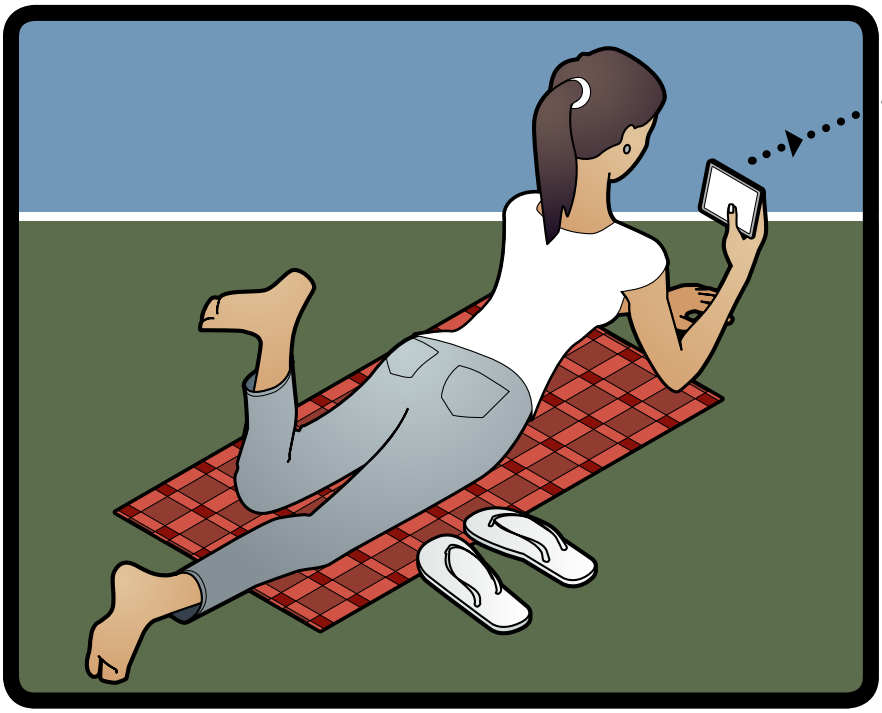
Two Teens v. Society

A Suit on Behalf of All Teens Accused of "Sexting" (A Modern Fable)

The practice known as "sexting," in which young people, mainly teenagers, send nude and sexually suggestive photos of themselves and others via their cell phones, has recently become a matter of increasing concern.

On the one hand, the teens who send such photos (mostly girls) usually intend for them to be seen by only one or two friends, commonly a boyfriend. They naively expect the pictures to remain private, and so are often devastated to discover that the original recipient, whether carelessly or maliciously, has sent them on to other classmates and friends, who, in turn, have sent them on to dozens more. The harassment and humiliation that can result from the wide dissemination of a teen's photos are often brutal; in at least one case, they drove a girl, Jesse Logan of Cincinnati, Ohio, to suicide.



In such cases, it is easy to see the original sexting teen as a victim, as one who has suffered disproportionately for an admittedly foolish but not intentionally wicked act. The ones who, like Jesse Logan's former boyfriend, pass photos on to others without the original sender's knowledge or permission seem less sympathetic, especially when they act out of spite or malice.

Legally, however, all sexting teens may be seen as distributors of lewd material, or even of child pornography, if, as is often the case, the subject of the photos is a minor. In recent years, teenagers in several states, including Vermont, Pennsylvania, and California have been charged with producing, possessing, and/or disseminating child pornography because of their sexting activities.

Yet, is it not hypocritical for society to bombard its teenagers' not-fully-mature brains with images of nudity via every medium of popular culture—and not a few of education—and then turn around and charge those teens with "sending child pornography" when they engage in sexting? After all, these teens are only mimicking the images and behaviors that society has deemed it appropriate to inflict upon them for years, despite the fact that scientific studies have proven that erotic images imprint themselves permanently upon children's immature brains, with damaging effects to their sexual attitudes, behavior, and health.

It would not be unreasonable, then, for an American teen who was prosecuted for sexting to claim that, since the law failed to protect him from exposure to

inherently harmful erotic images, he should not be held responsible for the effect of those images on his behavior.

