Cyberbullying and sexting. New open frontiers of criminal law: The case of Canada and Australia

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SUMMARY: 1.From bullying to cyberbullying: Worrying new reality or mere digital translation?; -2.Sexting between minors: Harmless practice or deviant behavior?; -3.Cyberbullying in European policies to combat online dangers; -4.Directive 93/2011 in the footsteps of the Lanzarote Convention; -5.(Follows) The Canadian context. The cyberbullying emergency: A "toxic" phenomenon. The case of A.B. (Litigation Guardian of) v. Bragg Communications Inc.; -6.From the first attempts at reforming criminal law to protecting Canadians from online acts; -7.The Nova Scotia Cyber Safety Act, the Crouch v Snell case and the profiles of unconstitutionality; -8.Sexting among young people in Canada: The first court cases; -9.Consensuality and child pornography: the "salvation" clause of R. v. Sharpe case; -10.The Protecting Canadians from Online Acts: The criminalization of the non-consensual distribution of intimate images; -11.(Follows) The Australian context. Cyberbullying in Australia, from the Halkic case to the Chloe's Law Movement; -12.The adoption of the Online Safety for Children Act and the influence of New Zealand legislation; -13.Criminal law once again on the test bench, towards a reform of the Online Safety for Children Act; -14.The sexting phenomenon in Australia: The DDP v Eades case; -15.The Australian Commonwealth discipline and the Crimes Legislation Amendment (Sexual Offences Against Children) Act: A first approach to sexting; -16.From pioneering Victoria State legislation to Commonwealth reform prospects; -17.Concluding remarks

Abstract: This paper tries to investigate and analyze new crimes such as sexting, cyberbullying and bulling in a comparative way. Cyberbulism is in fact a term which includes a vast range of different behaviors, which many times do not cover criminal figures punishable by any criminal code at national or international level. These are new open frontiers, elements that must necessarily be kept in mind when one comes to the legal side of the issue. In spite of scientific divergences, the aforementioned multiplicity can be brought to unity by recognizing the presence of recurring elements such as aggression, intentionality, repetitiveness, together with the obvious use of electronic and digital communication means. A very important aspect on these figures and new phenomena is the relationship with minors and legal protection at an international and European level in this area of criminal law.

Key words: bulling, sexting, comparative criminal law, cyberbullying, digital technology, European criminal law.

1.From bullying to cyberbullying: Worrying new reality or mere digital translation?

Bullying represents one of the most pervasive manifestations of hostility among minors[2], which has always accompanied the context and the educational institution and not still remains at the center of the scientific debate, without a universally recognized definitory label[3].

Pioneering in this sense is certainly the research conducted by Olweus, who in 1993 framed the phenomenon in those situations in which the victim is repeatedly exposed to negative actions by one

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[2]JONES S.E., MANSTEAD A. S. R., LIVINGSTONE A. G., Ganging up or sticking together? Group processes and children's responses to text-message bullying, in British Journal of Psychology, 2011. SHARIFF S., Cyberbullying Issues and solutions for the school, the classroom and the home, 2008 R., Cyberbullying. Approaches, Consequences and Interventions, Cambridge University Press, Cambridge, 2016.

[3]KOWALSKI R., LIMBER S., AGATSON P, Cyber bullying: Bullying in the digital age, Wiley & Sons, New York, 2008.

or more students[4]. Various definitions[5] followed, which, although based on the studies of the Norwegian researcher, ended up detaching themselves[6].
The starting point of the scientific investigation on the subject can be found in the study conducted in 2000 by researchers from the University of New Hampshire concerning bullying cases perpetrated by e-mail, chat rooms and instant messaging services[7]. As soon as children begin to use the Internet in their daily lives, new behaviors begin to emerge in cyberspace, immediately attracting strong media attention[8]. Thus was born a new linguistic label: Cyberbullying, used for the first time differently the social role of the victim. Different is the case in which the ultimate purpose is that of social exclusion or, if bullying is carried out through open attacks on the victim, they detect behaviors such as hitting, pushing, beating. In all cases, the impact of bullying can be devastating, causing tragic consequences. A distinction is then made between cases of direct and indirect bullying. In the first hypothesis, a face-to-face interaction takes place between the bully and the victim, which is present when the behavior takes place and is immediately aware of what is happening.
If the existence of a certain degree of overlap between the two phenomena cannot certainly be hidden, the term bullying does not appear as an appropriate category for the ever-changing digital world. Cyberbullying is omnipresent, anonymous, extended with respect to physical distances, difficult to identify, variable in duration, with unknown potential. The substantial differences between them consequently make cyberbullying emerge as a distinct phenomenon, which needs specific and increasing attention from scientific literature and beyond[9].
To characterize cyberbullying, in spite of other forms of online aggression, is the peer-to-peer dialectic, which involves only and exclusively minors[10], who can take on different roles within the conflict

[4]According to Olweus Bullying would occur in cases where: "a student is being bullied or victimized when he or she is exposed, repeatedly and over time, to negative actions on the part of one or more other students (…) it is a negative action when someone intentionally inflicts, or attempts to inflict, injury or discomfort upon another (...)". In this regard, it must be said that in the first studies conducted by Olweus the term bullying did not appear as much as that of mobbing. In fact, attention to time was focused on aggressive attacks by groups of children against individuals. Only when the Norwegian researcher realized that it was rather a phenomenon that develops from a peer-to-peer perspective did the term bullying become prevalent, completely supplanting the other. OLWEUS D. Bullying at school: What we know and what we can do, Blackwell Publishing, London, 1993.

[5]Farrington describes as: "repeated oppression of a less powerful person, physical or psychological, by a more powerful person (...) the absence of provocation by the victim" (FARRINGTON D.P., Understanding and preventing bullying, in Criminal Justice, 4 (4), 1993. ESPELAGE D.L., Understanding and preventing bullying and sexual harassment in school, in HARRIS K.R., GRAHAM, S., URDAN, GRAHAM, T., ZEIDNER M., Apa handbooks in psychology, American Psychology Association, 2012, pp. 394ss. ZYCH, I., FARRINGTON D.P., LLORENT V.J., Protecting children against bylling and its consequences, Springer, Berlin, 2017. ELLIS L., FARRINGTON D.P., HOSKIN A.W., Handbook of crime correlates, Academic Press, Cambridge, Massachussets, 2019.). "the systematic abuse of power" (SMITH P.K., SHARP S., School bullying: Insights and perspectives, ed. Routledge, London, 1994. SMITH, P.K., School bylling, in Sociologia, Problemas e Pràticas, 71, 2013, pp. 84ss. CATALANO, R., JUNGER-TAS J., MORITA Y., The nature of school bullying: A cross national perspective, ed. Routledge, London & New York, 2014. SMITH, P.K., KWAK, K., TODA Y., School bullying in different cultures. Eastern and western perspectives, Cambridge University Press, Cambridge, 2016). Rigby affirms that: "bullying involves a desire to hurt another, a harmful action, a power imbalance, repetition, an unjust use of power, evident enjoyment by the aggressor and generally a sense of being oppressed on the part of the victim (...)". (RIGBY K., New perspectives on bullying, K. Kingsley Publishers, London, 2002.).

[6]RIVERS I., SMITH P.K., Types of bullying behaviour and their correlates, in Aggressive Behaviour, 1994.

[7]JONES M. L., KMITCHELL K.J., FINKELHOR D., Online garassment in context: Trends from three Youth Internet Safety Survey (2000, 2005, 2010), in Psychology of Violence, 3 (1), 2013, 53-69. MITCHELL, K.J., JONES L.M., Cyberbullying and bullying must be student within a broader peer victimization framework, in Journal of Adolescent Health, 56 (5), 2015, pp. 476ss. SALEH F., GRUDZINSKAS, A., JUDGE A., Adolescent sexual behaviour in the digital age. Considerations for clinicians, legal professionals and educators, Oxford University Press, Oxford, 2014. MILOSEVIC T., LIVINGSTONE, Protecting children online. Cybebullying policies of social media companies, MIT Press, Massachusetts, 2017. RICHARDS T.N., MARCUM C.D., Sexual victimization. Then and now, Sage Publications, New York, 2014. HOLT T.H., Examining perceptions of online harassment among constables in England and Wales, in International Journal of Cybersecurity Intelligence & Cybercrime, 2 (1), 2019, pp. 27ss.

[8]JONES M. L., MITCHELL K.J., FINKELHOR D., Online harassment in context: Trends from three youth internet safety survey (2000, 2005, 2010), op., cit.,

[9]PATCHIN J. W., HINDUJA S., Measuring cyberbullying: Implications for research, in Aggression and Violent Behavior, 23, 2015. STICCA F., PERREN S., Is cyberbullying worse than traditional bullying? Examining the differential roles of medium, publicity, and anonymity for the perceived severity of bullying, in Journal of Youth and Adolescence, 42, 2013, pp. 739-750. BALDRY A.C., BLAYA C., FARRINGTON D.P., International perspectives on cyberbullying. Prevelance, risk factors and interventions, ed. Springer, Berlin, 2018. BETTS L.R., Cyberbullying. Approaches, consequences and interventions, ed. Palgrave Macmillan, London, 2016. VAN HASSELT V.B., BOURKE M.L., Handbook of behavioral criminology, ed. Springer, Berlin, 2018. EXTREMERA N., QUINTANA ORTS C., MÉRIDA-LÓPEZ S., REY L., Cyberbulling victimization, self-esteem and suicidal ideation in adolescence: Does emotional intelligence play a buffering role?, in Front Psychology, 9, 2018, pp. 369ss.

[10]CASSIDY W., JACKSON M. BROWN K.N., Sticks and stones can break my bones but how can pixels hurt me, in School Psychology International, 30 (4), 2009, 383-402). Equally, there is no clear data on any gender differences that may arise. In fact, if some studies tend to see a negative imbalance towards the female gender that would be more often the victim (for example HINDUJA S., PATCHIN J. W., Bullying beyond the schoolyard: Preventing and responding to cyberbullying, Sage Publications, Thousand Oaks, 2009. RAWLINGS V., Gender regulation violences and social hierarchies in school: Sluts, gays and scrubs, ed. Springer, Berlin, 2016. CUNHA C., MANUELA M., Handbook of research on digital crime, cyberspace security and information assurance, IGI Global, US, 2014. BLACKBURN, LINLIN CHEN I., PFEFFER R., Emerging trends in cyber

dynamics[11]. Roles that in turn change significantly compared to the offline variant. The bully, for example, no longer necessarily presents those elements of physical or social prevalence proper to bullying. The powerful tool of anonymity has allowed a reversal of traditional positions, well being now able to be bully who in the physical world would certainly have been a victim of the bullying of others. Cyberbullying ends up detaching itself with its own conceptual autonomy even from the more general cyber-aggression.

Cyberbullying, like other forms of online aggression, can manifest itself through the most diverse technological means, such as computers, mobile phones (smartphones) and above all the most varied social media platforms, whose growing popularity has contributed to increasing cases of cyberbullying worldwide[12]. This close link with the technological reality entails an inevitable influence on the evolutionary level of the phenomenon, clearly representing it both as a medium and as a place of commission. In any case, the technological medium also detects the consequences deriving from it (including the meaning of their actions), accidental on the three traditional elements of repetition, aggression and imbalance of power, to the point of the identification trait of the new phenomenon[13]. Furthermore, the possibility of anonymity[14]. makes it more pervasive. Unlike traditional bullying that is perpetrated by a person known in a limited audience, in these cases the true identity of the bully may be unknown to the victim[15]. With regard to repetition[16], it should be distinguished between direct cyberbullying, which occurs in the private arena where electronic communications are directed only to the victim and repetition takes on the same contours as in traditional bullying, and indirect cyberbullying, in which, instead, electronic communication sent directly to the victim is forwarded to other people. In such cases, the material can remain indefinitely in the public IT arena, can be viewed publicly countless times, can be distributed, saved and republished at a later time. In doing so, the material is pushed out of the private domain, "escaping" from the bully's sphere of control.

Equally discussed is also the aspect relating to the imbalance of power, considered by some to be completely neutralized by technology[17], by others, however, strongly amplified[18]. Beyond the different lines of interpretation, it clearly emerges that the unequal and coercive power, which distinguishes bullying from other forms of aggression, takes on a new role in cyberspace. It is no longer tied to a condition of physical superiority but rather to knowledge of the medium and its potential for anonymity[19]

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ethics and education, IGI Global, US, 2019. Contra: (LI Q., Cyberbullying in schools: A research of gender differences, in School Psychology International, 27 (2), 2006, pp. 157-170. LI Q., New bottle but old wine: A research of cyberbullying in schools, in Computers in Human Behavior, 23 (4), 2007, pp. 1777-1791). Instead, what seems to emerge clearly is a differentiation in the approach to the phenomenon, mainly direct in the case of males, indirect in females. (HINDUJA S., PATCHIN J. W., Cyberbullying: An exploratory analysis of factors related to offending and victimization, in Deviant Behavior, 29 (2), 2008, pp. 129-156. PATCHIN J.W., HINDUJA S., Cyberbullying among adolescents: Implications for empirical research, in Journal of adolescent Health, 53 (4), 2013, pp. 434ss. ROBERSON C., Routledge handbook on victims issues in criminal justice, ed. Routledge, London & New York, 2017. LIVAZOVIĆ G., HAM E., Cyberbullying and emotional distress in adolescents. The importance of family, peers and school, in Heliyon, 5 (6), 2019).

[11]In this regard, six different categories have been identified: bullies (entitlement bullies), victims of bullies (targets of entitlement bullies), avengers (retaliators), that is, victims of bullying that uses the Internet to make up for the injuries suffered, the victims of the latter (victims of retaliators), the spectators who participated in the problem (bystanders who are part of the problem) or the solution (bystanders who are part of the solution). TAR C.E, PADGETT S., RODEN J., Cyberbullying: A review of the literature, in Universal Journal of Educational Research, 1, 2013, pp. 5ss.

[12]GILLESPIE A. A., Cyberbullying and harassment of teenagers: The legal response, in Journal of Social Welfare and Family Law, 28 (2), 2006, 124.

[13]KOWALSKI R., GIUMETTI G.W., SCHROEDER A.N., LATTANNER M.R., Bullying in the digital age: A critical review and meta-analysis of cyberbullying research among youth, in Psychological Bulletin, 140 (4), 2014.

[14]HINDUJA S., PATCHIN J. W., Bullying beyond the schoolyard: Preventing and responding to cyberbullying, op. cit.,

[15]THOMAS H.J., CONNOR P., SCOTT J.G., Integrating traditional bullying and cyberbullying: Challenges of definition and measurement in adolescents-A review, in Education Psychology Review, 27 (1), 2015.

[16]DOOLEY J. J., PYZALSKI J. CROSS, D., Cyberbullying versus face-to-face bullying: A theoretical and conceptual review, in Journal of Psychology, 217 (4), 2009, which is affirmed that: "the use of information and communication technologies to carry out a series of acts as in the case of direct bullying, or an act as in the case of indirect cyberbullying, intended to harm another (the victim) who cannot easily defend him or herself ". LANGOS C., Cyberbullying: The challenge to define, in Cyberpsychology Behaviour and Social Networking, 15 (6), 2012. Schultze-Krumbholz, A., Hess, M., Pfetsch, J., Scheithauer, H., Who is involved in cyberbullying? Latent class analysis of cyberbullying roles and their associations with aggression, self-esteem, and empathy, Cyberpsychology: Journal of Psychosocial Research on Cyberspace, 12 (4), 2018.

[17]LAPIDOT-LEFLER N., DOLEY-COHEN M., Comparing cyberbullying and school bullying among school students: Prevalence, gender, and grade level differences, in Social Psychology of Education, 18 (1), 2015. BUCKELS E. E., TRAPNELL P. D., PAULHUS D. L., Trolls just want to have fun, in Personality and Individual Differences, 67, 2014, 97-102. ZEZULKA, LAUREN A., SEIGFRIED-SPELLAR, K.C., Differentiating cyberbullies and internet trolls by personality characteristics and self-esteem, in Journal of Digital Forensics, Security and Law, 11 (3), 2016. SHIN H.H., BRAITWAITE V., AHMED E., Cyber and face to face bullying: Who crosses over?, in Social Psychology of Education, 19, 2016, pp. 538ss. FICHMAN P., SANFILIPPO M.R., Online trolling and its perpetrators: Under the cyberbridge, Rowman & Littlefield, New York, 2016.

[18]RASKAUSKAS J., STOLZ A.D., Involvement in traditional and electronic bullying among adolescents, in Developmental Psychology, 43 (3), 2007. GULLOTTA T.P., PLANT R.W., EVANS M.A., Handbook of adolescent behavioral problems: Evidence-based approaches to prevention and treatment, ed. Springer, Berlin, 2014.

[19]SLONJE R., SMITH P.K., FRISEN A., The nature of cyberbullying, and strategies for prevention, in Computers in Human Behavior, 29 (1), 2013

or in any case in the ability to humiliate and hit the victim on a large scale. Anonymity is in fact a feature that cyberbullying does not share with its traditional variant20.

2.Sexting between minors: Harmless practice or deviant behavior?

The term sexting, created in the journalistic field around the early 2000s by the juxtaposition of the Anglo-Saxon terms sex (sex) and texting (messaging)[21] to indicate the exchange of messages with a sexual background between adults, is now used almost exclusively to refer to sexual practices engaging minors[22].

Although the exchange of messages with sexual content cannot be said to be something unknown[23], it must be recognized as an unprecedented phenomenon, precisely in consideration of the fact that now, in globalized society, content can be produced, transmitted, reproduced and re-edited with extreme ease, being able to move even without the consent or approval of the person portrayed[24].

Thus only in recent times has sexting been subjected to evaluation by the scientific literature, whose research is still in an embryonic phase. This translates into a conceptual uncertainty, which is already evident at the definitory level[25].

