:<sup>203</sup> in short, social objects are real and have profound impacts upon people’s lives. As has been documented with adolescent school girls in Britain: ‘Mobile technologies, and in particular smart phones, suffuse the everyday lives of young people, structuring and shaping their experiences. As this group of 14–15 year old girls told us, their mobiles are a constant from waking up in the morning to going to sleep at night.’<sup>204</sup> Thus, whereas older generations may see socializing through the internet as some sort of supplement to ‘real life,’ for the ‘born digital’ generation socialization via the internet and social objects *is* real life:

Mobile digital technologies are coming to permeate more and more aspects of young people’s lives, with young people suggesting they would ‘die’ without their phones, that phones and social networks play a ‘massive part’ in their relationships, and are shaping most aspects of everyday lives.<sup>205</sup>

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<sup>200</sup> Ibid.

<sup>201</sup> Harcourt (n 8), 25–26.

<sup>202</sup> Ringrose, Gill, Livingstone, and Harvey (n 25), 27.

<sup>203</sup> Ferraris (n 17), 126.

<sup>204</sup> Ringrose, Gill, Livingstone, and Harvey (n 25), 26.

<sup>205</sup> Ibid. 53.

Thus the weaving of social objects into the ‘text’ of the internet is not merely a banal activity for ‘born digital’ adolescents, it is their lifeblood. Consequently, the internet then becomes a natural medium through which to express sexuality and sexual identity, as noted by Joshua Garrison who comments that ‘Web 2.0’ and ‘other interactive technologies, including the proliferation of inexpensive and embedded photographic and videographic equipment,’ have ‘democratized’ pornography so that now ‘production itself has been decentered, and the boundaries between the pornographic consumer and producer have become blurred.’<sup>206</sup> Garrison’s sentiment affirms and evolves Derrida’s hypothesis from 1993,<sup>207</sup> whilst accurately accounting for how content creation has now, naturally, paved the way for sexting: ‘[s]exting could be viewed as merely an expression of teen sexuality in a digital age, reflecting a long-documented trend of teens “using whatever technology is at hand to express themselves and share their behaviour with the world.”’<sup>208</sup> As explained by Shaheen Shariff, apps such as Snapchat ‘are attractive to a captive generation of youth who test social boundaries online as their hormones rage.’<sup>209</sup> She then makes the nuanced point that this is really ‘no different from when social relationships were developed in the back seat of a car at a drive-in’ in the 1950s.<sup>210</sup>

Given this, there is great harm done to the lives of those who now find themselves dictated to by a law which has absolutely no understanding of what it means to engage in the creation of social objects as a natural action in the 21<sup>st</sup> century. Returning to Shariff’s insightful work, this is the huge problem with a legal system which ‘focus[es] on the kids’ behaviour *as though* they were living in a society without influences.’<sup>211</sup> And from this then emerges the second point of failure: outdated legal boundaries given to sexual behaviour.

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<sup>206</sup> Joshua Garrison, ‘The Self-Porning of American Youth’ (2011) Vol.392 Counterpoints: the sexuality CURRICULUM and youth CULTURE 348, at 349. Garrison continues: ‘Digital cameras are now ubiquitous and are connected directly to the online universe; social networking sites allow for the exchange of these images; and the genre of “amateur,” “reality,” and “voyeur” porn has enticed many to utilize these technologies to broadcast themselves in what has become a frenzied, chaotic, and impossible-to-control pornographic landscape where former roles are upended. ... Now, it seems, young people have become active producers of their own pornography, circulating these images in an interactive and underground virtual dimension that challenges not only adult control, but the very logic of the pornography industry.’

<sup>207</sup> Derrida and Stiegler (n 78), 53.

<sup>208</sup> Eraker (n 1), 563. The quote here is taken from Mary E. Muscari, ‘Sexting: New Technology, Old Problem’ (2009) 1 May 2009 Medscape Today <<http://www.medscape.com/viewarticle/702078>> accessed 30 August 2017.