A Hypothetical Lawsuit

Let's imagine two teenagers—we'll call them Tom and Becky—who, having been convicted on child porn charges for sexting, decide to file a class-action lawsuit to have their own and all similar convictions overturned. Could they mount a convincing case? What arguments could they make, and what evidence could they produce to back them up?

Let's begin with a legal brief summarizing their case: *Two Teens v. Society*.

> Minors Tom and Becky, having been convicted of making and sexting nude photos of Becky gratis to juvenile friends, petition the Court to hear their class-action lawsuit on behalf of all minors convicted of producing and/or distributing child pornography.
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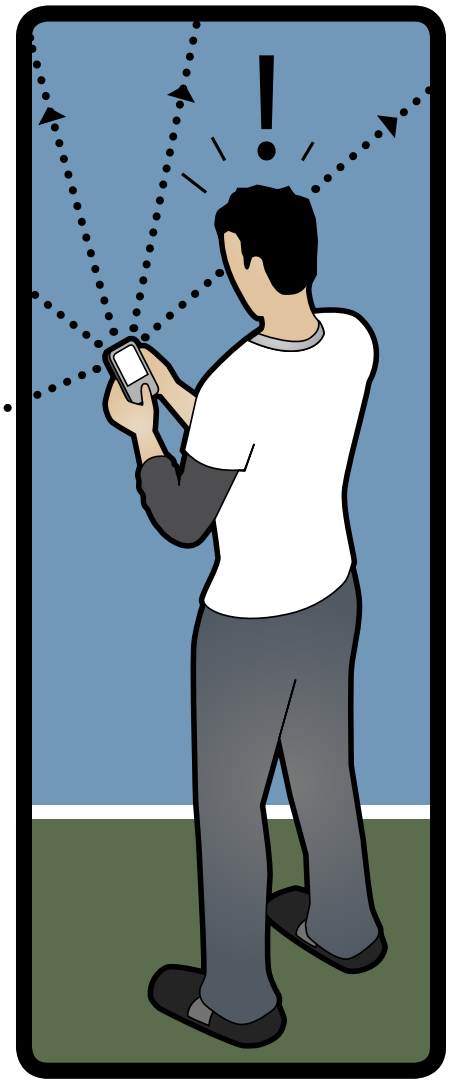
> The petitioners argue that: (a) modern science proves that the frontal area of the brain (the area of higher-level thinking, planning, and goal formulation) remains undeveloped until circa age 21, whereas (b) the sensory organs (vision, hearing, smell, taste, and touch) attain maturity during childhood. The evidence will show that the brains of minors are (c) regularly imprinted with erotic images distributed legally via the mass media and often via "appropriate" sex education classes, and that (d) the images so imprinted do damage to the minors' brains because their undeveloped frontal cortices are unable to handle them maturely.
>
> Therefore, the petitioners charge that the State, insofar as it has negligently exposed minor children to erototoxic images and has failed to protect them from the damage done thereby, has prejudicially and recklessly violated their right to equal protection of the laws. They seek relief by asking the Court to find erroneous the current classification of erotic images as a cognitive form of "speech" protected by the First Amendment. The petitioners further ask the Court to vacate all convictions of children on child pornography charges on the grounds that exposure to erototoxins overrides their capacity for informed consent with respect to sexting.



An Ubiquitous Toxin

Since December 1953, when our rather puritan nation was ambushed by *Playboy*'s half-nude, airbrushed ladies, the pornographers' toxic worldview has seeped into our national psyche, and millions nationwide (and worldwide) have absorbed it.

"Sex was created to keep the home fires burning," says an old adage, "not to burn the house down." Pornography is one of the things more likely to do the latter than the former. German professor Jakob Pastötter has said that pornographic magazines and videos should carry a warning: "The viewing of pornography can do considerable harm to your sexual health!"

According to the Oxford English Dictionary, a toxic substance is anything "introduced into or absorbed by a living organism [that] destroys life or injures health." Since erotic images cause injury, they meet the definition of a toxin. They are never trivial or innocuous.

A survey conducted by the Pew Research Center found that four percent of all cell-phone-owning teens (aged 12–17) admitted sending nude or near-nude images of themselves to others, and 15 percent said they'd received such images of "someone they know." Any nude or provocative image in a public forum always endangers the safety and lives of those displayed. Strippers, "centerfolds," and nude "actresses" have all suffered brutal

assaults by "admirers."