With regard to the analysis of the prevalence of the phenomenon in relation to its use for sexual encounters[26], they elaborated limited definitions for sending text messages with erotic and/or sexual content. A necessary expansion of the field of investigation followed, as a consequence of the change in the use of technology by users[27]. These practices were considered with prevailing reference to those digital contents in the form of images or videos, sexually suggestive or explicit, distributed through e-mails, messages, social networks.

However, the pin of the phenomenon is the element of consensuality, which concerns the origin of the content that can be produced by the subject himself or by third parties. The sending of this type of content takes place with a voluntary character, i.e. it is assumed that the subjects involved, be minors or adults, produce the aforementioned sexual erotic content in a voluntary manner, an aspect that underlines the private nature of the phenomenon and, therefore, the expectation of confidentiality of those who share them. An element that assumes a more problematic character, raising in this case the main legal legal implications, when only minors of age are involved[28].

In fact, although these practices take place mostly within the confines of an intimate relationship (or a desired relationship), the adolescents who put it in place are aware that the contents thus produced are often shared and exchanged with other peers[29].

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[20]DOOLEY J. J., PYZALSKI J. CROSS, D., Cyberbullying versus face-to-face bullying: A theoretical and conceptual review, op. cit.,

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[25]BARRENSE-DIAS Y., BERTCHTOLD A., SURIS J.C., AKRE C., Sexting and the definition issue, in Journal of Adolescent Health, 61 (5), 2017, pp. 545ss. BIANCHI D., MORELLI M., BAIOCCO R., CATTELINO E., LAGHI F., CHIRUMBOLO A., Family functioning patterns predict teenage girls sexting, in International Journal of Behavioral Development, 43 (6), 2019, pp. 509ss. DODAJ A., SESAR K., Sexting and emotional regulating strategies among young adults, in Mediterranean Journal of Clinical Psychology, 7 (1), 2019.

[26]ALBURY K, CRAWFORD K., Sexting, consent and young people's ethics: Beyond Megan's Story, in Continuum, 26 (3), 2012. ATTWOOD F., Sex media, J. Wiley & Sons, New York, 2017.

[27]COOPER K., QUAYLE E., JONSSON, L., GORAN C, Adolescents and self-taken sexual images: A review of the literature, in Computers in Human Behavior, 55, 2016.

[28]KLETTKE B., HALLFORD D. J., MELLOR D. J., Sexting prevalence and correlates: A systematic literature review, in Clinical Psychology Review, 34 (1), 2014.

[29]LIVINGSTONE S., GORZIG A., When adolescents receive sexual messages on the internet: Explaining experiences of risk and harm, in Computers

This finding prompts us to ask ourselves what motivations move today's young people towards adopting such risky behaviors. Even in this respect, there is no clear answer, as the scientific literature has elaborated different interpretative hypotheses[30]. There are those who believe that there must be a confirmation of the change in socio-affective relationships influenced precisely by the constant use of digital media[31]. Sexting would be nothing more than an expressive form of the sexual relationship, which is used to stimulate the attention of the partner (present or future) in order to impress him and thus retain / induce him within the relationship. Obviously, it is clear how this interpretative option is based on an entirely internal perspective, limited to relational dynamics32.

Sexting is situated between pornography and photography, between the appropriate and inappropriate[33], a condition that has given rise to a heated debate not only in the media, but also in the social and legal spheres, which has taken on the contours of social panic, thus generating a wide range of conflicting sentiments that went beyond mere judgments of inappropriateness to the point of signaling the dangers of criminalization in child pornography terms[34], as happened in many countries, and thus raising the vexatious and controversial question of how the right should be confronted with these new phenomena[35]. This is clearly evident already in correspondence with the first court cases, which emerged on the US scene in the mid-2000s. Starting from the A.H. v. State of Florida[36], which in 2007 had highlighted how the phenomenon raises, ex multis, a contrast between the legitimate expectation of confidentiality of the child and therefore his right to maintain sexual relations and the interest pursued by the State and directed the protection of the sexual allowance of the minor, passing through the Miller v. Skumanick case of 2009[37], which, instead, had placed the emphasis on the freedom of expression of the minor even in the sexual sphere.

One wonders, however, whether this profile relates to conduct that would be convicted of the crime of production of child pornography, pursuant to section 827.71 of the Florida penal code. Specifically, the conduct was assimilated to the action of promoting a sexual performance by a minor, through the production, direction or promotion of an inclusive representation of a sexual conduct of a minor of eighteen years, heavily sanctioned. A. H. appealing on appeal against the first instance sentence, he argued that it was detrimental to his right to privacy, a right which is expressly mentioned in the Florida constitutional charter, unlike in other States. The appeal judges, however, considered this claim without foundation since the contents had been taken up by two minors and that, although the same had remained within the couple, there was a risk that this protected area would come out when one

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[30]COOPER K., QUAYLE E., JONSSON, L., GORAN C, Adolescents and self-taken sexual images: A review of the literature, op. cit.,

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[37]Otherwise the case (Miller v. Skumanick, M.D. Pa. 2009) had concerned the case of three young Pennsylvania teenagers who had photographed themselves naked, therefore not in carrying out sexual acts. These contents were then circulated among peers. Therefore, a debate began on the child pornography nature of the contents and therefore on the freedom of expression of the young women in realizing them. For further analysis see also: STARRANT S., Gender, sex and politics. In the streets and between the sheets in the 21st century, Routledge, London & New York, 2015. HAFNER C.A., WAGNER A., BHATIA V.K., Transparency power and control: Perspectives on legal communication, Routledge, London & New York, 2016, pp. 155ss. SALEH F., GRUDZINSKAS A., JUDGE, A., Adolescent sexual behavior in the digital age. Considerations ror clinicians, legal professionals and educators, op. cit.,

of the two minors had decided to share them with third parties. Although Florida constitutionally protects the right to privacy, this should be protected in more limited terms if we are dealing with minors, precisely because, given the immaturity that characterizes this phase of life, they would be more led to unstable relationships. For this reason, therefore, the state interest in protecting them from the risk of their exploitation should prevail, in this case also highlighted by the possibility that a hacker, who entered the computer system of the minor, could become aware of the intimate images produced for then disclose them inside, for example, the pedophile circuit.

The involvement of the adult was mainly identified in the solicitation directed to the minor to send images with sexual content. A conduct that is now referred to as grooming, that is, enticement and which as such undoubtedly finds its legal relevance, being sanctioned by the system. Otherwise, when everything takes place between minors, sexting became aggravated in the hypotheses in the face of an intent to harm or reckless misuse. In the first case, it meant the presence of criminal, abusive behavior, in addition to the creation, sending and possession of sexual material produced by the minor. This category included different situations ranging from sexual abuse by a minor, to the hypothesis of threat, extortion or deception, up to those situations of interpersonal conflict between ex-partners or ex-friends. Instead, the reckless misuse hypotheses did not indicate openly criminal or abusive situations but rather those images taken or sent without the voluntary or conscious participation of the minor portrait.

Experimental sexting was identified, residually, in all those hypotheses in which it could not be said to be aggravated, that is, in which there is the creation and sending of sexual images produced by minors, without the involvement of an adult, the intent to harm or the reckless misuse. Three different sub-categories were equally distinguished. The first included the so-called romantic episodes, in which minors involved in a love relationship produced the material for themselves or for each other, without any desire to distribute it beyond the couple's borders. The second identified the images produced to be sent to peers outside of a sentimental relationship dynamic and for a specific purpose, namely to attract the sexual attention of third parties. Finally, the third category ended up representing a miscellany of options, in which different purposes were identified, but which had not found a precise identification.

In this sense, the use of tendentious terms was emphasized, which built the identification of the conduct and their subdivision on the basis of the underlying reasons, thus sinning in terms of objectivity[38]. Second, others, however, there was a big absentee: Wolak and Finkelhor had not recognized any value to the consent, which, instead, should have been considered just as a distinctive note[39].

On the basis of the criticisms made, a different classification from the more agile forms was proposed, based on the binary primary sexting-secondary sexting[40]. Developed by Calvert two years earlier, in 2009, it has found its fortune only in recent times, by virtue of its intrinsic neutrality[41]. The phenomenon is divided into hypotheses in which the sexually explicit contents are sent between two subjects and not subsequently forwarded to third parties (primary) by those, however, in which the content is disseminated to others (secondary). A central role is recognized in the consensus that in the first case is supposed to be present, while it appears absent in the second.

The term revenge or revenge ends up circumscribing the reasons that would be underlying it, causing many problems on the interpretative level of the same, especially the legal terms[42], when, however, the causative range appears to be much wider, sometimes perhaps even too much[43]. Equally also the

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[38]MORELLI M., BIANCHI M.D., BAIOCCO R., PEZZUTI L., CHIRUMBOLO A., Not-allowed sharing of sexts and dating violence from the perpetrator's perspective: The moderation role of sexism, in Computers in Human Beahviour, 56, 2016. DEKESEREDY W.S., DRAGIEWICZ M., Routledge handbook of critical criminology, Routledge, London & New York, 2018.

[39]HASINOFF A., Sexting panic: Rethinking criminalization, privacy, and consent, University of Illinois Press, 2015.

[40]BLYTH C., ROBERTS L.D., Public attitudes towards penalties for sexting by minors, op. cit.,

[41]CALVERT C., Sex, cell phones, privacy, and the first amendment: When children become child pornographers and the Lolita effect undermines the law, in Common Law Conspectus. Journal of Communications Law and Policy, 18, 2009, pp. 18ss. MCLAUGHLIN, J.H., Exploring the first amendment rights of teens in relationship to sexting and censorship, in University of Michigan Journal of Law Reform, 45, 2012, pp. 322ss. FRADELLA H.F., SUMNER J.M., Sex, sexuality, law and (in)justice, ed. Routledge, London & New York, 2016.

[42]KITCHEN A.N., The need to criminalize revenge porn: How a law protecting victims can avoid running afoul of the first amendment, in Chicago-Kent Law Review, 90, 2015, pp. 250ss. MITCHELL, K.A., The privacy hierarchy: A comparative analysis of the intimate privacy protection act vs. the geolocational privacy and surveillance act, in University of Miami Law Review, 73, 2019, pp. 574ss. LAGESON S.E., MCELRATH S., PALMER K.E., Gendered public support for criminalizing "revenge porn", in Feminist Criminology, 14 (5), 2019, pp. 562ss.

[43]LICHTER S., Unwanted exposure: Civil and criminal liability for revenge porn hosts and posters, in Harvard Journal of Law & Technologies, 2013.

same term porn, indicative of pornographic can be defined equally problematic[44]. Without considering how much the same revenge porn label can be considered more than demeaning for the victims, to which is added a further victimization to endure[45]. This expression then does not capture one of the main aspects of the phenomenon, namely the legitimate expectation of privacy present for the victims, who place their trust in their partner or in any case in the recipient of the shared content, and which obviously is absent from what is commonly considered pornography[46]. No specific weight is recognized for the element of consent which nevertheless plays a decisive role, since the phenomenon must be divided into two different steps: The first involves the consensual production of the image, the second the non-consensual distribution of the same[47]. Now, the discussion on sexting must necessarily take into account also this conceptualization, which progressively sees the erosion of part of the semantic scope of the term sexting in favor of a new linguistic label, that of non-consensual distribution of intimate images.

3.Cyberbullying in European policies to combat online dangers

Even at European level, cyberbullying has been recognized in recent years as a significant problem to be addressed through specific initiatives aimed at regulating the relationship between minors and Internet.

In this sense, there is a reference already at the time of the promotion of the first Safer Internet Program, which began in 2009, when the European Commission defined it as a phenomenon consisting of repeated verbal or psychological harassment, carried out by a group or an individual, which may take multiple forms, then framed a few years later, in 2013, by the European Fundamental Rights Agency, in its annual report Fundamental rights: Challenges and achievements, as "a common threat to the well-being of minors"[48].

As part of the programs mentioned above, the European Union has adopted a series of initiatives aimed at preventing the phenomenon. One example is the "Delete cyberbullying" project active until 2014, aimed specifically at contrasting the use of the Internet and related technologies to harm other people, in an intentional, repeated and hostile way, a real and substantial danger, capable of cause immediate and significant damage.

GOLDMAN E., JIN A., Judicial resolution of nonconsensual pornography dissemination cases, in I/S: A Journal of Law and Policy for the Information Society, 14 (2), 2018, pp. 288ss.

[44]The reference is here to those who believe that the hypotheses in which the images were obtained through hacking are also to be traced back to this hat. FRANKS M.A., Why we need a federal criminal law response to revenge porn, in Concurring Opinions, 2013. Others argue that misogyny or the economic advantage could be valid reasons. KEATS CITRON D., FRANKS, M.A., Criminalizing revenge porn, in Wake Forest Law Review, 49, 2014, pp. 348ss. FRANKS M.A., "Revenge porn" reform: A view from the front lines, in Florida Law Review, 60, 2017, pp. 1254ss. STOKES J.K., The indecent internet: Resisting unwarranted internet exceptionalism in combating revenge porn, in Berkeley Technology Law Journal, 29, 2014, pp. 932ss. BARTOW A., Internet defamation as profit center: the monetization of online harassment, in Harvard Journal of Law Gender, 32 (2), 2009, pp. 384ss. LIPTON, J. D., Repairing online reputation: A new multi-modal regulatory approach, in Akron Law Publications, 138, 2010, pp. 148ss. MARCUM C.D., Cyber crime, Wolters Kluwer, Alphen Aan Den Rijn, 2019. DÖRR, D., WEAVER R.L., The right to privacy in the light of media convergence: Perspectives from three continents, W. De Gruyter, Berlin, 2012, pp. 332ss. COHEN-ALMAGOR R., Confronting the internet's dark side. Moral and social responsibility on the free highway, Cambridge University Press, Cambridge, 2015, pp. 88ss. WITZLEB N., LINDSAY D., PATERSON M., Emerging challenges in privacy law: Comparative perspectives, Cambridge University Press, Cambrdige, 2014. REAGLE J.M., Reading the comments. Likers, haters and manipulators at the bottom of the web, MIT Press, Massachusetts, 2015. DRAPER N.A., The identity trade: Selling privacy and reputation online, New York University Press, New York, 2019. KUZMA J., Empirical study of cyber harassment among social networks, in International Journal of Technology and Human Interaction, 8, 2013. TRAVIS H., Cyberspace law: Censorship and regulation of the internet, ed. Routledge, London & New York, 2013. HOLT T.J., BOSSLER A.M., Cybercrime in progress. Theory and prevention of technology enabled offenses, ed. Routledge, London & New York, 2015.

[45]According to Franks, then, pornography is generally to be considered limited to situations of consent between adults, with inevitable consequences in terms of considering the phenomenon. FRANKS M.A., "Revenge porn" reform: A view from the front lines, op. cit.,

[46]In this regard, it must be said how the Google company in one of its Transparency Reports, in June 2015, communicated that it would eliminate from its search results relating to the revenge porn, on the basis of the numerous requests received, as "(...) revenge porn images are intensely personal and emotionally damaging, and serve only to degrade the victims predominantly women. So going forward, we'll honor requests from people to remove nude or sexually explicit images shared without their consent from Google Search results. This is a narrow and limited policy, similar to how we treat removal requests for other highly sensitive personal information, such as bank account numbers and signatures, that may surface in our search results (...)". BJARNADOTTIR M.R., Does the internet limit human rights protection? The case of revenge porn, in Journal of Intellectual Property, Information Technology and Electronic Commerce Law, 7, 2016, pp. 215ss. HAYNES A.M., The age of consent: When is sexting no longer speech integral to criminal conduct, in Cornell Law Review, 97, 2012, pp. 402ss. KAYR, P., Sexting or pedophilia?, in Revista Criminalidad, 56 (2), 2014, pp. 264ss.

[47]In this regard, it was stressed that there is no social pressure in adults that has been invoked for minors, however, even in these cases, the discussion cannot totally ignore the possible involvement of coercion. LEE M., CROFTS T., MCGOVERN A., MILIVOJEVIC S., Sexting among young people: Perceptions and practices, op. cit., pp. 1-9. WHITEHEAD J.T., LAB S.P., Juvenile justice: An introduction, Routledge, London & New York, 2018.

[48]LIEVENS E. A children's rights perspective on the responsibility of social network site providers, 25th European Regional ITS Conference, Brussels 2014, International Telecommunications Society (ITS).

Finally, as evidence of the growing attention for the phenomenon there is also the study conducted in 2016 by the European Parliament's Study Center and aimed precisely at providing an overview both from a phenomenological and a juridical point of view, having regard to the different Member States legislations.

4.Directive 93/2011 in the footsteps of the Lanzarote Convention

The attention of the European legislator towards forms of abuse related to sexual exploitation and child pornography takes shape through the adoption of the Council Framework Decision 2004/68/JHA49 on the fight against the sexual exploitation of children and child pornography that in addition to responding to specifically preventive needs, it achieved a progressive homogenization of criminal law.

This brings us to Directive 2011/93/EU50, as a result of a long process of maturation that began after the adoption of the Lanzarote Convention in 2007, to which the European Union landed, above all with the aim of curbing the phenomena of abuse and sexual exploitation of minors, increasingly frequent also for the diffusion of information technologies[51].

The 2011 news thus went to enumerate a series of "minimum standards" relating to the definition of crimes and sanctions regarding the abuse and sexual exploitation of minors, extending the spectrum of protection also to those conducted related to the development and use of new information technologies.

Among these, there are also the conduct concerning child pornography, defined in art. 2 lett. c), such as "any material that visually portrays a minor in explicit, real or simulated sexual attitudes" or "the representation of the sexual organs of a minor for mainly sexual purposes"[52], and identified in art. 5 in the purchase, possession, distribution, etc.

Still following the trail traced years before in Lanzarote, in paragraph 8 there is the possibility for the States to limit the punishment of obtaining, possessing or producing child pornographic material, if this has been produced and owned by the producer only for private use, provided that images of real minors in sexually explicit attitudes or their genital organs are not used for its realization, and provided that the risk of their spread does not derive from this activity[53].