<sup>209</sup> Shariff (n 35), 77.

<sup>210</sup> Ibid.

<sup>211</sup> Ibid. 97. Emphasis added.

## 2. *The legal boundaries of sexual activity.*

It is perhaps at least some consolation that noted authorities and legal scholars have realised the violent irony in deeming those who are below the age of majority to be ‘child pornographers.’<sup>212</sup> A law which indiscriminately labels and sanctions all adolescents for their actions regarding sexting is simply not fit for purpose. In fact, it is pertinent to note that in England and Wales, at the time of writing, there has not yet been a single prosecution for sexting, despite the fact that the data points to tens of thousands of instances taking place.<sup>213</sup> This is no doubt due, in part, to the Crown Prosecution Service’s strong line of resistance against prosecution.<sup>214</sup> As well as this, official guidance from the ground-breaking NSPCC study into sexting from 2012 advises that:

Importantly, unlike bullying, it cannot simply be generalised that all sexting is a problem. Thus any teacher must encompass within the discussion the recognition that young people are legitimately interested in their developing sexuality; thus exploring or playing with sexual ideas or relationships should not be ignored or rejected but issues of respect, consent and reciprocity in sexual relationships, including digital sexual communications should be discussed.<sup>215</sup>

These evidential points signal towards a growing concern with the inaccurate, indiscriminate, and ill-thought legislation governing the sexual lives of adolescents with regards to sexting. The law which is in place requires amendment so that the consensual distribution of sexually explicit images is legal when done by those who are legally able to participate in the very activity which

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<sup>212</sup> Fenhalls (n 40) and Shariff (n 35), 76. See also McLaughlin (n 197), at 173–174, for an insight into the North American context. Here McLaughlin argues that legislators in the United States need, at state-level, to reflect a ‘zone of teen privacy’ within which adolescents are afforded rights to engage in the adult conduct of sexting, in parallel to their rights to acts such as marriage, consensual sex, obtaining contraception and abortions, as well as testing for sexually transmitted diseases. See also McLaughlin’s article ‘Exploring the First Amendment Rights of Teens in Relationship to Sexting and Censorship (2012) Vol.45(2) University of Michigan Journal of Law Reform 315.

<sup>213</sup> Short of a prosecution the nearest incidents in England and Wales are, reportedly, some 50 ‘cautions.’ See Savage (n 24).

<sup>214</sup> The Crown Prosecution Service: ‘Guidelines on prosecuting cases involving communications sent via social media’: <[http://www.cps.gov.uk/legal/a\\_to\\_c/communications\\_sent\\_via\\_social\\_media/](http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/)> accessed 30 August 2017.

<sup>215</sup> Ringrose, Gill, Livingstone, and Harvey (n 25), 56. The study notes, at 56 also, that when ‘issues of power and coercion arise,’ or there are issues relating to ‘individual pressure, stereotyping and other hostilities ... then sexting may become problematic.’ This point is sound and accords with the aforementioned provisions within the Criminal Justice and Courts Act 2015.

is the subject of such imagery. As has been argued by the North American legal scholar Julia Halloran McLaughlin regarding the same difficulty faced in her own jurisdiction:

Given the existing inconsistent treatment of the evolving rights of teens as they mature and the poor fit between child pornography law and teen sexting conduct, a law directed specifically at teen sexting is required to distinguish this conduct from that of pedophiles [sic.] and the purveyors of child pornography. <sup>216</sup>

The implementation of a specific law regarding sexting, as opposed to mere reliance on a law which does not reflect the use of mobile phones, would be a sensible step for the law of England and Wales to take, given that the law is currently not being enforced due to its inadequacy. As the current law surrounding sexting is blind to the world foreseen by Derrida in the mid-1990s, and then explicated by Ferraris over ten years ago, it is clearly not fit for purpose. We are now living in an expository world in which the mobile phone, more than ever before, allows us as ‘digital subjects’ – or ‘*Homo digitalis*’ – to ‘give ourselves up in a mad frenzy of disclosure’ where we ‘exhibit our most intimate details in play, in love, in desire’ <sup>217</sup> into a world of ‘social objects’ which is parallel to an analogue world of ‘physical objects.’ This then leads to the third failure of the SOA 2003, its illogical framing of the age of adolescents to which the law applies.

