

A glass sphere sits on a dark, pebbly beach. The sphere is perfectly split horizontally, with the top half showing the actual sky and the bottom half reflecting it. The sky is filled with soft, white and grey clouds, and a warm, golden light from a low sun is visible, creating a hazy, atmospheric effect. The reflection in the sphere is a clear, inverted mirror image of the sky above.

TORMENT 2020!

A WAKE UP CALL

VOL - I

PEN ACCLAIMS

**To,
Soham,
Companion & confidant!**

“Torment 2020: A Wake up Call”

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Preface

A thought that has been enduring in mind when becomes real, is truly an interesting and exciting experience. This book is one such cherished work that has its roots in the persuasion of many authors, contributors and also mentors which has now embellished to become the snapshot of the innumerable efforts put in since months. This book serves to reinforce increased awareness, improved interaction and integration among all of us.

As the Editor of this book entitled “Torment 2020: A Wake up Call”, I wish to thank all researchers across the globe, who have submitted their contributions. The main aim of this book is to enhance knowledge among researchers, students and the legal fraternity at large and to provide an opportunity for creative research and multi-level consideration of broader issues related to legal insight from both national and interdisciplinary perspective.

It has been indeed a pleasure going through the journey of compiling this book. This maiden issue will surely inspire all of us for a new beginning and enlighten the minds of young scholars with hope, confidence and faith.

Happy reading! Stay Safe!

**Dr. Pooja Dasgupta
Chairperson
Pen Acclaims**

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“Smells like Teen Spirit”: A critique of Indian Anti-Sexting laws and the misrecognition of teen-sexuality¹”

***Nayonika Sen**
Jindal Global Law School,
O.P. Jindal Global University

****Farhan Zia**
Jindal Global Law School,
O.P. Jindal Global University

Despite it being practised in India,² sexting among teens has not received much attention in legal and societal discourse. Legitimate fears of abuse that can traumatise young users make regulation necessary. But must this necessarily be at the cost of children’s sexual expressions? In this essay we analyse Indian pornography laws to explore whether sexting always constitutes child pornography in the background of Karl Hanson’s classification of the ‘Schools of Thoughts in Children’s Rights’: Paternalism, Liberation, Welfare and Emancipation.³ We argue that current jurisprudence on sexting takes a paternalistic stance and that rather than classifying teen-sexting into blanket ‘pornography or not’ camps, it requires a more nuanced approach.

How child-sexuality is perceived has been a point of much debate for centuries. However, what is evident is that children engage in sexual practices; child-sexuality is clearly a reality.⁴ Children are regarded as “full of potential vice”⁵ and while opinions have differed, the trend of literature throughout history has been one that disapproves of it, views it as a negative concern⁶ and seeks to regulate child-sexuality. ‘Masturbation phobia’ in the 19th century exemplifies how ‘premature’ sexual interest was scientifically linked to insanity and health deterioration⁷ with violent practices having been used to suppress it.⁸ Accompanying this is a

¹Nirvana, *Smells Like Teen Spirit* (DGC Records, 1991) The title of this essay is obviously to refer to the popular American rock song by Nirvana, a much-celebrated youth anthem.

² Bianca Klettke et al., *Sexting and mental health: A study of Indian and Australian young adults*, 12 *Cyberpsychology: Journal of Psychosocial Research on Cyberspace* (2018), <https://doi.org/10.5817/CP2018-2-2> (last visited Apr 25, 2020).

Manoj Kumar Sharma et al., *Sexting and Self-Esteem Among Youth: Preliminary Trend for Building Cyberliteracy*, 1 *Journal of Psychosexual Health* 271-274 (2019), <http://doi:10.1177/2631831819890768>. (last visited Apr 23, 2020).

³ Karl Hanson, *School of Thought in Child's Rights*, in *CHILDREN'S RIGHTS FROM BELOW: CROSS-CULTURAL PERSPECTIVES* 63 (Manfred Liebel 1 ed. 2012).