Although it can be interpreted as a clear signal of the will of the Member States to want to allow the exclusion of so-called non-problematic or primary sexting[54], it is clear that the scope of the Directive is more limited than the opening granted by the Lanzarote legislature.

5.(Follows) The Canadian context. The cyberbullying emergency: A "toxic" phenomenon. The case of A.B. (Litigation Guardian of) v. Bragg Communications Inc.

Canada represents one of the most technologically advanced states, which as early as the mid-nineties of the last century has put in place political choices aimed at promoting the entry of young people into the interconnected space.

In hindsight, the first references within the parliamentary arena are gathered, albeit tangentially,

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[49]Council framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography. OJ L 13, 20.1.2004, p. 44–48. For further details see: NUNO GOMES DFE ANDRADE N., TOMÉ FÉTEIRA, New technologies and human rights. Challenges to regulation, ed. Routledge, London & New York, 2016. SUMMERS S.J., SCHWARZENEGGER C., EGE G., The emergence of EU criminal law. Cyber crime and the regulation of the information society, Bloomsbury Publishing, New York, 2014.

[50]Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335, 17.12.2011, p. 1-1. CARIAT N., La Charte des droits fondamentaux et lèquilibre constitutionalle entre l'Union europèenne et les États membres, ed. Bruylant, Bruxelles, 2016. FLORE D., Droit pènal europèen: Les enjeux d'une justice penale europèenne, ed. Larcier, Bruxelles, 2014.

[51]Art. 83 TFEU. For further details see also: HATJE, A., TERHECHTE, J.P., MÜLLER-GRAFF, P.C., Europarechtswissenschaft, ed. Nomos, Baden-Baden, 2018. SCHWARZE, J., BECKER, V., HATJE, A., SCHOO, J., EU-Kommentar, ed. Nomos, Baden-Baden, 2019. KELLERBAUER, M., KLAMERT, M., TOMKIN, J., Commentary on the European Union treaties and the Charter of fundamental rights, Oxford University Press, Oxford, 2019. BERRY, E., HOMEWOOD, M.J., BOGUSZ, B., Complete EU law: Text, cases and materials, Oxford University Press, Oxford, 2019.

[52]In Recital 9 of the Directive, it is specified as "child pornography often includes the registration of sexual abuse committed by minors by adults. It may also include images of minors involved in explicit sexual attitudes or images of their sexual organs, where such images are produced or used for predominantly sexual purposes, regardless of the fact (...) ".

[53]Specifically, art.5, par. 8 of the Directive states that "it is within the discretion of the Member States to decide whether paragraphs 2 and 6 of this article apply to cases where it is ascertained that pornographic material as defined in article 2, letter c), point iv) is produced and owned by the producer for private use only, provided that no pornographic material referred to in Article 2 (c), points i), ii) and iii) has been used for its production, and provided that the activity do not involve any risk of spreading the material (...)".

[54]LIEVENS E., Bullying and sexting in social networks: Protecting minors from criminal acts or empowering minors to cope with risky behaviour? in International Journal of Crime, Law & Justice, 43 (3), 2014.

already around 2008 on the occasion of the reform of the television content discipline, which, however, referred to the more general problem of violence expressed through communication media[55]. However, it is only from 2010 that the phenomenon becomes central within the Canadian debate, as a consequence of relevant news reports that shocked the country's public opinion, reaching an echo that can be said to be worldwide.

The first to commit suicide is Jamie Hubley, an Ottawa teenager who committed suicide in 2011, entrusting his last notes to the Tumblr blog. Because of his homosexuality he had been mocked and bullied by his peers to the point of sinking into a state of deep depression. Shortly thereafter, in 2012, the well-known case of 15-year-old Bristish Columbia Amanda Todd follows, who before dying decides to share online what had happened to her with the video "My story: Struggling, bullying, suicide and self harm", which today it has over 12.5 million views[56]. Another name was added to the list of young suicides, in 2013, that of the young woman from Nova Scotia Rehtaeh Parsons, who committed suicide after the humiliations and harassment following the online distribution of the photos that portrayed her during the rape she had suffered during a party. These were different cases, but at the same time they had strong similarities, especially in terms of pervasiveness[57].

It is well understood how these tragic events may have influenced the general consideration of cyberbullying, which the Canadian jurisprudence came to define, pronouncing itself in the case of A.B. [Litigation Guardian of] v. Bragg Communications Inc., as a "toxic phenomenon" harmful in psychological terms for those targeted by it[58].

In what has been defined as a true landmark case in the field of cyberbullying and children's rights, the Canadian supreme judges had found themselves deciding on the request for confidentiality made by AB, a fifteen-year-old victim of cyberbullying, in whose name he had been created a fake Facebook profile, through which sexualized and defamatory materials were shared. The minor had asked the Nova Scotia judicial authorities to order Bragg Communications Inc., the Internet Service Provider based in Halifax, to disclose information useful to identify the user who had used the fake profile and to block the re-publication of the sexualized content thus produced. Procedure that the same required to be activated with the indication not of his full name but of a pseudonym, to protect his own identity. On this occasion, the Supreme Court of Canada not only took the opportunity to affirm the strong pervasive charge of the phenomenon, but, in deciding in favor of the minor, it also addressed a warning to the same authorities, underlining how behind the cases of inertia of the defenseless of the young victims, there is a risk of subsequent and unacceptable victimization.

This ruling thus represents a fundamental step in the process of public awareness of the phenomenon,

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[55]The first reference to cyberbullying is found in the parliamentary acts of the Standing Committee on Canadian Heritage with reference to the reform of the Broacasting Act, in the matter of television content, where it is defined as "online culture of cruelty…[that is] closely linked to violence in television broadcasting, as many of the same assumptions on context and outcomes are relevant in promoting an ambivalence towards the use of violence in our daily lives". BAILEY J., Canadian legal approaches to "cyberbullying" and cyber violence: An overview. in Ottawa Faculty of Law Working Paper, 2016/37, pp. 5ss. PASHANG S., KHANLOU, N. CLARKE, Today's youth and mental health: Hope, power and resilience, ed. Springer, Berlin, 2018. In this sense, there is an alignment with respect to what happened in the United States where the debate on the matter originated as a result of the tragic suicide of the teenager Megan Meier, who committed suicide in 2006 shortly after his fourteenth birthday after being a victim of cyberbullying. The teenager was in fact lured, through a fake Myspace profile, by a sixteen year old named Josh Evans, who was actually the fifty year old father of a previous friend of the girl, who believed he had spread false gossip about his daughter. After being seduced and abandoned, she was repeatedly harassed and forced to commit suicide. BARNETT L., GARCIA A., How not to criminalize cyberbullying, in Missouri Law Review, 70, 2012

[56]In 2009, the young woman had resorted to video chat services to meet new people and had come across an unknown subject who had enticed and convinced her to show her breasts during an online conversation. Subsequently, after threatening to spread this image if he did not continue to "perform", the man had created a Facebook profile with the images thus obtained, adding to his account as friends the boys who attended the same school as the girl, who came therefore repeatedly offended and harassed. Falling into a state of depression and taking refuge in alcohol and drugs, the teenager was forced to change schools several times, but with each new movement, the photos that took her naked were spread within the new school circuit. At that point he decided to take his own life, failing. The failed attempt accelerated the vexation of vexation to the point where, after spreading a video online that told his story, he decided to hang himself. Subsequently the author was identified in an adult man of Dutch origin, already convicted of several crimes perpetrated online to the detriment of numerous victims, about 34, of both sexes and residents in different parts of the world. PENDERGRASS W, WRIGHT M., Cyberbullied to death: an analysis of victims taken from recent events, in Issues in Information Systems, 15, 2014. NAUARRO R., YUBERO S., LARRAÑAGA E., Cyber bullying across the globe: Gender, family and mental health, ed. Springer, Berlin, 2015.

[57]GUTENKUNST E.K., Cyberbullying: A legal crisis in the age of technology, in Revue Juridique étudiante de L'Université de Montréal, 2014

[58]A.B. v. Bragg Communications Inc., 2012 SCC 46, [2012] 2 S.C.R. 567. For further analysis see: BAILEY J., "Sexualized online bullying" through an equality lens: Missed opportunity in AB v. Bragg ?, in McGill Law Journal, 59 (3), 2014, pp. 709-737. BURKELL, J., BAILEY, J. Equality at stake: Connecting the privacy/vulnerability cycle to the debate about publicly accessible online court records, in Canadian Journal of Comparative and Contemporary Law, 4. 2018. STEEVES V., BAILEY, J., Egirls, ecitizens: Putting technology. Theory and policy into dialogue with girls and young women's voices, University of Ottawa Press, Ottawa, 2019. GRAHAM R., The role of courts in assisting individuals in realizing their s. 2(b) right to information about court proceedings, in BENYEKHLEF J., et al, eds., eAccess to Justice, University of Ottawa Press, Ottawa, 2016, pp. 96ss.

which originated a series of parliamentary debates and government choices within which-as observed by Bailey-the issue of cyberbullying emerged not so much as a problem as rather as a social and intellectual avalanche (juggernaut) which has brought with it a wide range of social problems and political ideologies into the public agenda[59] .

6.From the first attempts at reforming criminal law to protecting Canadians from online acts

It is in this sense that the first federal inquiry conducted by the Human Rights Commission of the Canadian Senate, to which it was entrusted in November 2011, therefore shortly after the death of Jamie Hubley, arises the mandate to examine the phenomenon with explicit reference to the obligations deriving from the Status from adherence to the Convention on the Rights of the Child, and in particular, from art. 19[60]. The subject of this mandate must obviously be read in correspondence with the aforementioned general comment n.13 elaborated by the United Nations Commission on the Rights of the Child and Adolescent, which precisely had established as the aforementioned provision also applied with reference to cyberbullying.

The results to which the Commission landed flowed into the Cyberbullying Hurts: Respect for Rights in the Digital Age[61], report, made public in July of the same year, through which the adoption of a joint strategy among all the social actors involved aimed at spreading knowledge of the phenomenon was recommended. A weakness in the Canadian system was identified, mainly attributable to the lack of coordination between the federal system and provincial governments, which provided for fragmented regulations on offline bullying[62].

Basically, however, an intervention area of a mainly educational-preventive type was looming, which did not neglect, but limitedly considered a possible punitive response.

According to the reconstruction carried out by the Commission, in cases in which the acts of cyberbullying reached a seriousness such as to lead to criminal implications, some criminal cases provided for by the Canadian Criminal Code could apply, especially with regard to the crimes of harassment, aggression, defamation, intimidation and replacement of person[63], obviously without prejudice to the rules governing the criminal liability of the minor (Youth Criminal Justice Act)[64]. The Commission preferred to postpone the limited requests that required a modification of the criminal discipline, as the punitive instrument was considered by the great majority of those present in the debate as not responding to the primary need to put a stop to cyberbullying cases.

Certainly influenced by the models adopted in the Aboriginal communities[65], the Canadian legal landscape has adopted over the years a wide spectrum of different tools and institutions ranging from extended dialogue to parental groups (the so-called family group conferences) to community meetings for the measurement of the penalty (defined as sentencing circles)[66]. The conclusions reached by the Commission must necessarily be read in correlation with what was the first criminal law proposal on cyberbullying presented to the Canadian Parliament. In fact, always in correspondence with the death of the young Jamie Hubley, but before the establishment of the Cyberbullying Hurts: Respect for Rights

[59]BAILEY J, Time to unpack the juggernaut? reflections on the Canadian federal parliamentary debates on cyberbullying, in Dalhousie Law Journal, 37 (2), 2014, pp. 30ss.

[60]LIEFHARD T., SLOTH NIELESEN J., The United Nations convention on the rights of the child, ed. Brill, Bruxelles, 2016, pp. 54ss.

[61]STANDING SENATE COMMITTEE ON HUMAN RIGHTS, Cyberbullying Hurts: Respect for Rights in the Digital Age, 2012.

[62]In this sense see also: Legislative Assembly of Ontario, Education Act, R.S.O. 1990, c. E.2, s. 306(1), Bill 14: Anti-Bullying Act, 2012,; National Assembly of Quebec, An Act to prevent and deal with bullying and violence in schools, 2012, c. 19, National Assembly of Québec, An Act respecting the National Assembly, R.S.Q., c. A-23.1, s. 55 (7); Legislative Assembly of Nova Scotia, Promotion of Respectful and Responsible Relationships Act, S.N.S. 2012, c. 14, Government of Nova Scotia, Ministerial Education Act Regulations, N.S. Reg. 80/97, s. 47(2); Legislative Assembly of Manitoba, The Public Schools Act, C.C.S.M. c. P250, s. 47.1(2)(b)(i.1), 47.1(2.1), 47.1.1(6)(b), The Public Schools Amendment Act (Reporting Bullying and Other Harm), S.M. 2011, c. 18, The Public Schools Amendment Act (Cyber-Bullying and Use of Electronic Devices), S.M. 2008, c. 25], The Community and Child Care Standards Act, C.C.S.M. c. C158, s. 15.2(1)(b)(i), Government of Manitoba, Reporting Bullying Regulation, Public Schools Act, Regulation 37-2012; Government of British Columbia, Appeals Regulation, School Act, B.C. Reg. 24/2008, s. 2(2)(g).

[63]The reference was therefore to the following cases of the Criminal Code of Canada: s. 264 (criminal harassment); s. 264.1 (uttering threats); s. 265 (assault); s. 271 (sexual assault); s. 298 (defamatory libel); s. 346 (extortion); s. 403 (identity fraud, personation with intent); s. 423 (intimidation).

[64]The Criminal Code of Canada identifies at s.13 the threshold of criminal imputability in the twelfth year of age. The criminal liability of minors under the age of eighteen is then governed by the Youth Criminal Justice Act, which entered into force in 2003.

[65]SHAW M., JANÉ F., Restorative justice and policing in Canada. Bringing the community into focus, Royal Canadian Mounted Police, Ottawa, 1998. WALGRAVE L., Repositioning restorative justice, Routledge, London & New York, 2012. BAZEMORE G., SCHIFF M., Juvenile justice reform and restorative justice, Routledge, London & New York, 2013.

[66]In the first case (family group conference), the mediation meeting involves in addition to the author and the victim also the respective families and/or reference communities in support. Otherwise, the sentencing circles or commensurative councils constitute a moment of discussion within the community, usually concerning the commensuration of the sentence.

in the Digital Age investigation, then in July 2011 the law: Bill C-273, was presented to amend the Criminal Code (cyberbullying). The proposed text was intended to intervene in a modifying key of the crimes already in force, through the insertion of a specific mention of the technological tools among the commissive means of the crimes of criminal harassment (s.264), defamatory libel (s.298) and false messages and indecent or harassing telephone calls (s.372). In fact, beyond the most tragic instances of incitement to suicide[67], such were the types of crime that seemed to be able to find application in the various hypotheses in which cyberbullying can be used[68].

In this broad regulatory framework, section 264 can certainly be defined as the reference standard, through which the criminal relevance of harassment is recognized. Inserted in the Canadian criminal article in 1993 as an antistalking rule[69],

it sanctions those conducted, alternatives to each other, recognizable in following or communicating repeatedly, supervising or threatening that they establish in the victim a state of fear for their own safety. If, then, the harassment degrades to forms of threat of serious physical damage or even death, the contiguous crime envisaged in section 264.1 entitled uttering threat[70]. is configured. Its application is clearly seen even in the most tragic cases of bullying[71], but the same cannot be said for the actions that are carried out in cyberspace. In hindsight, this transposition was easier in the second case than in the aforementioned crime of harassment[72]. Sec. 2641.1, although originally included in the penal code in order to pursue those threats made through letters, telegrams, radio or other means, was then modified, assuming the current configuration, following the reform carried out by the Criminal Law Amendment Act of 1985, which has eliminated any reference to the commission.

The protection of honor and reputation is then entrusted to crimes relating to defamatory libel or defamatory publications, provided for in sections 298-301[73]. Canadian criminal law provides protection against conduct that may harm an individual's reputation or expose him to hatred, contempt or absurd[74], even if they occur in the online world, with the sole exception of the discussed section 372, in false messages, indecent and/ or harassing telephone calls[75]. As can well be understood from the section of the standard, these are three distinct criminal hypotheses, which, although showing

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[67]Sec. 241: "Everyone is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years who, whether suicide ensues or not, (a) counsels a person to die by suicide or abets a person in dying by suicide; or(b) aids a person to die by suicide".

[68] Sec. 264: "No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them. (2) The conduct mentioned in subsection (1) consists of (a) repeatedly following from place to place the other person or anyone known to them; (...) 3) Every person who contravenes this section is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or (b) an offence punishable on summary conviction.".

[69] The case in question is in fact inserted into the current Canadian penal code under the Bill C-126 of 1993 then An Act to amend the Criminal Code and the Young Offenders Act, RS 1993, which is affirmed that: "specific response to violence against women, particularly to domestic violence against women". GRANT I., BIRENBAUM J.,Taking threats seriously: Section 264.1 and threats as a norm of domestic violence, in Criminal Law Quarterly, 59 (2), 2012, pp. 209ss.

[70]Sec. 264.1 "(1) Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat (a) to cause death or bodily harm to any person; (b) to burn, destroy or damage real or personal property; or (c) to kill, poison or injure an animal or bird that is the property of any person. (2) Every one who commits an offence under paragraph (1)(a) is guilty of (a) an indictable offence and liable to imprisonment for a term not exceeding five years; or (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months (..,.)".

[71]R. v. G.J.M, concerning a 14-year-old man, convicted of making threatening comments to a slightly younger peer. (R. v. GJM, 1996 CanLII 8699 (NS CA). While for the crime of uttering threats, the sentence R v. DH is recalled, which led to the conviction of two teenagers for having threatened their peer, who, in following the threats received, he decided to commit suicide, (R v. DH [2002] BCJ No 2454, [2002] BCJ No 2136). PASHANG S., KHANLOV N., CLARKE J.,, Today's youth and mental health: Hope, power and resilience, op. cit.,

[72]SWEENY J., BRABDEIS L. D., Gendered violence and victim-blaming: The law's troubling response to cyber-harassment and revenge pornography, in A.A.V.V., Social issues surrounding harassment and assault: Breakthroughs in research and practice, ed. Information Resources Management Association, Hershey, 2018.