Our fictional Tom and Becky could argue that their sexting is a predictable, juvenile manifestation of the toxicity of pornography in society as a whole.

Current **scientific knowledge** of brain processing, Tom and Becky could assert, **requires reexamining** the media's **"right" to erotically pollute** the airwaves.

Fleeting, yet Harmful

Our two petitioners could bolster this argument by citing the findings of the 2009 Supreme Court case *FCC et al. v. Fox Television Stations, Inc., et al.,* on the use of "fleeting" expletives in mass media. In that case (hereafter referred to as *FCC v. Fox*), the Court reversed and remanded a ruling of the Second Circuit Court of Appeals that found "arbitrary and capricious" the reasoning behind orders issued by the FCC that confirmed findings of indecency against Fox Television for the use of the F- and S-Words in two live broadcasts.

The Court's decision cited an earlier (2004) FCC order in which the commission had noted that, since the "F-Word" "inherently has a sexual connotation," its use can be "shocking and gratuitous" even when not meant literally. The FCC therefore determined, as the Court noted, that "a nonliteral (expletive) use of the F- and S-Words could be actionably indecent, even when the word is used only once."

Justice Antonin Scalia, who wrote the majority opinion for the Court, explained that, in order to establish that broadcast profanity has a harmful effect on children, one could hardly "demand a multi-year, controlled study, in which researchers intentionally expose some children to indecent broadcasts (and insulate them from all other indecency), and shield others from all indecency." Nevertheless, he wrote, "it suffices to know that children mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate."

Hence, the Court ruled that for the FCC to find the use of fleeting expletives actionable was perfectly in line with the commission's stated obligation to "safeguard the well-being of the nation's children from the most objectionable, most offensive language." (Alas, after the case was remanded to the Second Circuit for consideration of the constitutional arguments, the circuit court ruled, in a decision issued on July 13, 2010, that the FCC's policy violated the First Amendment because it was "unconstitutionally vague." Whether the FCC will again appeal to the Supreme Court was unknown at press time.)

Evidence from Brain Studies

Tom and Becky could also cite a 2008 report in the *New York Times* showing, with illustrations, the stages of development of a child's brain. By age 4, a child's vision and sensation areas are almost fully developed, but the frontal lobes, which affect judgment and self-control, don't fully mature until about age 21.

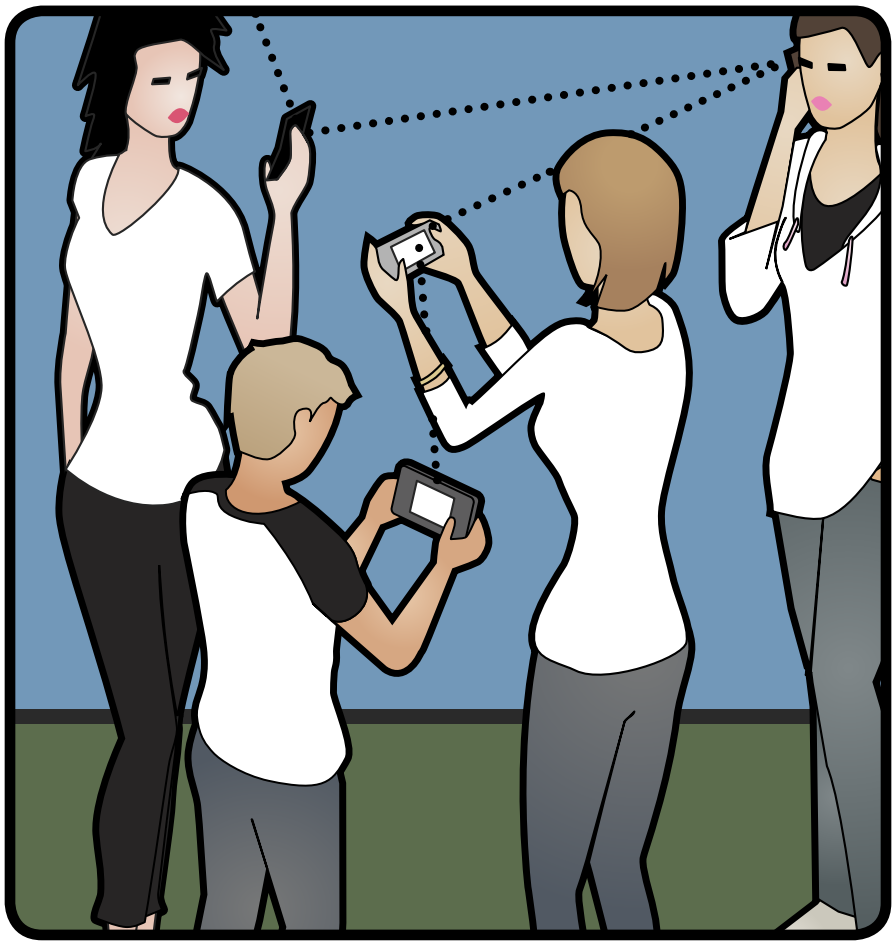
By the time children become teenagers, then, the sensory areas in their brains have been absorbing images for years, while their capacity to control their emotions and impulses and to make good decisions is still at least a few years away. Hence, even as teens, they are ill-equipped to deal properly with erotic images and messages, even fleeting ones.