⁴ Corinne May-Chahal & Emma Kelly, *Sexual Practices in Childhood*, in *ONLINE CHILD SEXUAL VICTIMISATION* 55-87 (1 ed. 2020), <https://www.jstor.org/stable/j.ctvz938jv> (last visited Apr 19, 2020).

⁵R. DANIELLE EGAN & GAIL HAWKES, *THEORIZING THE SEXUAL CHILD IN MODERNITY* 40 (2010).

⁶ Corinne May-Chahal and Emma Kelly, *Sexual practices in childhood*, *Online Child Sexual Victimization*. Bristol University Press (2020).

⁷ *Supra* note 5, at 24.

⁸ Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality* in *PLEASURE AND DANGER* 268 (1985) (Carole S. Vance ed.).

narrative that focuses more on the vector i.e. social media, as corrupting children who display engagement with it and not recognizing that children are sexual beings themselves.⁹ Consequently, *New York v Ferber*¹⁰ made it illegal for a person of any age to possess child porn. Ironically, such laws unwittingly penalize those for whose protection the law was made. One may become a felon, simply for holding a picture of her genitalia, if below the age of 18!¹¹

This attitude reflects the position of “sexual conservatives” who believe that abstinence from sexuality is safest for children,¹² a stance that prioritizes child protection over child sexual expression. Hanson’s differentiation is based on *inter alia*, whether children are full human beings or not, and whether children are competent to reason like adults.¹³ While Liberation views children as full human beings, competent to reason rationally, Paternalism takes a diametrically opposite stance.¹⁴ The latter justifies control over children from protection from self and others, with their ‘best interest’ being defined by adults. We now explore which of these approaches do Indian laws incline towards by the use of three hypothetical scenarios of teen-sexing We now explore this question by pointing out several faults in the law, through the means of three possible situations of teen-sexing and conflict with the law.

The post-Nirbhaya amendment to the Juvenile Justice Act suggests that teenagers are capable of such mental and sexual maturity to commit sexual offences and understand their consequences.¹⁵

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⁹ Robbie Duschinsky, *The 2010 UK Home Office ‘Sexualisation of Young People’ Review: A Discursive Policy Analysis*, 41 *Journal of Social Policy* 715-731 (2012).

¹⁰ 458 U.S. 747, 758. See also *Ashcroft v. Free Speech Coalition* 535 U.S. 234 (2002).

¹¹ Seth F. Kreimer, *Sex, Laws, and Videophones: The Problem of Juvenile Sexting Prosecutions* in CHILDREN, SEXUALITY, AND THE LAW, 133, 135, 144 (Sacha M Coupet & Ellen Marrus eds. 2015). In America, charges of possessing child pornography have been seriously pursued against the photo of a teenage girl dressed in a bikini on the grounds of it being “provocative”. Similar charges were levied on a 12-year-old girl over a digital photo of hers taken at a slumber party of her torso, in which she wore a white opaque bra.

¹² JOEL BEST & KATHLEEN A. BOGLE, *KIDS GONE WILD: FROM RAINBOW PARTIES TO SEXTING, UNDERSTANDING THE HYPE OVER TEEN SEX* 102 (2014).

¹³ *Supra* note 3.

¹⁴ *Id.* 73-77 The other two approaches, Emancipation and Welfare take moderate stances between the two.

¹⁵ This view manifests in the Amendment made to the Juvenile Justice Act, 2015. It was triggered by the fact that one of Nirbhaya’s rapists was a minor, aged 17. The Amendment suggests that if a juvenile is apprehended for a heinous crime before the age of 21, their mental and physical capacity would be evaluated to determine whether they would be tried as an adult or a minor (Barring the death penalty). This is indicative of the fact that the law does take cognisance of minors’ abilities to comprehend and make decisions that are ‘mature’ given the nature of the act. However, the limitation to this Act is that this clause of ‘evaluation’ only extends to minors above the age of 16.



PenAcclaims

(Multi-disciplinary National Journal)

Email: editor.penacclaims@gmail.com

Website: www.penacclaims.com