[73]In this regard, the Canadian penal code defines the defamatory libel as "matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published. A defamatory libel may be expressed directly or by insinuation or irony (a) in words legibly marked on any substance; or (b) by any object signifying a defamatory libel otherwise than by words (...)".

[74]DALAY R., The medium is not the message: reconciling reputation and free expression in cases of Internet defamation, in McGill Law Journal, 55, 2010.

[75]Sec. 372: "Everyone commits an offence who, with intent to injure or alarm a person, conveys information that they know is false, or causes such information to be conveyed by letter or any means of telecommunication.Indecent communications (2) Everyone commits an offence who, with intent to alarm or annoy a person, makes an indecent communication to that person or to any other person by a means of telecommunication. Harassing communications (3) Everyone commits an offence who, without lawful excuse and with intent to harass a person, repeatedly communicates, or causes repeated communications to be made, with them by a means of telecommunication.Punishment (4) Everyone who commits an offence under this section is (a) guilty of an indictable offence and liable to imprisonment for a term of not more than two years; or (b) guilty of an offence punishable on summary conviction".

relevance in the context of cyberbullying, limit their scope of applicability to outdated forms of technological communication. In this sense, sub-sections 2 and 3 are located, which refer respectively to indecent phone calls and harassment by telephone. Otherwise, the first section presents a broader list of means of communication, with respect to which, however, it is not clear whether those of an electronic nature can also find space. In this sense, various attempts have been made to modernize the case in point, aimed precisely at making it also applicable to acts committed through Internet.
Therefore, at the basis of the aforementioned Bill C-273 proposal, there was a judgment of inadequacy of the criminal calls referred to, considered dated and inapplicable to modern forms of communication, and therefore inadequate to cope with the pervasive phenomenon of cyberbullying.
Precisely at the behest of the then Prime Minister Harper, in 2012, the bill called Bill C-30, Protecting Children from Internet Predators Act[76]. was presented before the Canadian Parliament. So, a few months after the rejection of the previous drawing, a new intervention was proposed to modify the penal code, which however immediately seemed to want to go further than the text that had preceded it. In addition to the creation of new criminal cases, the transfer to the police of new and extensive investigative powers was envisaged, including the possibility of requesting online service providers to facilitate the interception of users and to provide information on the subscribers of their services.
A criminal policy that, if on the one hand it could be explained in light of the difficulties that emerged in relation to the aforementioned Todd case, on the other hand ended up placing itself on a dangerous ridge, threatening the freedoms of users on the net. For this reason, the text was soon surrounded by a strong criticism, to the point of being labeled "the online surveillance bill", accused of wanting to be directed not so much to protect minors from cyberbullying but rather to control the Internet and monitoring the activities of online users. The aversion shown not only by experts and civil rights activists, but also by public opinion led to the abandonment of the Bill C-30.
On the basis of the examination of the cases of cyberbullying that had occurred up to that moment in the country, the need to maintain a multilateral approach to the phenomenon was confirmed, however inclusive of a new proposal to amend the criminal matter. In fact, the consideration that Candese criminal law did not present itself with the necessary tools to face this new challenge posed by technology, which precisely in function of the particular category of victim to which it referred, needed punitive responses certain. In hindsight, the area of intervention, went beyond the phenomenon considered, extending its scope to the different phenomenon of the non-consensual distribution of intimate images, which will be explored later.
Cyberbullying was thus embryonic defined as a broad spectrum of behavior, many of which did not take on the traits of criminal conduct, an element that made it impossible to delineate a single criminal case, even creating it from scratch[77].
It was only possible to act on the existing level, in the wake of the previous proposals. This suggestion was taken only for one case, which presented itself as the most problematic, namely section 372, regarding false messages and indecent or harassing telephone calls. By virtue of its internal structure, which was well reflected in the rubric, this provision was considered per se incapable of being effectively used in the context of cyberbullying, given the reference to obsolete tools such as telegram, radio or telephone. An amendment was therefore proposed that would make it applicable also in the face of conduct established by electronic means[78].
Again, then, the extension of the powers granted to the police was proposed, in order to facilitate investigations, on the basis of what has already been indicated in the expired Bill C-30[79].

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[76]SCHELL B.H., Internet censorship. A reference handbook, ABC-Clio, S.B., California, 2014, pp. 162ss. SCHANTZ J., TOMBLIN J., Cyber disobedience: Re:Presenting online anarchy, John Hunt Publishing, UK, 2014.
[77]We can clearly read, in fact, in the conclusions drawn up by the group of experts like: "bullying/cyberbullying manifests itself in such a broad range of behaviour that it should not and cannot be addressed through a single, stand-alone offence prohibiting all manifestations of bullying/cyberbullying behaviour generally". CCSO Cybercrime Working Group, Report to the Federal/Provincial/Territorial Ministers Responsible for Justice and Public Safety, "Cyberbullying and the Nonconsensual Distribution of Intimate Images", 2013. PLAXTON M., Implied consent and sexual assault., intimate relationships autonomy and voice, McGill Queen's Press, Quèbec, 2015.
[78]In this sense it is remembered how numerous were the previous attempts to intervene in order to modernize the language used in the case in question. Among all, the Bill C 3021 bill presented the previous year, in 2012.
[79]Specifically, read the Recommendation number 4-"data preservation demands and orders; new production orders to trace a specified communication; new warrants and production orders for transmission data; improving judicial oversight while enhancing efficiencies in relation to authorizations, warrants and orders; other amendments to existing offences and investigative powers that will assist in the investigation of cyberbullying and other crimes that implicate electronic evidence". CCSO CybercrimeWorking Group, Report to the Federal/Provincial/Territorial Ministers Responsible for Justice and Public Safety, op. cit.,

The recommendations thus formulated by the Cybercrime Working Group fell on deaf ears, but flowed into the well-known Protecting Canadians from Online Crime Act, adopted in 2015 following a legislative process that can be said to be more than tortuous. Risen from the ashes of previous failed attempts, Bill C-13 was presented to the Canadian Parliament by the then head of the Department of Justice Peter Mackay in the aftermath of the publication of the work conducted by the Cybercrime Working Group, as the final text, which would have represented a reference rule in the fight against cyberbullying.
Although the scope of operations, already in the text of the draft law, was focused on three different specific areas of intervention (the crimes committed through the use of telecommunication tools, the expansion of investigative powers and the insertion of new criminal case relating to the non-consensual diffusion of intimate images) the most discussed point was precisely the profile of the expansion of the investigative powers, like what happened with the aforementioned Bill C-30, of which the same forecasts were proposed, accompanied by the same criticism, which underlined how in fact it wanted to promote surveillance of Internet users[80]. In fact, from the first discussions in the parliamentary arena disputes emerged from the constitutionality of the law[81], which was believed to have led to completely unbalanced situations in which the individual's right to privacy would have been in fact sacrificed in favor of the new guarantees of operations granted to law enforcement agencies.
On the other hand, the criminal matters, dealt with briefly, resolved on the one hand in the modification of the aforementioned section 372, and on the other in the insertion of a new type of crime aimed at sanctioning the non-consensual distribution of sexually explicit material[82], a true distinctive feature of the reforming intervention of the Protecting Canadians from Online Acts.

7.The Nova Scotia Cyber Safety Act, the Crouch v Snell case and the profiles of unconstitutionality
Nova Scotia, which had mourned the death of Reateh Parson in 2013, was the first Canadian province to promote reform of its legal system.
An intervention that should have had as its object, at least in the intentions of the local legislator, the school legislation (Educational Act), but which soon saw its intentions and aims change, as a consequence of the death of the young woman. However, it was not only the girl's tragic disappearance that affected the change of perspective, but also the legal affair related to her, which, like what happened in the Amanda Todd case, had highlighted an inability of the judicial system to face the new dangers of the web represented by cyberbullying. It should be remembered that the young woman had decided to commit suicide after the investigating authorities had declared the impossibility of being able to proceed due to the absence of evidence against those who had shared on the net some photos depicting the rape suffered some time earlier by some peers.
Thus, as a result of general indignation, the adoption of the Cyber Safety Act was reached, only three weeks after the disappearance of the young woman. A timing that alone was worth many of the numerous criticisms raised that saw in this legislative policy not so much a reasoned intervention as a mere emotional response, from the belly, to a tragic event[83]. Although it was a provincial measure and, therefore, as such with limited efficacy both for the territory, having value within the borders of Nova Scotia, and for the matter, not being able to intervene on the criminal matter, it still represented a measure that cannot be neglected in the analysis of the Canadian legislative approach to the phenomenon[84].

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[80]COBURN P. I., CONNOLLY D.A., ROESCH R., Cyberbullying: Is a federal criminal legisaltion the solution? in Canadian Journal of Criminology and Criminal Justice, 57 (4), 2015, pp. 567ss. PATTERSON, V. C., CLOSSON, L. M., PATRY, M.W., Legislation awareness, cyberbullying behaviours, and cyber-roles in emerging adults, in Canadian Journal of Behavioural Science, 51(1), 2019, pp. 12-26. SMITH P.K., SUNDARAM S., SPEARS B.A., Bullying cyberbulling and student well-being in schools: Compaing European, australian and indian perspectives, Cambrdige University Press, Cambridge, 2018. KLEIN J., Cullying: A reference handbook, ABC-Clio, BA, California, 2019.
[81]According to Bailey's interpretation, the conceptual elasticity of the term, together with the tragic cases of suicide that occurred and, therefore, with the urgent feeling of protection of innocent minors, served as a pretext to insert a new form of state surveillance on the public agenda. BAILEY J, Time to unpack the juggernaut? reflections on the Canadian federal parliamentary debates on cyberbullying, op. cit., pp. 674ss.
[82]FELT M., The incessant image: How dominant news coverage shaped canadian cyberbullying law, in University of New Brunswick Law Journal, 66, 2015. ESPELAGE D.L., SUNG HONG J., Cyberbullying prevention and intervention efforts: Current knowledge and future directions, in The Canadian Journal of Psychyatry, 62 (6), 2016, pp. 376ss.
[83]TAYLOR J, Minding the gap: Why and how Nova Scotia should enact a new cyber-safety act, in Canadian Journal of Law and Technology, 14 (1), 2016.
[84]The Cyber Safety Act it was defined, depending on the angle of perspective, as a limited measure or beyond limits CARTWRIGHT B. E., Cyberbullying and Cyber Law, A Canadian Perspective, 2016 IEEE International Conference on Cybercrime and Computer Forensic (ICCCF),

With the Cyber Safety Act, the Nova Scotia legislature had decided to promote a multisectoral intervention, thus intervening on several fronts, obviously excluding the criminal one. In addition to the modification of the so-called Educational Act, aimed at raising awareness and empowering school staff, a specific investigative unit (Cyber SCAN) was set up, with the task of dealing with cyberbullying complaints, applying negotiation mechanisms between cyberbully victims, always in that view, which was previously said to be proper to the Canadian context, of alternative dispute resolution.
The most significant changes concern the so-called protection orders. Specifically, the Cyber Safety Act provided for the possibility of personally requesting, or in the case of a minor, through the parent or other legal representative to the judicial authority to issue ex parte an order of protection against the alleged cyberbulb, to the purpose of prohibiting the offender from persevering in the conduct of cyberbullying or of communicating directly or indirectly with the victim, being able to jointly request also a restriction on the use of technological tools or the temporary or partial confiscation of the same. Prescriptions that, if disregarded, could configure a summary conviction offense, punishable by a penalty of $ 5,000 or/and imprisonment for up to six months[85].
The extension of this definition clearly emerges, which not only also includes the role of the spectator, thereby wanting to emphasize the importance of those who assist without playing a direct role in injuring the victim, but above all who do not discriminate in reason the age of the same, applying indifferently to adults and minors. This wide scope, which can be grasped both on an objective and on a subjective level, immediately gave rise to a strong criticism that led to the affirmation of the unconstitutionality of the Cyber Safet Act.
The test case is certainly represented by the Crouch v Snell case[86]. It is immediately surprising that the case in question, which led to the abolition of the "first Canadian law on cyberbullying", actually involved two adult men.
In fact, Crouch and Snell were both businessmen, founders of a company operating in the digital market. Following Crouch's abandonment of the company, Snell had started a defamatory campaign against the former partner, through various social profiles, stating that Crouch had been fired for distracting the company's funds, also informing the new employer of an alleged investigation by the tax agency. For this reason, Crouch requested the Court to issue a protection order in 2014, in compliance with the provisions of the Cyber Safety Act. The order was granted and was substantiated in an order of prohibition in communicating with Crouch or Crouch with others, as well as the removal of all posts uploaded by Snell on social media and relating to the former partner.
Snell thus appealed to the Supreme Court of Nova Scotia, noting the presence of a constitutional conflict in the grounds of appeal. Specifically, it was stated that the Cyber Safety Act presented an evident violation of sections 2 (b) and 7 of the Canadian Charter of Rights and Freedoms[87], with specific reference, therefore, to the right to freedom of thought, belief, opinion and expression, from on the one hand, and the freedom and security of the person on the other.
The Supreme Court of the State, called to settle the controversy, came to affirm how the Nova Scotian legislature in an attempt to remedy the dangers of cyberbullying had gone too far[88]. It was evident that the case in question concerned two main aspects: On the one hand the definition of cyberbullying and on the other the procedure of protection orders granted ex parte, with a clear prevalence of the former

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Vancouver, 2016, 1-7.
[85]As mentioned by Cartwright, the main problems traditionally raised in the field of cyberbullying can be identified in the consideration of this phenomenon as difficult to identify, given the possibility of interference of the character of anonymity, as well as difficult to combat appropriately given the indefinite audience of recipients of the contents disseminated online, as well as the minor age of the author. CARTWRIGHT B. E., Cyberbullying and Cyber Law, A Canadian Perspective, 2016 IEEE International Conference on Cybercrime and Computer Forensic (ICCCF), Vancouver, BC, 2016, pp. 1-7.
[86]Crouch v. Snell, 2015 NSSC 340. For further details see: BRUCKERT C., LAW T., Women and gendered violence in Canada: An intersectional approach, University of Toronto Press, Toronto, 2018. HARVEY D.J., Collissions in the digital paradigm: Law and rule making in the internet age, Bloomsbury Publishing, New York, 2017.
[87]In this regard, it must be remembered that the Canadian Charter of Rights and Freedoms, which entered into force in 1982, represents the charter of rights and freedoms incorporated into the Canadian Constitution in the aftermath of the process of transferring the powers of modification of the Constitution from the British motherland to the state Canadian ("Patriation"). Therefore, in accordance with the provisions of the Charter in its opening section, the fundamental freedoms and rights recognized in it are subject only to those reasonable limitations provided for by the law which can be demonstrably justified in a free and democratic society. According to the provisions of art. 1 “the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.
[88]“The Cyber Safety Act and the definition of cyberbullying in particular is a colossal failure”. Crouch v Snell. Hfx. n. 434423 of 1st December 2015, par. 165. For further details see: TAYLOR J., Minding the gap: Why and how Nova Scotia should enact a new cyber-safety act, op. cit., pp. 164ss.

over the latter. The most problematic aspect was the profile of the protection of freedom of thought and expression.
At the center of the question was the concept of cyberbullying as elaborated by the Nova Scotia legislature, which - it is repeated - had added to the already highly extensive character of the term itself, a descriptive label with excessive application scope, no longer restricted to school or at least youth environment. To this must be added that, in spite of the few previous court cases in which this definition had been considered accompanied by the element of the "malice" or by fraud, it had to be observed that there was no mention of this characterization of subjectivity in the text of the Cyber Safety Act and how, on the other hand, those conduct characterized by a "culpable intent" as well as those "conduct where harm was not intended, but ought reasonably to have been expected"[89] could be considered included, i.e. where the damage was not wanted but had to be reasonably considered. The result was an endless expansion of the scope of the rule which thus ended up going beyond those conduct that the legislator intended to prevent, also given the absence of standard mechanisms and guarantees that could avoid an arbitrary and discriminatory application.
The reference standard in this is section 2 (b) of the Fundamental Charter, according to which everyone is guaranteed the freedom of "thought, belief, opinion and expression, including freedom of the press and other media of communication"90. This provision identifies a widely protected right, in which all activities that consist in communicating meaning find protection. This is a very wide range of forms of expression, from which only those conduct which include violence or threats of violence should be excluded, as established in the Attorney General of Quebec v Irwin Toy Ltd. case[91] , but which may well include those unpopular and unpleasant expressive forms[92].
Cyberbullying, as formulated in the aforementioned regulation, had to be recognized as having the constitutional coverage provided for in the matter of freedom of expression, a freedom that the contested act ended up restricting unjustifiably[93], contrasting with the provisions of the Canadian Charter of Rights and Freedoms.
The unconstitutionality of the rule was declared, not without strong criticism from those who, on the other hand, believed that doing so affected the interests of minors, vulnerable subjects to whom the rule was addressed. Again there was a contrast of positions between those who believe that freedom of expression must be protected at all costs and those who otherwise admit a limitation for the purpose of preventing cyberbullying. In an attempt to find a balance and to fill the gap created by the Supreme Court, the Nova Scotia legislature, collecting the warning of part of the doctrine[94], issued the Cyber-Protection Act in July 2018, in which, in light of the reasons to the aforementioned sentence of unconstitutionality, has opted for a delimitation of the definition of cyberbullying, making explicit reference to the elements of "malice" or "recklessness", absent in the previous act[95], trying to limit the effects of a friction of the norm with the freedom of expression protected by the Constitutional Charter.