### 3. *What is an age?*

The SOA 2003 effectively altered the age of a legal ‘child’ and in doing so it created an illogical distinction between the consensual age for corporeal and digital sexual activities: the former is 16 years of age whereas the latter is 18 years of age. This ill-thought distinction causes the difficulties seen above, given that digital communication is second-nature to born digital adolescents: ‘sexting simply is a way of representing or replicating one’s sexual corporeality.’ <sup>218</sup> Such a distinction has long been a target for Derrida’s deconstructive critique, given that this critique shows that all phenomena – such as a person’s age – are inscribed within a limitless field of referentiality and thus do not exist without being constituted by relation to other external

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<sup>216</sup> McLaughlin (n 197), 174.

<sup>217</sup> Harcourt (n 8), 18.

<sup>218</sup> Garrison (n 206), 359.

phenomena: ‘The presence of an element is always a signifying and substitutive reference inscribed in a system of differences and the movement of a chain.’<sup>219</sup> This critique drove Derrida’s scepticism of discrete ages being used to impose legal boundaries because any given discrete age is subject to slippage whereby it is constituted both by inscribed references to other ages and by the stipulated rights, obligations, or legal physiognomies of those other ages.

As an example, writing in 2000, Derrida was extremely critical of a 1989 death penalty case, *Penry v. Lynaugh*, in which the U.S. state of Texas sought to execute a convicted criminal who was of a suitable legal age (‘twenty-two years old at the time of the crime’) but only the mental age of a child (‘but, according to the experts, had the mental age of a six-and-a-half-year-old-boy’).<sup>220</sup> Here, deconstruction allowed Derrida to interrogate the concept of ‘an age,’ and to ask ‘[w]hat is an age and at what age is a subject legally responsible?’<sup>221</sup> Derrida’s questioning aimed to highlight that an age, whatever it may be, is composed of:

the multiplicity of mental and social ages in each of us, but also by the more serious existence of the differences between the age of so-called mental, social consciousness, etc., and the age, if there is one, of the unconscious.<sup>222</sup>

Because deconstruction reveals that a singular age is always multifaceted – ‘the multiplicity of ages, our ages, of the heterogenous ages that divide up our lives as mortals’<sup>223</sup> – Derrida’s work has a criminological impact in critiquing the SOA 2003. His work deconstructs legal subjectivity on a metaphysical level and consequently enriches the positivist critique of legal subjectivity in the work of Fenhalls,<sup>224</sup> McLaughlin,<sup>225</sup> and Shariff.<sup>226</sup> By developing the critique of the different consensual ages for corporeal and digital sexual activities Derrida’s work offers an important critique of the conceptual apparatus which drives legal reasoning: ‘law has not

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<sup>219</sup> Derrida (n 74), 369.

<sup>220</sup> Jacques Derrida, *The Death Penalty: Volume II* (Elizabeth Rottenberg tr, Geoffrey Bennington and Marc Crépon eds, The University of Chicago Press, 2017), 10. The case in question here was *Penry v. Lynaugh* 492 U.S. 302 (1989). However, the defendant was not executed due to the subsequent ruling in *Atkins v. Virginia* 536 U.S. 304.

<sup>221</sup> Derrida (n 220), 11.

<sup>222</sup> Ibid.

<sup>223</sup> Ibid. 12.

<sup>224</sup> Fenhalls (n 40).

<sup>225</sup> McLaughlin (n 197).