That is why kids "mimic behavior they observe" as "normal and appropriate" in the mass media and the classroom. The areas of their brains that would allow them to evaluate and make mature judgments about the things they see simply haven't been developed yet. Thus, as Justice Scalia pointed out in *FCC v. Fox,* "Programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives." He later comments, "To predict that complete immunity for [broadcasters' use of] fleeting expletives . . . will lead to a substantial increase in fleeting expletives seems to us an exercise in logic rather than clairvoyance." Logic backed up by scientific studies of the brain, we might add.

For those who might still be skeptical, Tom and Becky could point to the findings of even earlier brain researchers. The Soviet neuropsychologist A. R.

Luria found that the human brain responds to "a law of strength," which means that "biologically significant" stimuli produce a stronger response than weak stimuli. But—and here is the crucial part—for a stimulus to be biologically significant does *not* mean that it has to be of long duration.

In the pioneering award-winning public television series *The Brain: Learning and Memory* (1984), brain researcher Gary Lynch of the University of California noted that "an event which lasts half a second" can produce "a structural change that is in some ways as profound as the structural changes one sees in [brain] damage." His finding that "an incredibly modest signal . . . which is in your head as an electrical signal for no more than a few seconds can . . . leave a trace that will last for years," has been confirmed by cutting-edge neuroscientific data. Tom and Becky could say that they are living validation of these brain studies.



Closing Argument

Tom and Becky could thus claim that they never gave (nor—because of the immaturity of their frontal cortex—*could* give) informed consent to the media or to their schools to expose them to the sexual images now wired into their brains, images that have left a "trace that will last for years." They were neither shielded from nor warned about the deleterious effects of those images. Therefore, they ought not to be held responsible for the actions that resulted from their exposure to these toxic images.

They could further claim that, because "children mimic the behavior they observe," the only way to prevent sexting and similar behavior in children is to protect them from exposure to the things that give rise to it. This means that the media must eliminate even fleeting erotic images and messages if minors are in the audience. Current scientific knowledge of brain processing, they could assert, requires reexamining the media's "right" to erotically pollute the airwaves.

Media outlets typically defend themselves against charges of indecency by claiming that the content of their broadcasts is protected by the First Amendment's guarantee of the right to free speech. But as Justice Scalia pointed out in a concurring opinion in *Barnes v. Glen Theatre, Inc.* (1991), "public indecency—including public nudity—has long been an offense at common law." Hence, Tom and Becky could contend that the First Amendment was not intended to protect indecent words or images, especially ones recklessly directed at minor children.

This hypothetical case is meant to illustrate the need for legal reversals of court decisions that have allowed the mass media and schools to damage our children's brains and lives under the guise of protecting the disseminators' First Amendment rights. We also need stronger enforcement of current laws meant to protect children from all pornographic erototoxins. Science, logic, and constitutional authority all stand behind these goals.

To attain them, we need lawyers, legislators, and law enforcement officials with the mental and moral mettle of our Founders. If we are to be what John Adams called "a moral and religious people," we must once again safeguard the innocence, health, humanity, and welfare of millions of Toms and Beckys.