8.Sexting among young people in Canada: The first court cases
The Canadian landscape shares with the American one a pioneering position in becoming aware of the existence of sexting.
Already in 2005, therefore well before the explosion of social media, Cybertip.ca, a national green line designed to report episodes of sexual exploitation online to the detriment of minors, had raised attention to an emerging phenomenon, consisting in that growing trend that he was involving young

[89]TAYLOR J., Minding the gap: Why and how Nova Scotia should enact a new cyber-safety act, op. cit.
[90]TAYLOR J., Minding the gap: Why and how Nova Scotia should enact a new cyber-safety act, op. cit.,
[91]The Attorney General of Quebec v Irwin Toy Ltd., [1989] 1 SCR 927 For further details see also: SCHERTZER R., The judicial role in a diverse federation: Lessons from the Supreme court, University of Toronto Press, Toronto, 2016, pp. 264ss. MCCORMICK P.J., The end of the charter revolution: Looking back from the new normal, University of Toronto Press, Toronto, 2014. FRIEDMAN M., MAY L., PARSONS K., Rights and reason. Essays in honour of Carl Wellaman, ed. Springer, Berlin, 2013.
[92]ROACH K., SCHNEIDERMAN D., Freedom of expression in Canada, in Supreme Court Law Review, 61, 2013.
[93]"Prevention of cyberbullying is a purpose that aims to restrict the content of expression by singling out particular meanings that are not to be conveyed, i.e. communication that is intended or ought reasonably be expected to cause fear, intimidation, humiliation, distress or other damage or harm to another person's health, emotional well-being, self-esteem or reputation (...) . Crouch v Snell, op. cit., para 165-166.
[94]TAYLOR J, Minding the gap: Why and how Nova Scotia should enact a new cyber-safety Act, op. cit., pp. 172ss.
[95]The text of the Cyber Protection Act indicates cyberbullying as: ”an electronic communication, direct or indirect, that causes or is likely to cause harm to another individual’s health or well-being where the person responsible for the communication maliciously intended to cause harm to another individual’s health or well-being or was reckless with regard to the risk of harm to another individual’s health or wellbeing”.

girls to pose naked in front of a webcam, thus creating content that could be divulged online[96].
The term sexting began to spread shortly thereafter, first among the media and then also among the operators of the law and with the emergence of the first reports, the possible frictions emerged with the legislation envisaged in the field of child pornography[97].
A seventeen-year-old young man was convicted in 2012 of producing and distributing child pornography for filming the attack of one of his peers, drugged and raped during a party, and then sent the video to a friend, who in turn had posted the video online. Similarly, a group of teenagers, aged between thirteen and fifteen, were arrested in 2013 for having ordered their partners, their peers, to send photos that portrayed them naked through the social media Snapchat. A sixteen year old was sentenced in 2015 for possession and distribution of child pornography after sharing the intimate images of the ex-girlfriend without the consent of the same.
In a context in which the lawfulness of a practice involving the production and sharing of intimate images appeared quite different, the need to protect that right to privacy guaranteed by the Constitutional Charter also emerged with preponderance in art.8.
It is a right that in the Canadian system is affected by two poles of attraction: On the one hand the European one built on the concept of dignity and on the other the US one oriented towards a perspective of greater freedom. In fact, for its part, art. 8 ECHR, representative of the European "pole", considers dignity as an integral part of the right to respect for private life, with respect to which the right to privacy extends[98] incorporating within itself the right to the moral and physical integrity of the person, including that of sex life, ensuring protection that does not automatically lapse in the event of consent or public disclosure, an element, however, which seems to be able to occur in the American context, precisely tending to be informed of a prevalence of the individual's freedom[99].
That of Canada, it was said, is a median position, to which, however, part of the doctrine has recognized the demerit of having made the path of the interpreters even more complex towards the formulation of appropriate and consistent conclusions in the concrete cases submitted to them. If, in fact, the attractive force towards the European model can be said to be stronger, in the Canadian jurisprudence the US seems to emerge in some ways. The test case would be precisely to be found in the hypotheses in which the intimate contents are shared then without the consent of the person portrayed[100]. It is therefore, in this context and with such premises, that sexting enters the Canadian social, political and legal debate.

9.Consensuality and child pornography: the "salvation" clause of R. v. Sharpe case
Canadian criminal law protects the freedom and sexual integrity of minors through the use of an articulated complex. Within this legal framework, there is a recognized sphere of autonomy in the management of one's sexual activity, which sees the achievement of the sixteen-year threshold[101], as

[96]KARAIAN L., Policing "sexting": Responsabilization, respectability and sexual subjectivity in child protection/crime prevention responses to teenagers' digital sexual expression, in Theoretical Criminology, 18 (3), 2013. VANDEBOSCH H., GREEN L., Narattives in research and interventions on cyberbullying among youth people, ed. Springer, Berlin, 2019. SETTY E., "Confident" and "hot" or "desperate" and "cowardly"? Meanings of young men's sexting practices in youth sexting culture, in Journal of Youth Studies, 2019.
[97]The Royal Canadian Mounted Police (RCMP) itself in 2011 expressed itself in 2011 in one of its press releases, underlining the possible criminal implications of the phenomenon, stating "from a legal perspective, each photo may be constituted as child pornography and individuals can be charged with Possession of Child Pornography as defined by the Criminal Code of Canada. Further, a person sending a photo or video, even of themselves, can be charged with Distributing Child Pornography.
[98]KARAIAN L., VAN MEYL K., Reframing risqué/risky: Queer temporalities, teenage sexting, and freedom of expression, in Laws, 4 (1), 2015, pp. 19ss. GREALY L., DRISCOLL C., HICKEY-MOODY A., Youth, technology, governance, experience. Adults understanding youth people, ed. Routledge, London & New York, 2018. WAUGH T., ARROYO B., I confess: Constructing the sexual self in the internet age, McGill-Queen's Press, Quèbec, 2019. See also in argument the case: Maple Ridge, B.C., Case (2012). SLANE A., Sexting and the law in Canada, in Canadian Journal of Human Sexuality, 22 (3), 2013. SLANE A., From scanning to sexting: The scope of protection of dignity-based privacy in canadian child pornography law, Osgoode Hall Law Journal 48 (3/4), 2010, pp. 543-593. SLANE A., Luring Lolita: The age fo consent and the burden of responsibility for online luring, in Global Studies of Childhood, 1 (4), 2011, pp. 358ss.
[99]WHITMAN J.Q., The two western cultures of privacy: Dignity versus liberty, in Yale School Legal Scholarship, 113, 2004, pp. 1156ss. AKRIVOPOULOU C.M., Human rights and the impact of ICT in the public sphere: Participation, democracy and political autonomy, IGI Global, US, 2014. BAKHOUM, CONDE GALLEGO B., MACKENRODT M.O., Personal data in competition, consumer protection and intellectual property. Towards a holistic approach, ed. Springer, Berlin, 2018.
[100]SLANE A., From scanning to sexting: The scope of protection of dignity-Based privacy in canadian child pornography law, op. cit., HASINOFF A.D., Sexting as media production: Rethinking social media and sexuality, in New Media & Society, 15 (4), 2012, pp. 452ss.
[101]Canada ranks among those states that have opted for an increase in the age of sexual consent in recent years. For more than a hundred years, from 1892 until 2008, in fact, the legal age for sexual consent was indicated in the fourteenth year of age, then increased to sixteen due to the effect of the Trackling Violent Crime Act, which entered into force on the 1st January 2008.

a limit, without prejudice to the possibility of lowering this limit when certain conditions are met. These are the so-called "close-in-age exceptions", exceptions determined by the close age of the subjects involved, by virtue of which the consent given by the fourteen or fifteen year olds in reference to non-abusive sexual activities is considered valid[102]. Otherwise, there is no recognition of value to the consent given by the minor to pornographic representations. In this regard, it must be said how child pornography crimes entered Canadian law in 1993. These behaviors fell within the area of relevance of obscene crimes, which, of course, could also apply to content depicting adult subjects[103].

The reference rule of the "new" discipline is section 163.1 of the Canadian Criminal Code[104], which sanctions all those conduct of production, publication, access, transmission, disclosure, distribution, sale, export and possession of the so-called child pornography material.

According to the first paragraph of the aforementioned provision, any visual representation (in the form of a photograph or drawing) showing a person under the age of eighteen (or represented as under the age of 18) engaged in sexual activities or for whom genital organs or belonging to the anal area are taken for sexual purposes. To this must also be added writings recommending sexual activities or describing illegal sexual activities with minors under the age of eighteen[105].

It is a wide range of contents, all portraying under-eighteen-year-old subjects, whose eventual consent is not recognized by law. Thus, while on the one hand the Canadian legislator seems to allow the involvement in sexual activities of minors, even under the threshold of sixteen, in fact it criminalizes the resumption by the same of the same activity.

Then in times still far from the pervasive era of social media, the Canadian Supreme Court was called in 2001 to rule on the constitutionality of the aforementioned section 163.1, with explicit reference to the conduct of possession and production of pornographic material, conflicting, according to the applicant, with the aforementioned section 2 (b) of the Basic Charter, cornerstone of freedom of expression.

The case specifically concerned an adult subject who had been convicted of possession of child pornography. The lower courts appealed that the prohibition of possession of such material should be considered unconstitutional as it is unjustly limiting the use of the right to freedom of expression. Decision that was appealed by the Public Prosecutor, recognizing in this case a restriction justified by the most other public interest of the protection of the minor subject.

In resolving the question submitted to it, the Court adhered, at least in its fundamental reconstruction, to the applicant's argument, stating that there was a justified restriction. Child pornography crimes, in

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[102]If, on the other hand, these are activities that are carried out within relationships of trust or dependence even if between minors, consent loses relevance, thus going to be a criminal case, punishable by itself. MACKAY R., The legal age in Canada of consent to sexual activity. Library of Parliament background Papers, 2017. WEBBER M., BEZANSON K., Rethhinking society in the 21st century: Critical readings in sociology, Canadian Scholars Press, Toronto, 2012, pp. 425ss.

[103]This reform intervention, carried out through the Bill C-128 An Act to amend the Criminal Code and the Customs Tariff (child pornography and couuprting morals), acted as the landing point of the work carried out, in the aftermath of the entry into force of the Canadian Criminal Code, ab origin without any specific case, by a special commission (Committee on Sexual Offences against Children and Youth), called the Badgley Commission, appointed by the Department of Justice with the aim of analyzing the use of minors in the pornographic production circuit and, therefore, their access to said material. Although it was concluded that the Canadian territory did not present an epidemic emergency in this sense, it was recommended to take innovative action on criminal matters. In fact, before the 1993 news, the phenomenon of child pornography could find limited coverage only in the crimes of obscene publications (section 163) and corruption of the child's morality (section 172). In this process of awareness, a decisive role was certainly played also by the Canadian jurisprudence, in particular through the leading case R.v. Butler, who ended up reinterpreting the crime of obscene publications, going to outline the traits of the new crime of child pornography. If, therefore, there was at the time a broad support for the adoption of this intervention, it was, in reality, the point of arrival of a long path, a point that had remained noted for years on the Canadian legislative agenda. BLUGERMAN B., The new child pornography law: Difficulties of Bill C-128, in Media & Communications Law Review, 4, 1993.

[104]Sec. 163.1:"Every person who makes, prints, publishes or possesses for the purpose of publication any child pornography is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year.Distribution, etc. of child pornography (3) Every person who transmits, makes available, distributes, sells, advertises, imports, exports or possesses for the purpose of transmission, making available, distribution, sale, advertising or exportation any child pornography is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year. Possession of child pornography (...)".

[105]Sec. 163.1 "In this section, child pornography means (a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means, (i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or (ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years; (b) any written material, visual representation or audio recording that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act; (c) any written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act; or (d) any audio recording that has as its dominant characteristic the description, presentation or representation, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act. (...)". R v. Sharpe [2001] 1 S.C.R. 45.

particular in relation to the conduct of possession, are subject to damage for the child represented, which can be seen in the contribution to the child pornography market, which in turn leads to production involving the exploitation of the child himself, but also in facilitating the seduction and solicitation of the minor, as well as in the ability of these contents to break the inhibitions or incite the actions of those who could then commit sexual acts against minor victims[106].

At the basis of the criminalization of child pornography there would be the violation of the rights of dignity of minors, considered as a means by sexual criminals, therefore in fact their exploitation would be found. That is the reasonable risk that justifies the limitation of the right to freedom of expression.

However, the judges of the Supreme Court took a further step forward, underlining the concern that the law subjected to constitutionality could lead to the criminalization of subjects under the age of eighteen in relation to the possession and of private and personal images depicting the same alone or during legitimate sexual activities.

The Supreme Court restricted the purpose of the provision, excluding from the area of punishment the production and possession of the contents, referred to in the first paragraph, in the presence of self-produced materials (self created expressive material) or reproduction of licit sexual activity (private recordings of lawful sexual activity)[107].

Thus an exemption from punishment was introduced for jurisprudential, called private use exception[108]. Actually, these were two exceptions applicable to possession crimes (sec.163.1. (4)) and making child pornography (sec.163.1. (2)) and related, respectively to "written materials or visual representations created and held by the accused alone, exclusively for personal use "or" visual recordings created by or depicting the accused that do not depict unlawful sexual activity and are held by the accused exclusively for private use"109, against which the material it remains child pornography, but the minors involved can lawfully own it for their private use.

Attention must be paid to the second, which specifically relates to the hypothesis of "visual recording", therefore shooting, intended as visual recording. According to the directives indicated by the supreme judges, in order for the cause of non-punishment to operate in such cases, three different requirements must be considered satisfied.

The first relates to the presence of the subjects: The recovery must be made or in any case must portray the accused subject. Secondly, the content must objectively fall within the catalog indicated in the first paragraph of sec. 163.1, having to appear as ex pornographic. It must be a filming of consensual sexual activities, involving subjects who have reached the age of consent. Element that requires a verification of consent first in terms of sexual activity, since there should be no hypothesis of abuse (in the various forms in which it can occur) nor of sexual acts with subjects with whom there is an absolute presumption of irrelevance of consent, established by the Canadian law upon reaching the age of sixteen, having made the aforementioned close-in-age exception or otherwise in other cases where sexual activity must be said to be illegal (e.g. incest). Subsequently, the consensuality must also be assessed with reference to the resumption of said activity. Consent clearly represents the founding element, which must regulate the sexual relationship, to be considered legally valid, but also the content itself produced by the parties and shared only between them.

Finally, as a third element, the subject is required to hold the content only for an exclusively private purpose[110].

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[106]SLANE A., From scanning to sexting: The scope of protection of dignity-based privacy in canadian child pornography law, op. cit.,

[107]To these were then added two other statutory defense, identified respectively in the presence of a legitimate aim (relating to the administration of justice, science, medicine, education, art), which, however, must not subject the minor under eighteen to undue risks (section 163.1, fifth paragraph), and in the proof that the author had deemed the adult and that for this purpose he had taken all the necessary measures to ascertain it (section 163.1, sixth paragraph).

[108]The exception found obstructionism from the judges who formulated dissenting opinions, according to which, therefore, the minors involved in the production of these materials could be said to be equally at risk of exploitation, and in turn could cause harm to other minors. SHAW W. D., Child Pornography and the Media. R. v. Sharpe, in Dialogues about Justice, 2 (4), 2002.

[109]SHAW W. D., Child Pornography and the Media. R. v. Sharpe, op. cit.

[110]GILLESPIE A.A., Adolescents, sexting and human rights, in Human Rights Law Review, 13 (4), 2013, pp. 624ss. SETTY, E. A Rights-based approach to youth sexting: Challenging risk, shame, and the denial of rights to bodily and sexual expression within youth digital sexual culture, in International Journal of Bullying Prevention, 1, 2019, pp. 300ss. GILLESPIE A.A., Cybercrime key issues an debates, Routledge, London & New York, 2015. TUFFORD L., Child abuse and neglect in Canada: A guide for mandatory reporters, Oxford University Press, Oxford, 2019. SCHUBERT A., WURF G., Adolescent sexting in schools: Criminalisation, policy imperatives and duty for care, in Issues in Educational Research, 24 (2), 2014, pp. 192ss. STOLLOVA M., LIVINGSTONE S., KARDEFELT-WINTHER D., Global kids online: Researching children's rights globally in the digital age, in Global studies of Childhood, 6 (4), 2016, pp. 457ss.

To be sure, the Canadian supreme judges, who at the beginning of the 2000s ignored that social custom, which after ten years would have exploded to touch the borders of the criminally relevant, were more than far-sighted[111].
Consensual and primary sexting seemed to find an escape route in the Canadian context, even if formulated ante litteram, which was then collected by subsequent jurisprudence also with reference to new technologies[112]. A solution capable of recognizing the importance of protecting the sexual freedom of expression of young people and of giving consent a role of central importance also in the field of child pornography, thus circumventing the different configuration of age limits imposed by law.

10.The Protecting Canadians from Online Acts: The criminalization of the non-consensual distribution of intimate images
However, the possibility remained that, in the face of secondary sexting episodes, a minor could incur child pornography accusations.
Voyerism behaviors are characterized precisely by the stealth with which the image is taken, as there is no room for consensuality, while obscene publications require the element of violence linked to sexuality, which should emerge from the content itself, but in the so-called revenge porn violence is, if anything, in the very connotation of distribution[113]. The harassment, then, is based on the victim's perception of a feeling of fear for his own life, but in the hypotheses considered, this does not happen, because, when intimate content is spread without his consent, the victim tries first of all humiliation, she feels injured in her privacy[114].
Thus emerged a crime framework not able to adequately grasp the offense of the phenomenon. An inadequacy that in the case of the minor was perceived as amplified, given the obvious possible reference to the provisions of sec. 163.1 in the field of child pornography, a discipline which, however, felt inappropriate in such cases, also due to the consequences that a conviction of this type could entail, and which on the other hand had determined a certain reluctance to prosecute minors for these offenses. Furthermore, it was observed that the lesion deriving from the distribution of intimate images, therefore a lesion of privacy, is actually qualitatively different from that, however, underlying the distribution of child pornography and identified, as already mentioned, in the sexual exploitation of the minor. Thus the presence of a legislative gap was ascertained which had to be filled by the legislator. Following the stated example of the New Jersey legislation, the Cybercrime Working Group recommended intervening, inserting a new crime into the penal code, a recommendation which later merged into the aforementioned Protecting Canadians from Online Acts. In fact, the novel brings with it the introduction of a new specific case, inserted in section 162.1 (1) of the Canadian penal code through which the conduct of publicizing, distributing, transmitting, selling, selling, making available or intentionally advertising intimate images of a person, without the consent of the same or neglecting imprudently (reckless) whether or not there is such consent[115].
The crime de quo thus shares the same needs for confidentiality underlying the different, but in some ways contiguous cases of voyerism, having as its object nudity or explicit sexual activity in circumstances that animate a reasonable expectation of privacy. The new provision requires that, at the time of registration, there must have been circumstances that gave rise to a reasonable expectation of confidentiality. In continuity with the aforementioned case of vouyerism, this expectation can only descend from the content and the circumstances in which the registration took place, where the hypothesis of the content taken up by a third party can also be seen, with respect to which, however, the couple in the portrait, he remains private, a circumstance whose assessment will be up to the judge in the specific case.