<sup>226</sup> Shariff (n 35).

reckoned with this other thinking of age even though, as you know, ... penal discourse has been obsessed ... with the question of legal age.’<sup>227</sup> Against the obsession whereby discrete ages purport to provide truths of the world on a metaphysical level, Derrida’s work shows the illogical fallacy underpinning this legal reasoning; a discrete age which acts as a legal boundary is in fact already infused with elements outside itself.

The occurrence of these three flaws resulting from the nonsensical application of a technologically out-dated law serve as evidence that the law requires change, whereby it can account for a world inclusive of prevalent, consensual, sexually explicit social objects. Having now assessed this landscape, made evident by Derrida’s and Ferraris’ work, the article now moves to examine developments in Australian law which may illustrate a remedy for the ill-fated implementation of the SOA 2003. The move to Australian case-study seeks to conclude this article by suggesting a suitable legal framework for the social ontology explicated throughout.

## **6. Conclusion: legislating sexting.**

In 1995 Virilio stated that digital technologies would find their niche in, amongst other situations, connecting lovers at a distance: ‘distancing brings (interactive) lovers together.’<sup>228</sup> Virilio believed this connection, as Derrida had noted,<sup>229</sup> would occur at near instantaneous speeds: *everything is ruled by lightning*, and the *coup de foudre* of disunited lovers suddenly becomes a *coup de grâce*.<sup>230</sup> With the ubiquity of the mobile phone and prevalence of sexting it appears that Virilio’s premonition, like Ballard’s aforementioned vision, has rung true. And in Australia the country now faces the consequences of this new age in which legislation, just like in England and Wales, is drastically outdated. But there are legislative initiatives currently underway in Australia which could serve as blueprints for future amendments to the law of England and Wales, which urgently needs to reflect how adolescents use their ‘absolute device.’

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<sup>227</sup> Derrida (n 220), 9–10.

<sup>228</sup> Paul Virilio, *Open Sky* (Julie Rose tr, Verso Press, 2008), 117. This point was originally made in Virilio’s *La vitesse de liberation* (Editions Galilée, 1995).

<sup>229</sup> Derrida (n 92), 17.

<sup>230</sup> Virilio (n 228, 2008), 117.

## An Australian case-study: re-examining sexting laws.

In Australia it has come to light that in the states of Queensland and Victoria the act of sexting is not adequately accounted for in law. Drawing on its various reports, proposed legislative amendments, and recent findings, the case-study of Australia offers an interesting basis for future legal amendments in England and Wales.

### The state of Queensland.

The first point to note from the Australian example is the data recently released by the Sentencing Council for the state of Queensland. Their May 2017 document ‘Sentencing Spotlight on ... child exploitation material (CEM) offences’ shows that between 1 July 2006 and 30 June 2016 there were ‘3035 offenders’ responsible for ‘8198 CEM-related [Child Exploitation Material] offences.’<sup>231</sup> Of these 3035 offenders 1565 were sentenced in court and 1470 were dealt with outside of the court.<sup>232</sup> What is most striking therein is the distinction between those dealt within inside, and outside of the court. Of the 1565 people sentenced in court less than 2% were under 17 years of age (28 people), whereas *all* of the 1470 people who were dealt with in ways other than penal sentences were under 17 years of age.<sup>233</sup> The reason for this striking distinction lies in the type of CEM-related act committed by adolescents: ‘The QPS [Queensland Police Service] advised the majority of CEM offences for which young offenders were diverted from court relate to sexting.’<sup>234</sup> The QPS specifically diverted adolescents involved in sexting from the more serious sanctions delivered by the court because ‘this approach promotes an educative response for young people who are sexting unless specific circumstances warrant a more formal approach.’<sup>235</sup> This is clear evidence that, like in England and Wales, the prosecutorial authorities have deliberately not seen sexting, by adolescents, as an equivalent illegal act to child pornography: ‘the behaviour conducted by young people in this context often

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<sup>231</sup> See — ‘Sentencing Spotlight on ... child exploitation material (CEM) offences,’ page 2  
<[http://www.sentencingcouncil.qld.gov.au/data/assets/pdf\\_file/0010/519535/Sentencing-Spotlight-on-child-exploitation-offences-July-2017.pdf](http://www.sentencingcouncil.qld.gov.au/data/assets/pdf_file/0010/519535/Sentencing-Spotlight-on-child-exploitation-offences-July-2017.pdf)> accessed 30 August 2017.