[111]BAILEY J., HANNA M., The gendered dimension of sexting: Assessing the Applicability of Canada's child pornography Provision, in Canadian Journal of Women and Law, 23 (2), 2011, pp. 436ss. ADORJAN M.C., RICCIARDELLI R., Cyber risk and youth: Digital citizenship, privacy and surveillance, op. cit.,
[112]R. v. Keough [2011] A.J. No. 89 (Q.B.), R. v. Barabash [2012] A.J. No. 191 (Q.B.), R. v. Cockell [2013] A.J. No. 466 (C.A.)
[113]MATHEN C., Crowdsourcing sexual objectification, in Ottawa Faculty of Law-working paper, 2014/23. MATHEN C., Crowdsourcing sexual objectification, in Laws, 3 (3), 2014, pp. 9ss.
[114]SLANE A., From scanning to sexting: The scope of protection of dignity-based privacy in canadian child pornography law, op. cit.,
[115]Sec. 162.1 "everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct, is guilty a) of an indictable offence and liable to imprisonment for a term of not more than five years; or (b) of an offence punishable on summary conviction.".

It must be said, however, how such visual representations can at the same time be defined as child pornographic material within the meaning of the aforementioned discipline where the person portrayed is less than eighteen years old, thereby posing clear questions regarding the relationship, therefore, existing between section 163. 1 and the new section 162.1.
Through this reformed intervention, Canada has outlined a way out from those situations involving only minors and for whom the child pornography discipline is considered inadequate, while also responding to the different need to provide answers to those same practices, carried out within adult relationships, which, however, could not find direct criminal coverage, remaining fragmented in different cases, which seemed not to provide appropriate protection to the injured legal good.

11.(Follows) The Australian context. Cyberbullying in Australia, from the Halkic case to the Chloe's Law Movement

The term bullying appears in the Australian legislative discourse as early as the early nineties, precisely in the context of a series of initiatives concerning episodes of violence within the school setting[116].
In this sense, the parliamentary inquiry Sticks and Stones: A report on violence in Schools of 1994[117], must be mentioned, which represented in fact not only a first general picture concerning the forms of physical and verbal aggression in the Australian school context, but at the same time also the starting point for the adoption of increasingly targeted initiatives[118]. Among these emerges the National Safe Schools Framework program adopted in 2003 with the aim of developing an integrated national policy aimed at the prevention and treatment of school violence in general and bullying in particular[119]. In line with this pioneering approach, in a short time the attention is focused more intensely on the risks associated with the use of new technologies and therefore also on cyberbullying. To play an important role was the visibility that the Australian media gave to a first research on the phenomenon conducted informally in 2003 by an association of parents and citizens, which marked the starting point of a growing media campaign, strongly fueled by some tragic cases reports that brought out its strong pervasiveness.
The most disturbing was the suicide of seventeen-year-old Allem Halkic, who in 2009 decided to jump from Melbourne's West Gate Bridge, after being repeatedly harassed with threatening messages, sent through instant messaging services by a peer, Shane Philip Gerada. The story was not only affected by the cruelty that the young man had suffered, but above all because it was the first case in which cyberbullying entered the courtroom of an Australian court, where, however, he did not find that punitive response that public opinion He expected. The perpetrator of the vexatious conduct, found guilty, avoided jail in favor of a sentence of public utility works[120].
Then, in 2012, the death of Sheniz Erkan, fifteen years old from the state of Victoria, and, in 2013, that of Chloe Fergusson, fifteen years old from the state of Tasmania[121], which decided to commit suicide due to the repeated bullying, online and offline, immediately.
Thus the awareness of the relevance of the phenomenon gradually emerged, which began to find recognition not only in the public media debate, but also at the institutional level[122]. The result was several fragmented initiatives, culminating in February 2013 in a review of the aforementioned National

[116]CAMPBELL, M.A., BUTLER D., KIFT S., A school's duty to provide a safe learning environment: Does this include cyberbullying? in Australian and New Zealand Journal of Law and Education, 13 (2), 2008.
[117]AUSTRALIAN HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON EMPLOYMENT, EDUCATION AND TRAINING, Sticks and Stones: A report on violence in School, 1994.
[118]CHADWICK S., Impacts of cyberbullying, Building social and emotional resilience in schools, ed. Springer, United States, 2014, pp. 6ss. SMITH P.K., MORIA Y., JUNGER.TAS J., OLWEUS D., CATALANO R., SLEE P., The nature of school bullying: A cross-national perspective, ed. Routledge, London, 1998, pp. 324ss.
[119]CROSS D., EPSTEIN M.M HERAN L., SLEE P., SHAW T., MONKS H., National safe schools framework: Policy and practice to reduce bullying in Australian schools, in International Journal of Behavioral Development, 2011, pp. 398ss.
[120]SRIVASTAVA A.A., BOEY J., Online bullying and harassment: An Australian perspective, in Masaryk University Journal of Law and Technology, 12, 2012, pp. 300ss. CLOUGH J., Principles of cybercrime, Cambridge University Press, Cambridge, 2015, pp. 420ss.
[121]LANGOS C., Which laws can apply to cyberbullying?, in Bulletin of the Law Society of South Australia, 35 (10), 2013, pp. 72ss.
[122]A first reference is found in the report promoted in 2011 by the Parliamentary Commission on IT security, where there is a definition of the phenomenon, although still strongly connected to traditional bullying ("Bullying is repeated verbal, physical, social or psychological behaviour that is harmful and involves the misuse of power by an individual or group towards one or more persons. Cyberbullying refers to bullying through information and communication technologies". JOINT SELECT COMMITTEE ON CYBER-SAFETY, High-Wire Act: Cyber-safety and the Young, 2011.

Safe Schools Framework. A reform that included cyberbullying among its objectives[123], always remaining within the framework of an approach limited to the school context and therefore exclusively oriented towards a preventive-educational key[124].
A change of perspective that inevitably ends up placing criminal law at the center of the debate, greatly influencing the political choices of both the Commonwealth and the individual States.

12.The adoption of the Online Safety for Children Act and the influence of New Zealand legislation
The Australian system recognizes criminal jurisdiction mainly to States and Territories, entrusting to the Commonwealth only a limited power of intervention in relation to specific areas[125], regulated mainly in the Crimes Code Act of 1995[126].
Ratione materiae, for example, the discipline of communications is considered to be a federal competence, given the nature of the same on which the involvement of multiple jurisdictions may depend. Consequently, the use of telecommunication services for illicit purposes, differently identified, is protected by the Commonwealth criminal code[127], through a discipline that was immediately recognized as a useful instrument of contrast, at federal level, against conduct harassment online.
In particular, this must also be said with reference to the cases of cyberbullying[128], without prejudice in these cases to the guarantees provided for the particular personal condition of the subject who committed the crime[129].
The reference is specifically to section 474.17, entitled using a carriage service to menace, harass or cause offence[130], of which we saw a first application already in 2010 in the proceedings against the cyberbully Shane Philip Gerada[131]. Moreover, the wide scope of the law is well suited to the multifaceted phenomenon, since the use of communication tools[132] is sanctioned for the purpose of threat, harassment or offense. It is a wide range of conduct, both instantaneous and repeated over time, whose threatening, harassing and offensive nature is considered in the light of the criterion of reasonableness, to be assessed taking into account the standards of morality, decency and appropriateness, as well as any artistic, literary or educational merit. The criminal protection framework, thus prepared at the federal level[133], is then completed by the discipline provided for by

[123]We read, in fact, in the objectives of this intervention as the "Framework provides a vision and a set of guiding principles for safe and supportive school communities that also promote student wellbeing and develop respectful relationships. It identifies nine elements to assist Australian schools to continue to create teaching and learning communities where all members of the school community both feel and are safe from harassment, aggression, violence and bullying. It also responds to new and emerging challenges for school communities such as cybersafety, cyberbullying and community concerns about young people and weapons". MINISTERIAL COUNCIL ON EDUCATION, EMPLOYMENT, TRAINING AND YOUTH AFFAIRS, National Safe Schools Framework, 2013.
[124]LANGOS C., Regulating cyberbullying: A South Australian perspective, in Flinders Law Journal, 16, 2014
[125]In hindsight, the Commonwealth of Australia Constitution Act does not explicitly attribute material areas within which States can legislate. Section 51 is limited to indicating a number of subjects within the Federation's jurisdiction, excluding which, pursuant to the clause expressed in sect. 107, should be recognized as operational to the Member States. In particular, it must be said that the same constitution provides that, according to what stated in sect. 120, criminal law, police services and prisons, are under state jurisdiction. However, although there is no constitutional provision of federal legislative competence in criminal matters, it is believed that this can be said to be implicit in the protection of all those matters assigned to the Federation.
[126]The Criminal Code Act 1995 (Cth) obtained the royal seal on March 15, 1995, coming into force on December 15, 2001.
[127]In particular, the sections are called: 474.14 (using a telecommunications network with intention to commit a serious offence), 474.15 (using a carriage service to make a threat), 474.16 (using a carriage service for a hoax threat), 474.29A (using a carriage service for suicide related material).
[128]BUTLER D., KIFT S., CAMPBELL M.A., Cyber bullying in schools and the law: Is there an effective means of addressing the power imbalance, in eLaw Journal: Murdoch Electronic Journal of Law, 17, 2010. KIFT S. M., CAMPBELL M.A., BUTLER D., Cyberbullying in social networking sites and blogs: Legal issues for young people and schools, in Journal of Law, Information and Science, 20 (2), 2010, pp. 60-97.
[129]"(...) it should be remembered that in all Australian jurisdictions, the criminal liability threshold is identified when reaching the tenth year of age. Furthermore, in the case of minors between the ages of ten and fourteen, they are subject to the presumption of malice unable and can be held liable only if it is proven beyond any reasonable doubt that the minor knew that he should not have committed the crime (...)". URBAS G., The age of criminal responsibility, in Australian Institute of Criminology, 11, 2000.
[130]Sec. 414.17: "A person commits and offence if: (a) the person uses a carriage service; and (b) the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive (...)".
[131]VPOL v Shane Gerada (Y03370432) [2011] Magistrates Court of Victoria, Melbourne.
[132]Section 7 of the Telecommunications Act 1997 in fact identifies in the carriage service those instruments in which the transmission of telecommunications is entrusted to electromagnetic energy "service for carrying communications by means of guided and/or unguided electromagnetic energy". This is obviously a definition, which, although it was developed in the late nineties or before the advent of social media, but also of the World Wide Web itself, presents an extension that is able to cover many of the electronic communications of the present time (messages, emails and contacts through social media).
[133]Leaving aside the criminal law, the Commonwealth law offers a framework of protection in this area which also includes other relevant provisions such as the Telecommunications (Interception and Access) Act 1979, the Privacy Act 1988, and the Defamation Act 2005.

the individual state systems, accompanied by an extensive catalog of provisions, concerning the more traditional crimes of threat, defamation, stalking, harassment, which, expected minimal differences[134], are presented with a strong similarity in local laws.
In this context there was a strong reference to the instrument of restorative justice, borrowed, as has already been seen for Canada, by the indigenous communities[135] and which for this belongs almost "genetically" also to the Australian legal system, which in fact seemed to recognize its application satisfactory also in cases of cyberbullying, especially with reference to the instrument of the aforementioned Family Conferencing[136].
In these cases, the concern was above all the adoption of a predominantly punitive response, which if for some it should have been limited to the most execrable cases[137], for others it represented the only way out to resolve the system's inability[138].
These criminalization claims were first collected at the state level. In this sense, the State of Victoria moved and in 2011 adopted the Crimes Amendment (Bullying) Act aimed at modifying the penal code of the State, in order to provide a decisive response to the most serious cases of bullying. Popular outrage, fueled by the media wave, favored the punitive push that led to a change in the sect. 21A of the Crimes Act of 1958 on stalking, whose application scope was thus extended on the one hand and the edictal framework on the other, providing for imprisonment of up to a maximum of ten years. In hindsight, however, what will later be called Brodie's Law, originated from a tragic event that, however, did not involve minors[139].
The Commonwealth government, which had made online child safety one of the subjects of its electoral propaganda, in 2013 proposed a new bill to Parliament, based on an exclusively educational-preventive approach and on the creation of innovative protection tools for the minor victim of cyberbullying, which then led to the adoption in 2015 of the Online Security for Children Act.
As also confirmed by the federal government when proposing the bill, this new regulation is deeply influenced by the New Zealand coeval legislation promoted by the Harmful Digital Communications Act[140]. It therefore appears evident that the two interventions must necessarily be read together. For its part, New Zealand had suffered a call for criminalization, on the basis of a strong media campaign that arose as a result of the suicide of fifteen-year-old Hayley-Ann Fanton, who in 2009 committed suicide after being the victim of repeated threatening messages and violent[141], which was followed by other tragic events and a contextually growing perception of the inability of the penal system to respond to the threats posed by new technological threats[142]. At the request of the then Prime Minister Jhon Key, a specific Commission of Inquiry was set up in 2012, in advance of the Australian reform process, with the task of assessing the adequacy of the system, especially criminal, with explicit reference, not as much to cyberbullying, as, and herein lies the main peculiarity, the whole set of the so-called harmful digital communications or the harmful communications committed through the use of technological means of communication. On the basis of the results obtained[143], the Parliament adopted the Harmful Digital Communications Act.
Through the Harmful Digital Communications Act, the New Zealand legislature, in addition to

[134]The reference is in this case to the Crimes Act 1900 of New South Wales which provides in sect. 60E the sanction for those conduct of abuse, harassment and intimidation carried out against a student within the school environment.
[135]RICHARDS K., Police-referred restorative justice for juveniles in Australia Trends & Issues in Crime and Criminal Justice, 2010. JOUDO-LARSEN J., Restorative justice in the Australian criminal justice system, Australian Institute of Criminology, 2014.
[136]Langos and Sarre also spoke in this sense, underlining how this approach should be preferred over a criminal sanction. In particular, it is the tool of the already mentioned family conferencing that should be looked at, already applied also to the hypotheses of traditional bullying. AHMED E., BRAITHWAITE J.,Forgiveness, shaming, shame and bullying, in The Australian and New Zealand Journal of Criminology, 38 (3), 2005, pp. 298ss. LANGOS C., SARRE R., Responding to cyberbullying: The case for family conferencing, in Deakin Law Review, 20 (2), 2015, pp. 318ss.
[137]DAVIS J., Legal responses to cyberbullying by children: Old law or new?, in UniSA Student Law Review, 2, 2015.
[138]KING A., Constitutionality of cyberbullying laws: Keeping the online playground safe for both teens and free speech, in Vanderbilt Law Review, 63 (3), 2010. KIFT S, CAMPBELL M, BUTLER D., Cyberbullying in social networking sites and blogs: Legal issues for young people and schools, op. cit., CAMPEBELL M, ZAVRSNIK, A., Should cyberbullying be criminalized?, in SMITH P., G. STEFFGEN, (eds.), Cyberbullying through the new media: Findings from an international network, Psychology Press, New York, 2013.
[139]GANS J., Modern criminal law of Australia, Cambridge University Press, Cambridge, 2016, pp. 9ss.
[140]BERG C., Cyberbullying and public policy: An evolutionary perspective, in UniSA Student Law Review, 2, 2015.
[141]GREEN V., HARCOURT S, MATTIONIL, PRIOR T., Bullying in New Zealand schools: A final report, Victoria University, 2013.
[142]Obviously, reference is made to the provisions on defamation (Defamation Act 1992), to the strictly computer crimes sect. 5 Crimes Amendment Act), the crimes of intimidation (Summary Offences Act 1981), of harassment (Harassment Act), of instigation to suicide (section 179 Crimes Act), only by way of example.
[143]LAW COMMISSION, Harmful digital communications: the adequacy of the current sanctions and remedies, Wellington, 2012.

extending the case of incitement to suicide[144], inserts a new criminal case, entitled Causing harm by posting digital communication, aimed at sanctioning the conduct of the person (over the age of fourteen) which sets up a digital communication with the intent to cause damage to the victim, providing for a prison sentence of up to two years and a fine of up to a maximum of $ 50,000 for natural persons, 200.00 for legal entities[145].

It was evident that protection was mainly aimed at cyberbullying and revenge porn, while at the same time losing sight of the limits within which this intervention had to be carried out. It is not surprising, in fact, that in relation to this amendment, the Harmful Digital Communications Act has been accompanied by heavy criticisms, especially in terms of the limitation of freedom of expression online[146].