<sup>232</sup> Ibid.

<sup>233</sup> Ibid. See also 5: ‘Of the 1470 young people diverted by the QPS [Queensland Police Service], the vast majority were formally cautioned (92.9%), with the remaining 7.1% (n=105) attending a youth justice conference.’

<sup>234</sup> Ibid. 6.

<sup>235</sup> Ibid.

involves different circumstances to an adult sending or viewing CEM.’<sup>236</sup> Further, this differentiation is highlighted in Queensland’s follow-up final report ‘Classification of child exploitation material for sentencing purposes,’<sup>237</sup> in which it notes that because there exists both sexting which is ‘consensual sexting between two people’ and that which, akin to revenge pornography, is ‘the forwarding or releasing of images to other parties without consent,’<sup>238</sup> there therefore must exist:

...a range of options to respond appropriately to individual cases, for example, educative responses for sexting, with stronger justice responses when sexting may in fact be associated with more exploitive or coercive aspects.<sup>239</sup>

This ideal for a ‘range of options’ adheres to the report’s comment that it shares the ‘concern that young people are criminalised for sexting,’ something which it adds ‘has been raised in several jurisdictions.’<sup>240</sup> Again, this assessment coalesces with much of what has been made clear from the context of England and Wales. Building on this, the legislative proposals from the state of Victoria then provide suggestions for the next step in developing suitable law for sexting.

### The state of Victoria.

Like the state of Queensland, the state of Victoria has investigated, and is currently implementing, how to alter its law regarding child pornography, child exploitation material, and sexting, to produce legislation which is fitting for the 21<sup>st</sup> century. To that end, there is currently an amendment in the ‘Sex Offenders Registration Amendment (Miscellaneous) Bill 2017’ which

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<sup>236</sup> Ibid.

<sup>237</sup> See — ‘Classification of child exploitation material for sentencing purposes: final report’ <[http://www.sentencingcouncil.qld.gov.au/data/assets/pdf\\_file/0017/531503/cem-final-report-july-2017.pdf](http://www.sentencingcouncil.qld.gov.au/data/assets/pdf_file/0017/531503/cem-final-report-july-2017.pdf)> accessed 30 August 2017.

<sup>238</sup> Ibid. 194–5. The report also notes, at 195: ‘Research indicates that sexting is common, and for the most part becoming normalised among young people in their early to late teens, and the majority of young people involved in sexting are using devices within their homes.’

<sup>239</sup> Ibid. 195.

<sup>240</sup> Ibid. 194.



would grant a right of appeal to those convicted of child sex offences for having received an indecent photo from an adolescent under the age of 18: 241

The Bill introduces a scheme enabling young adults who are found guilty of one or more specified sex offences to apply in limited circumstances for a court order exempting them from being “automatically” registered upon being sentenced (a “registration exemption order”). Persons who have already been “automatically” registered as a result of being sentenced for a specified offence before the commencement of this Bill will also be able to apply for a registration exemption order removing them from the Register of Sex Offenders. 242

This necessity of the amendment results from the recent attention which has been given to sexting – as illustrated via Queensland’s reports – in which it has been discovered that this activity is not adequately accounted for in law. From the ‘Explanatory Memorandum,’ just referred to, in an explanation of Clause 7 of the bill it notes that:

The purpose of these order is to give the courts greater discretion to prevent the “automatic” registration of young adults sentenced for specified offences where they are not a risk, or are only a low risk, to the sexual safety of one or more persons or of the community. 243