It does not seem a coincidence that the Online Safety for Children Act, which followed shortly after, despite the instances that led to its adoption had pushed towards a punitive intervention, has no trace of it. The intervention of the Australian Commonwealth is limited to borrowing the creation of an independent authority, called Children's eSafety Commissioner[147], with the task of investigating the cases of cyberbullying identified in that material, provided through a social media service or an electronic service, which according to a reasonable person, he would identify himself as a serious threat, intimidation, harassment and humiliation deliberately directed against a minor[148]. Obviously, the character of the "seriousness" of the conduct plays a decisive role, to be inferred in the light of the factual circumstances, since, by limiting the operation of the definition, they exclude those that are inoffensive. If the authority deems that a fact falling within the above definition has actually occurred, it is required to resolve the matter through one of the two schemes provided for by the new regulation. Specifically, these are the Tier scheme and the end-user notice scheme. In the first case, this mechanism is used in order to remove harmful material from websites with speed, within the maximum term of forty-eight hours[149]. Alternatively, the second scheme can be used that allows the Authority to send a notification directly to the subject who shares the material online, then the end-user, ordering him to remove the same, to refrain from publishing it or to apologize to the victim. In hindsight, in this case it is a procedure that has more extended terms of construction than the first[150].

It is clear that the two provisions, the Australian and the New Zealand ones, although they must be read with a view to strong interdependence, differ in some points, which are not seen only on the strictly penal level, as in the object of the intervention itself which stands out both on the objective level, in a broader case and in the other restricted to the phenomenon of cyberbullying, as well as on the subjective one. Australia has chosen to provide limited protection for minors, while the New

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[144]Previously, in fact, this crime provided for the sanctioning of the conduct only if the victim had then attempted or committed suicide, now instead extended to all instigating conduct regardless of the victim's attempted suicide.

[145]Sec. 19: "(1) A person commits an offence if-(a) the person posts a digital communication with the intention that it cause harm to a victim; and (b) posting the communication would cause harm to an ordinary reasonable person in the position of the victim; and (c) posting the communication causes harm to the victim.(2)In determining whether a post would cause harm, the court may take into account any factors it considers relevant, including-(a)the extremity of the language used:(b) the age and characteristics of the victim:(c)whether the digital communication was anonymous (...)".

[146]PANZIC S. F., Legislating for e-manners: Deficiencies and unintended consequences of the harmful digital communications act, in Auckland University Law Review, 7, 2015.

[147]In the guidelines we read how: "the Commissioner has the power to investigate complaints and conduct investigations into cyberbullying material as he thinks fit. This includes balancing a person's right to freedom of expression to the extent necessary with the rights or reputation of the child at whom the material is targeted (...)". OFFICE OF THE CHILDRENS' E-SAFETY COMMISSIONER, Information guide: Cyberbullying complaints handling, 2015.

[148]"Under subsection 5(1), material meets the definition if it satisfies the following conditions: (a) the material is provided on a social media service or relevant electronic service; (b) an ordinary reasonable person would conclude that: (i) it is likely that the material was intended to have an effect on a particular Australian child; and (ii) the material would be likely to have the effect on the Australian child of seriously threatening, seriously intimidating, seriously harassing or seriously humiliating the Australian child; (c) such other conditions (if any) as are set out in the legislative rules".

[149]However, this scheme has been strongly criticized as it is based on an unjustified differentiation of the reference provider. There are, in fact, two types of Tier scheme. In the first, social media (and by this procedure we mean airG, Ask.fm, Snapchat, Twitter, Yahoo! 7 Answers, Yahoo! 7 Groups) if they do not provide for the request made by the authority, the same is required to renew the request. , since there is no obligation to fulfill it. Otherwise in the second case, the services (identified here on Facebook, Google+, Instagram, Youtube) are subject to direct regulation, and if they do not comply with the request addressed to them, they may incur a civil penalty. YOUNG H., CAMPBELL M., SPEARS B., BUTLER D., CROSS D., SLEE P., Cyberbullying and the role of the law in Australian schools: Views of senior officials, in Australian Journal of Education, 60, 2016.

[150]It must be said that as of 2018, as a result of the Online Safety for Children Amendment Bill 2017, the Authority's competences are considered applicable also with reference to the acts committed against adults "(...) in relation to persons at risk of family or domestic violence, in relation to victims of the non-consensual sharing of intimate images, and in relation to the safe use of the internet by older Australian), but not the indicated procedures which remain so limited to the minor subject, who, due to their condition, requires broader forms of protection (...) The Government considers child victims of cyber-bullying a priority. The Government does not consider there is any need to create any new powers to investigate cyberbullying complaints between adults at this time". Explanatory Memorandum, Enhancing Online Safety for Children Amendment Bill 2017.

Zealand legislation has a general applicability, without distinctions based on age[151].
Similarly, a general point of contact can be found in the provision of a two-step system, which prefers, in the first instance, an approach that takes account of negotiation and mediation, relegating the coercive one to the second line[152]. In fact, both provide for the use of a specific government agency with the task of dealing with cyberbullying episodes and maintaining relationships with service providers. Choice that should guarantee a more effective response to the phenomenon at least at national level, also in light of a system, precisely based on the new orders, which contributes to forming a more flexible legislative regime than the traditional one and certainly faster in responding to the needs of young victims[153]. However, this has ended up raising many doubts in both contexts regarding the respect for freedom of expression[154].

13.Criminal law once again on the test bench, towards a reform of the Online Safety for Children Act
Although the 2015 reform had deliberately kept away from criminalization claims, these did not seem to have failed even after the adoption of the Online Security for Children Act. This consideration can be said to be the basis of the recent mandate, conferred at the beginning of 2018, to the Constitutional Affairs Commission of the Australian Senate, with the specific task of examining the adequacy of the criminal cases existing in both federal and state criminal law with explicit reference to the phenomenon of cyberbullying[155]. To determine a reverinment of the criminal matter, in addition to the aforementioned influence of the New Zealand legislation, some tragic cases of suicide occurred in the Country[156], to determine a reverinment of the criminal matter, in addition to the aforementioned influence of the New Zealand legislation, some tragic cases of suicide occurred in the Country[157] which have shocked the Australian public opinion, creating again a social panic around cyberbullying, as evidenced by the growing number of complaints submitted to the eSafety Commissioner.
In criminal law, an instrument capable of deterrence is once again seen, to be used to send a specific message to society and to indicate that such behavior is to be considered socially unacceptable. A rebirth of punitive impulses that does not seem, once again, to meet in favor part of the doctrine[158].
In particular, the aforementioned section 474.17 is the subject of criticism, considered by some to be incapable of coping with the emergence of the phenomenon[159] and therefore to be replaced with new cases, more responsive to the protection needs of the social era.
On closer inspection, however, the reform proposals received by the Commission seem to go beyond the scope of cyberbullying, contradicting its nature. In this sense, the proposal put forward by Maurice Blackburn Lawyers, which however has as its object the "cyberbullying" suffered at the workplace,

[151]This choice can find its explanation in a case report that just in 2014, so when the law was still in full discussion in the parliamentary classrooms, the New Zealand public opinion was shocked by the suicide of Charlotte Dawson, a well-known television personality, victim of repeated online abuse, which had become the symbol of the fight against cyberbullying and then decided to take his own life from the severe depression that followed.
[152]DAVIS J., Legal Responses to cyberbullying by children: Old law or new?, op. cit.,
[153]DAVIS J., Legal Responses to cyberbullying by children: old law or new?, op. cit.
[154]BERG C., BREHENY S., A social problem, not a technical problem: Bullying, cyberbullying and public policy, 2014.
[155]The assignment was entrusted to the Commission at the motion of Senator Kakoschke-Moore, at the end of 2017, with the specific objective of evaluating "the adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying, including: (a) the broadcasting of assaults and other crimes via social media platforms (...)". SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS, Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying, 2018.
[156]The reference is in particular to the suicides of the teenagers Libby Bell and Amy "Dolly" Everett.
[157]During the hearings conducted by the Commission it reads as "The law itself is an educational tool. Laws are in place to act as a deterrent and impact upon behaviours – to teach people that there are acceptable and unacceptable ways to behave. This is further reason to have a nationalised standard legal definition of cyberbullying and to leverage the law to educate our community that such behaviour is unacceptable". SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS, Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying, 2018, 30.
[158]This is how prof. Slee, member of the Australian Universities' Anti-bullying Research Alliance (AUARA),:"the criminalisation of young people really does lead to a lot of unfortunate sequela. Criminalisation leads to school disengagement, and the evidence is that it leads to a reduction in academic performance. It ultimately leads to the juvenile justice system, and that's where we would not think there is a role." SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS, Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying, 2018, 30.
[159]According to the Media, Entertainment & Arts Alliance (MEAA): "(...) section 474.17 [of the Commonwealth Criminal Code] has not kept pace with the rise of offences it seeks to curtail and punish. The tools of cyberbullying are readily available, easily used, allow for anonymous attacks and enable viral assaults" e la Victorian Women Lawyers, was affirmed that: "the application of [section 474.17] is limited in providing justice in that it is not enough that the conduct simply hurt or wound the feelings of the recipient in the mind of a reasonable person.". SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS, Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying, 2018, 33. 49 "(…)changes to the regulatory environment in relation to cyberbullying must include enforceable sanctions against employers who fail in their duty to provide a safe workplace for their employees (...)".

and according to which the reform should go towards a reinforcement of the penalties applicable to employers who do not respect the obligation to ensure a safe workplace for their employees. In other cases, however, the reference to forms of intervention already adopted in the field of domestic violence seems to prevail, to be aggravated with sanctions more suitable to the Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying, context technology, such as suspension or restriction of Internet access[160]. On the other hand, there are those who believe that there should be no criminal reform aimed at criminalizing cyberbullying, considered unnecessary and also unproductive. In this sense, the role of reference provision recognized in section 474.17[161], is stressed, considered broad enough to be able to fully adapt to the phenomenon under examination. In the reconstruction carried out by the Public Prosecutor's Office, the favor clearly shown by the Australian legislator towards neutral regulatory techniques is highlighted, which for this reason would be better able to respond to the changing needs of reality. An editorial technique that, it is recalled, has also been maintained with reference to communication services, as a general framework has been preferred and for this reason it is resistant, impervious to frequent and rapid changes deriving from technological innovation[162].
It must also be added that a certain degree of caution has also been expressed by the Law Council with reference to the necessary balance of interests at stake, in order to ensure that the limitations of personal freedoms always respect the criteria of necessity, reasonableness and proportionality[163].
At the same time, however, it could be said to give a blow to the circle and one to the barrel, the Commission leaves room for intervention to the Commonwealth criminal legislator, recommending, in the light of the recognized serious damages that may descend, a penalty punishment to be translated into a maximum edict identified in five years of imprisonment in spite of the three indicated in the aforementioned section 474.17. The report, filed by the Senate Commission at the end of March 2018, evidently places criminal law on the test bench, opening up suggestions that the federal legislator could grasp within the limits of its competence.

14.The sexting phenomenon in Australia: The DDP v Eades case

In the Australian landscape, attention to the sexting phenomenon has dominated the political discourse of recent years. First of all, the Eades v DPP (Director of Public Prosecutions) case[164], which not only shone the spotlight on a previously unknown phenomenon, but also highlighted its possible legal implications. The young (but eighteen) Damien Eades, originally from the State of New South Wales, was prosecuted in 2009 for having requested and obtained photos of the young naked girl from her thirteen-year-old girlfriend. The offenses alleged against the young man were those of "inciting a person under 16 to commit an act of indecency" and "possession of child pornography" provided for in Sections 61N (1) and 91H (3) of the Crimes Act 1900 (NSW)[165], respectively, which sanctioned both conduct of incitement to indecency and possession of pornography, as common crimes, without any distinction regarding the age of the perpetrator of the crime[166]. A choice, that of the proceeding

[160]"(...) suggest an intervention order scheme (…) would be mirrored on domestic violence orders which are issued by police or a court upon application by a victim (…) and consider reforms to enable authorities to suspend internet access, or some forms of internet access, from those who repeatedly perpetrate serious cyberbullying". SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS, Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying, 2018, 34.
[161]HELLER K.J., DUBBER M., The handbook of comparative criminal law, Stanford University Press, Stanford, 2010, pp. 50ss.
[162]"This approach is consistent with Commonwealth criminal law policy, which prefers offences of general application over numerous slightly different offences of similar effect. General offences criminalising classes of conduct avoids the technical distinctions, loopholes and additional prosecution difficulty or appearance of incoherence that can be associated with multiple more specific offences (...)". SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS, Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying, 2018, 34.
[163]"(…) any Australian Government response to cyberbullying should explicitly address these competing interests. It should then seek to balance these interests in a manner which ensures that any limitations placed on individuals' rights are necessary, reasonable and proportionate". SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS, Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying, 2018, 35.
[164]Eades v Director of Public Prosecutions [2010] NSWCA 241. ANGELIDES S., The fear of child sexuality. Young people, sex and agency, op. cit.,
[165]For further details see also: REED A., BOHLANDER M., General defences in criminal law: Domestic and comparative perspectives, ed. Routledge, London & New York, 2016.
[166]The eighteen year old was prosecuted in first instance before Penrith Local Court, from which he was found not guilty. However, this decision was challenged by the public prosecutor (Director of Public Prosecutions). The case was thus sent back to the Local Court, whose decision (Director of Public Prosecutions v Eades [2009] NSWSC 1352, 17 December 2009) was however appealed by the defendant before the Court of Criminal Appeal, to return so the case again in front of the Local Court (Eades v Director of Public Prosecutions [2010] NSWCA 241, 17 September 2010). The offenses alleged against the young man were those of "inciting a person under 16 to commit an act of indecency", which is "a person who commits an act of

authority, which immediately raised serious concerns. At first instance, the young man was acquitted, as the judicial authority did not believe that the images in question could qualify as "indecent" in relation to the case cited, nor that they presented any sexually explicit element, as well as in the terms required by the legislation then in force[167]. The public prosecution, however, appealed to the Supreme Court of the State, appealing the acquittal sentence with exclusive reference to the crime of inciting indecent acts. Appeal that was accepted on the basis of the finding that in the evaluation of the judges of merit some fundamental elements had not been considered such as the sexually explicit intent of the young man, the content of the text messages exchanged and the difference in age between the two. The ruling was canceled with postponement and remitted to the lower Court which recognized the criminal liability of the subject limited to the instigation of the young woman to acts of indecency.
From 2010 onwards, other cases followed before the Courts of the various states of Australia, which, unlike what happened in the Eades v DPP case, made the possible friction with the child pornography discipline emerge with increasing incidence[168], above all with reference to that category of minor subjects, teenagers, aged between fifteen and seventeen who, removed from the possible area of operation of the defense of the doli incapax, could well be pursued for the conduct of creation, possession and dissemination of material child pornography[169], which normally leads to heavy sentences (imprisonment) and registration in the register of sex offenders.
As a result, there was a growing interest in public opinion as well as by law scholars and the legislator[170], from which opposing orientations flourished, on the one hand directed towards a criminalization of the phenomenon[171], which were opposed on the other hand, however strong concerns about prosecuting minors on pornography charges.

15.The Australian Commonwealth discipline and the Crimes Legislation Amendment (Sexual Offences Against Children) Act: A first approach to sexting

The legal and political debate regarding sexting arises first, albeit timidly, at the federal level. In this regard, it should be clarified that the Commonwealth has ratione materiae in the case of sexual tourism, child pornography and solicitation in the case of sexual conduct committed against minors, if these offenses contain an element of transnationality or otherwise present links with the online world[172]. Although the production, possession and distribution of child pornography[173], constitutes an

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indecency with or towards a person under the age of 16 years, or incites a person under that age to an act of indecency with or towards that or another person, is liable to imprisonment for 2 years e "possession of child pornography", per cui a person who has child pornography in his or her possession is guilty of an offence. Maximum penalty: imprisonment for 5 years", provided respectively in Sections 61N (1) and 91H (3) of the Crimes Act 1900 (NSW). Both cases, as can be seen, identify the active subject of the crime in a generic person, as defined in sect. 4 of the aforementioned code, without any distinction in terms of age.

[167]The ruling specifically states that according to the judicial authorities, "no posing, no objects, no additional aspects of the photograph which are sexual in nature or suggestion were not discernible. This interpretative landing is justified by the definition at the time in force in the legislation of New South Wales. At the time, the definition of child pornography in section 91H (1) Crimes Act 1900 (NSW), the result of the changes made by the Crimes Amendment (Child Pornography) Act 2004 No 95, which is referred to: "material that depicts or describes, in a manner that would in all the circumstances cause offence to reasonable persons, a person under (or apparently under) the age of 16 years: (a) engaged in sexual activity, or (b) in a sexual context, or (c) as the victim of torture, cruelty or physical abuse (whether or not in a sexual context)". Subsequently, by the reformer intervention of Crimes Amendment (Child Pornography and Abuse Material) Act 2010 No 9, within the penal code of the state, any reference to pornographic material was replaced with the expression "child abuse material", then defined in section 91 FB (1) as "material that depicts or describes, in a way that reasonable persons would regard as being, in all the circumstances, offensive: (a) a person who is, appears to be or is implied to be, a child as a victim of torture, cruelty or physical abuse, or (b) a person who is, appears to be or is implied to be, a child engaged in or apparently engaged in a sexual pose or sexual activity (whether or not in the presence of other persons), or (c) a person who is, appears to be or is implied to be, a child in the presence of another person who is engaged or apparently engaged in a sexual pose or sexual activity, or (d) the private parts of a person who is, appears to be or is implied to be, a child (...)".

[168]SALTER M., CROFTS T., LEE M., Beyond criminalisation and responsabilisation: Sexting, gender and young people, in Current Issues in Criminal Justice,24 (3), 2013.

[169]There are those who believe that a role in the production and proliferation of sexually explicit materials among minors must also be recognized, including the introduction of specific offenses of voyerism, which entered the Australian criminal legislation at the end of the first decade of the two thousand. SCHUBERT A., WURF G., Adolescent sexting in schools: Criminalisation, policy imperatives, and duty of care, op. cit., pp. 194ss.

[170]PLATER D, Setting the boundaries of acceptable behaviour? South Australia's latest legislative response to revenge pornography, in UniSa Student Law Review, 2, 2016.

[171]SALTER M., CROFTS T., LEE M., Beyond criminalisation and responsabilisation: Sexting, gender and younge people, op. cit.,

[172]In this regard, it is recalled that the reform carried out by means of the Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No 2) 2004, through which the federal legislator adapted the existing legislation on child sexual abuse and child pornography to in order to make these types of offenses applicable even if they are committed through electronic means of communication, for the definition of which please refer to the aforementioned Telecommunications Act 1997.