Accordingly, at the court’s discretion, an adolescent registered as a sex offender could have their record expunged should they meet certain criteria. Such criteria include that the applicant was either 18 or 19 years old at the time of the offence, that they pose no, or a low, risk to the sexual safety of the community, that they have not been found guilty of other related offences, and that the adolescent in question is, or was, over 14 years old. 244 So, for example, if an 18 year-old took pictures of their 17 year-old sexual partner with their personal mobile phone, with

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241 Calla Wahlquist, ‘Teenagers put on Victorian sex offender register over sexting to given right of appeal’ *The Guardian* (Sydney 11 May 2017) <<https://www.theguardian.com/australia-news/2017/may/11/teenagers-put-on-victorian-sex-offender-register-over-sexting-to-be-given-right-to-appeal>> accessed 30 August 2017.

242 See ‘Sex Offenders Registration Amendment (Miscellaneous) Bill 2017 – Introduction Print Explanatory Memorandum,’ page 1.

<[http://www.legislation.vic.gov.au/domino/Web\\_Notes/LDMS/PubPDocs.nsf/ee665e366dcb6cb0ca256da400837f6b/7DA5884521B44633CA25811C000A17F8/\\$FILE/581264exi1.pdf](http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs.nsf/ee665e366dcb6cb0ca256da400837f6b/7DA5884521B44633CA25811C000A17F8/$FILE/581264exi1.pdf)> accessed 30 August 2017.

243 Ibid. 5.

244 See ‘Sex Offenders Registration Amendment (Miscellaneous) Bill 2017,’ 11A (1) – (4), 11B (1) – (7).

<[http://www.legislation.vic.gov.au/domino/Web\\_Notes/LDMS/PubPDocs.nsf/ee665e366dcb6cb0ca256da400837f6b/7DA5884521B44633CA25811C000A17F8/\\$FILE/581264bi1.pdf](http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs.nsf/ee665e366dcb6cb0ca256da400837f6b/7DA5884521B44633CA25811C000A17F8/$FILE/581264bi1.pdf)> accessed 30 August 2017.

their consent and only for the partner's gratification, and these were the only instances which would make the 18 year-old liable for registration, then it may well be that their record could be expunged by the court. In summary, this practical amendment seeks to provide a way around the illogical and severe sanction which currently operates against consensual adolescent sexting and consequently should be considered as an option for England and Wales, short of full scale reform.

### Concluding thoughts.

The current landscape of digital technology is immense. The number of social objects which inhabit this landscape is gargantuan. As correctly hypothesised by Derrida in 1993, billions of people around the world now create and share their own digital content via the internet: 'those who were previously in the position of consumer-spectators can intervene in the market.'<sup>245</sup> At the heart of this still growing movement is the mobile phone, 'the *absolute device*,'<sup>246</sup> which Ferraris, ten years ago, described as 'perfectly embody[ing]' the writing system for social ontology.<sup>247</sup> He has, arguably, been proved right, as this device now heralds a new dawn for 21<sup>st</sup> living. And the complication which has arisen regarding sexting is but one of a myriad of complications which the law is currently dealing with and will no doubt have to deal with in the future. However the requirement of acknowledging the digital topology of today's world is paramount in providing a legal system which coalesces with contemporary life. This is evidently the case with regards to sexting within the *res publica* and once again recalls an insight gleaned from a deconstructive methodology:

What circulates on the internet, for instance, belongs to an automatic space of publication: the public/private distinction is already being wiped out there, with the lawsuits, the allegations of rights and legitimation that proliferate from that, but also the movements toward the appropriation of the *res publica*. Today this is one of the big political issues – it *is* politics.<sup>248</sup>

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<sup>245</sup> Derrida and Stiegler (n 78), 54.

<sup>246</sup> Ferraris (n 7), 59.

<sup>247</sup> Ibid. 7.

<sup>248</sup> Derrida (n 102, 2005, 'The Word Processor'), 32.