[173]Crimes Act 1900 (NSW) s 91H; Criminal Code 1899 (QLD) ss 228A-D; Crimes Act 1958 (Vic) ss 6870; Criminal Code Act Compilation Act 1913 (WA) ss 218-20; Criminal Code Act 1924 (Tas) ss 130130D; Criminal Code Act 1983 (NT) s 125B; Crimes Act 1900 (ACT) ss 64A-65; Criminal Law Consolidation Act 1935 (SA) ss 63-63B. For further details see: WAGNER A., SHERWIN R.K., Law, culture and visual studies, ed. Springer,

offense in all the jurisdictions of the States and territories, including the offensive shooting or description of a person who is or appears to be a minor engaged in sexual activity or within a sexualized context[174], the state jurisdiction abdicates in favor of the federal one in consideration of the peculiar ways in which the material is obtained, transmitted or made available in any case.

Therefore, the reference provisions are sec. 474.19 (Using a carriage service for child pornography material)[175] and 474.20 (Possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service)[176]

Given that for the definition of technological means or carriage of service it must refer to the provisions, and already previously indicated, by the Telecommunications Act of 1997, the heart of the matter is identified precisely with reference to the definition of child pornography material[177].

According to sec. 473.1 of the Criminal Code Act 1995, this is to be understood as material that represents a person who is, or appears to be, under the age of 18 and who is engaged or appears to be engaged in a sexual pose or sexual activity or is in the presence of a person who is engaged, or who appears to be engaged in a sexual pose or sexual activity. This definition also includes those materials in which the dominant characteristic is the representation, description or representation for sexual purposes of sexual organs, anal regions or breasts, always attributable to a subject under the age of eighteen (or who appears to be)[178].

The very wide scope of this definition is evident, circumscribed by the only limit requirement identified in the criterion of the reasonable person, who, acting as the standard proper to the community of reference, determines whether a certain type of material can be considered child pornography[179], thus being able to include the contents of the sexting hypotheses. In this sense, for example, the State of New South Wales, which follows the federal model, includes in the definition of child pornography material also the reference to the mere description of private parts of the genital, anal or sinus area[180], which, instead, is absent in the criminal laws of other states such as that of Western Australia[181].

Federal criminal law identifies the taxable person in child pornography in the under-eighteen-year-old

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Berlin, 2013, pp. 230ss. MATHEWS B., New international frontiers in child sexual abuse: Theory, problems and progress, ed. Springer, Berlin, 2018, pp. 275ss. STARKI F., Culpable carelessness: Recklessness and negligence in the criminal law, Cambridge University Press, Cambridge, 2016, pp. 44ss. GANS J., Modern criminal law of Australia, op. cit.,

[174]Crimes Act 1900 (NSW) s 91FB; Criminal Code 1899 (QLD) s 207A; Crimes Act 1958 (Vic) s 67A; Criminal Code Act Compilation Act 1913 (WA) s 217A; Criminal Code Act 1924 (Tas) s 1A; Criminal Law Consolidation Act 1935 A) s 62; Criminal Code Act 1983 (NT) s 125A. MATHEWS B., New international frontiers in child sexual abuse: Theory, problems and progress, op. cit.,

[175]Sec. 474.19 "Using a carriage service for child pornography material (1) A person commits an offence if: (a) the person: (i) accesses material; or (ii) causes material to be transmitted to himself or herself; or (iii) transmits, makes available, publishes, distributes, advertises or promotes material; or (iv) solicits material; and (aa) the person does so using a carriage service; and (b) the material is child pornography material. Penalty: Imprisonment for 15 years".

[176]Sec. 474.20 "Possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service (1) A person commits an offence if: (a) the person: (i) has possession or control of material; or (ii) produces, supplies or obtains material; and (b) the material is child pornography material; and (c) the person has that possession or control, or engages in that production, supply or obtaining, with the intention that the material be used: (i) by that person; or (ii) by another person; in committing an offence against section 474.19 (using a carriage service for child pornography material).Penalty: Imprisonment for 15 years (...)".

[177]The possession, production, control, production and obtaining of child pornography material outside the borders of Australia is prohibited by the federal penal code pursuant to section 273.5, according to which "Possessing, controlling, producing, distributing or obtaining child pornography material outside Australia (1) A person commits an offence if: (a) the person (i) has possession or control of matter (ii) produces, distributes or obtains material; or (iii) facilitates the production or distribution of material; and (b) the material is child pornography material; and (c) the conduct referred to in paragraph (a) occurs outside Australia. Penalty: Imprisonment for 15 years.".

[178]Sec. 473.1 "(a) material that depicts a person, or a representation of a person, who is, or appears to be, under 18 years of age and who: (i) is engaged in, or appears to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or (ii) is in the presence of a person who is engaged in, or appears to be engaged in, a sexual pose or sexual activity; and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or (b) material the dominant characteristic of which is the depiction, for a sexual purpose, of: (i) a sexual organ or the anal region of a person who is, or appears to be, under 18 years of age; or (ii) a representation of such a sexual organ or anal region; or (iii) the breasts, or a representation of the breasts, of a female person who is, or appears to be, under 18 years of age; in a way that reasonable persons would regard as being, in all the circumstances, offensive (...)".

[179]KRONE T., Does thinking make it so? Defining online child pornography possession offences, in Trends and Issues in Criminal Justice, 2005. REICHEL P., ALBANESE J., Handbook of transnational crime and justice, Sage Publications, New York, 2013.

[180]Sec. 91FB (1)) Crimes Act 1900 (NSW) :"1) In this Division: "child abuse material" means material that depicts or describes, in a way that reasonable persons would regard as being, in all the circumstances, offensive:(a) a person who is, appears to be or is implied to be, a child as a victim of torture, cruelty or physical abuse, or (b) a person who is, appears to be or is implied to be, a child engaged in or apparently engaged in a sexual pose or sexual activity (whether or not in the presence of other persons), or (c) a person who is, appears to be or is implied to be, a child in the presence of another person who is engaged or apparently engaged in a sexual pose or sexual activity, or (d) the private parts of a person who is, appears to be or is implied to be, a child."

[181]Sec. 217A Western Australian Criminal Code Act Compilation Act 1913 (WA) "child pornography means material that, in a way likely to offend a reasonable person, describes, depicts or represents a person, or part of a person, who is, or appears to be a child-(a) engaging in sexual activity; or (b) in a sexual context"

minor. The jurisdictions of Australian Capital Territory and Northern Territory are also on this line, together with those of the States of Tasmania and Victoria, where, however, the age of sexual consent is set in the sixteenth year of age. Differently, in other States the two ages, that of sexual freedom and that, we could say, of pornographic freedom, coincide, as happens in the legal systems of New South Wales, Queensland, Western Australia, where both are recognized starting from the sixteenth year of age, while in South Australia, the threshold age is raised to the seventeenth year of age. Empasse that part of the doctrine had tried to resolve by referring to the aforementioned defense of the doli incapax[182]. The result is a diversified regulatory framework, which inevitably influences the prospect of an adequate, but above all uniform response to the phenomenon of sexting within the borders of the Australian continent.

This awareness, in addition to the growing concern of the possible friction with the child pornography legislation, first emerged in 2010 in the parliamentary debates related to the Crimes Legislation Amendment (Sexual Offences Against Children) Bill183. On this occasion, the Australian Parliament proposed to amend various provisions of the Commonwealth legislation[184], with the aim of ensuring a regime inclusive of those sexual cases involving minors who could take place with a transnational character. Specifically, it was suggested to modify some crimes already present in the field of sexual abuse of minors and child pornography, as well as to create from scratch new criminal cases that could meet the needs posed by the massive use of new technologies.

There were those who, in light of the necessary phenomenological distinction between sexting and child pornography, believed that the applicability of the aforementioned rules should be excluded, in favor of new punitive responses, still to be elaborated, which, however, arose as necessary as a deterrent function towards involvement in these new practices considered in the bed of antisociality[185].

The matter, ex multis, was referred to the evaluation of the Constitutional Affairs Commission of the Australian Senate, which tried to give voice to the debate that was taking place in the meantime. Several references emerged towards a revision of the criminal matter that took account of the phenomenon[186], especially in light of the new cases that it was proposed to adopt.

Among these, the crime called Using a carriage service to transmit indecent communication to person under 16 years of age, which found a place in the sec. 474.27A of the federal penal code187.

For its part, the Law Council, or the association representing the Australian lawyers, took a position stressing that the fact that, in the case of recourse to child pornography crimes, a conviction would also have led to the registration in the register. of sex offenders, a brand that soon became a heavy social stigma.

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In the Recommendations of the Parliamentary Commission, a compromise line prevailed, then collected by the legislator, identified in the introduction of a new guarantee mechanism to protect minors of sexting (consensual) conduct. Therefore, with the approval of the Crimes Legislation Amendment (Sexual Offences Against Children) Act, it was foreseen that, in the case of crimes of child pornography and sexual abuse of a minor, the action of the criminal action against a minor, infringing eighteen years old at the time of the event, should be submitted to the necessary consent of the Attorney General (sec. 474.24C)[188].

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[182]CROFTS T. LEE M., "Sexting", children and child pornography, in Sydney Law Review, 35 (1), 2013.

[183]LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE, Crimes Legislation Amendment (Sexual Offences Against Children) Bill, 2010.

[184]Specifically, the bill was intended to amend the Australian Crime Commission Act 2002, the Crimes Act 1914, the Criminal Code Act 1995, the Surveillance Devices Act 2004 e il Telecommunications (Interception and Access) Act 1979.

[185]In this sense, MP Simpkins immediately exposed himself by affirming: "I agree that sexting is not in its original sending intentionally child pornography, yet it may be the next time it is transmitted or the time after that (…) I would, however, say that it is not healthy behaviour of teenagers to win favour (...)".

[186]SVANTESSON D., Sexting and the law-How Australia regulates electronic communication of nonprofessional sexual content, in Bond Law Review, 22 (2), 2010, pp. 43ss.

[187]GANS J., Modern criminal law of Australia, Cambridge University Press, Cambridge, 2012, pp. 210ss.

[188]In this provision there is a point of contact with the English legislation, where pursuant to the Prosecution of Offence Act of 1985, an assessment of the prosecution of the prosecution of the prosecutor is envisaged, which must take into account the interests of the minor involved. STONE N., The "sexting" quagmire: Criminal justice responses to adolescents. Electronic transmission of indecent images in the UK and the USA, in Youth

A provision which, if in part was welcomed (also because it did not in fact affect the substantial matter of the dispute), on the other hand did not protect the minor from an eventual arrest and from the consequent formulation of the accusation, in fact prior to the intervention of the Attorney General.

16.From pioneering Victoria State legislation to Commonwealth reform prospects

In the long process of reflection that has invested the Australian legal system with specific reference to the phenomenon under consideration, the reform carried out by a state legislator, that of the State of Victoria, which must be recognized as the driving force of a change that cannot be considered it then spread like wildfire to other jurisdictions, ending up also influencing the federal one.

The legislature of the State of Victoria is the first to have promoted a legislative intervention in criminal matters concerning the phenomenon of sexting. The starting point is the establishment in 2011 of a parliamentary commission of inquiry called Inquiry into Sexting, which was entrusted with the specific mandate to investigate the phenomenon in question as well as the compatibility of the rules currently in force in the State[189].

A choice that was clearly in continuity with the first reform movements that had converged at the federal level in the aforementioned Crimes Legislation Amendment (Sexual Offences Against Children) Act, issued a few months earlier.

It was certainly the media pressure that originated in correspondence with some news reports that pushed towards a reflection on the point, which, on the one hand gave evidence of the growing diffusion of the phenomenon of sexting among the youngest, on the other expressed strong concerns for the legal consequences that could follow. The picture that was being outlined seemed to see a failure of the educational tool and an inability of the legal one to cope with these new behavioral manifestations.

The subject of investigation was that phenomenon identified in "creating, sharing, sending or posting sexually explicit messages or images through the Internet, mobile devices or other devices, especially among young people". Faced with the acknowledged lack of definitive static and connected nature in constant evolution, it was felt that in reality it was a wide spectrum of practices and behaviors, not necessarily perceived as deviant[190].

Until the end of the nineties, the state system did not provide for a specific discipline concerning child pornography, which was pursued in light of the provisions of the Classification of Films and Publications Act 1990, regarding obscene films or publications. These also included those concerning minors under sixteen years of age involved in sexual activities, whose production was sanctioned only in cases where this had been determined by a clear economic intent or the minor had been induced to produce said material. A discipline that, according to the Commission, could have applied in cases of sexually explicit selfies produced by minors, if it had still been in force.

In this context of reform, the definition of child pornography material, included in sec. 67A of the Crime Act of 1958 and identified in films, photographs, publications or video games depicting a person who is, or appears to be, a minor involved in sexual activity or filmed in a sexually connoted mode or context[191]. At first, this material was restricted to the hypotheses in which "the person portrayed or described is or appears to be less than 16 years"192, a limit then extended up to the eighteenth year of age. However, as observed by the Commission itself, if this extension of the range of protection provided could certainly be welcomed, a situation contrasted between the legislation on child pornography and that envisaged in the event of sexual violence against minors.

In fact, the Crimes Act of 1958 sanctions sec. 45 sexual activity with a minor under the age of sixteen,

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Justice, 11 (3), 2011, 268ss. DÖRING T., Consensual sexting among adolescents: Risk prevention through abstinence education or safer sexting?. In Cyberpsychology: Journal of Psychosocial Research on Cyberspace, 8(1), 2014. SCHELL B.H., Online health and safety: From cyberbullying to internet addiction: From cyberbullying to internet addiction, ABC-Clio, S.B: Greenwood. PEGG S., DAVIES A., Sexual offences: Law and context, ed. Routledge, London & New York, 2016.

[189]As precisely indicated in the parliamentary mandate, the work of the Commission should have been considered "the incidence, prevalence and nature of sexting in Victoria; 2) the extent and effectiveness of existing awareness and education about the social and legal effect and ramifications of sexting (...)".

[190]CROFTS T., LIEVENS E., Sexting and the law, in WALRAVE M., VAN OUYTSEL J., PONNET K., TEMPLE R., (eds.) Sexting: Motives and risks in online sexual self-presentation, Palgrave Macmillan, London, 2018.

[191]Sec. 67A: "A film, photograph, publication or computer game that describes or depicts a person who is, or appears to be, a minor engaging in sexual activity or depicted in an indecent sexual manner or context".

[192]GANS J., Modern criminal law of Australia, op. cit.

acknowledging the sexual freedom of the minor between the ages of 16 and 18. Therefore, in the light of this discipline, in this age group, young people could legally have sexual relations, but they committed a particularly serious crime if they filmed or photographed the same act that they could legitimately perform. That said, the range of cases envisaged in this area was broad and potentially aimed at affecting all the conduct connected with child pornography, including the possession, production and publication of the material[193].

With exclusive reference to the conduct of possession, however, the criminal law of the state provides for a defense, inserted in sec. 70 (2) of the Crimes Act 1958, applicable in two different hypotheses, whose common element was recognizable in the consensual context. The first concerns the cases in which a subject creates and owns a film or image that portrays a minor who is no more than two years younger or the cases in which the subject receives a film or image from the minor who appears portrayed in the photo, you are always the age limit of the two years of difference. The second, on the other hand, concerns situations in which the accused is always a minor who is eight years old and is the only one represented in the photos or is portrayed with another minor.

Based on this consideration, many experts called to intervene in the parliamentary debate proposed the extension of section 70 (2) to the whole range of crimes in this matter, in order to ensure that the cases of consensual sexting were not prosecuted and at the same time were adequately addressed the non-consensual one.

Unlike what had emerged at the federal level, there were several pushes towards a de-criminalization of consensual sexting. Not only was the subject of the proportionality of the sentence and the consequences, also on a social level, that a conviction for child pornography could lead to a child[194], but the awareness that it was not a deviant behavior rather of experimental practices and relational exploration typical of adolescence.

The punitive pressures seemed to converge on the so-called secondary sexting, in which the consensually produced content is then shared with third parties without the consent of the portrayed subject. A practice that seemed detached from the dynamics of pedophilia, creating a different type of damage to the victim, not only minor.

On the basis of the reservations to this effect highlighted, specific amendments were proposed to the body of state criminal laws.

The Commission focused its attention on the defense tool. Section 70 (2), valuable in some ways, in other ways risked opening up to problematic outcomes, especially with reference to the age criterion, which already suffered from the discrepancy between the thresholds set for sexual and pornographic freedom. Thus it was proposed to make the defense applicable also to other child pornography behaviors[195], however redesigning their prescriptive heart, no longer based on the aforementioned age criterion as on the presence of images depicting legal sexual acts involving minors of age[196].

As regards, however, the hypotheses of non-consensual sexting, it was evident that it could not be considered acceptable or appropriate behavior, but rather an invasion of the privacy of the individual with significant consequences for the subject involved. Consequences that did not seem to find protection within the legal system if not of a fragmented type. On the basis of the further awareness that the phenomenon seemed to be increasingly taking place even among adults, thus trespassing from the sphere of child sexting, the Commission thus formulated a first proposal for criminalization

[193]With regard to the Crimes Act 1958 (Vic) they can recall the crimes of Production of child pornography (68(1)), Inviting, procuring, causing or offering a minor to be in any way concerned in the making of child pornography (69(1)), Knowingly possessing child pornography (70(1)). To this must be added, the Classification (Publications, Films and Computer Games) (Enforcement) Act 1995 (Vic), which provides for the crime of "Publication or transmission of child pornography" (57A(1)).

[194]Furthermore, the Children's Court itself, which intervened as an expert, expressed itself by defining the use of these cases as "using a sledge hammer to crack a nut", underlining how the rules created in defense of minors and their psycho-physical development could end up creating harmful situations in the hands of those subjects to whose protection they were directed. VICTORIAN LAW REFORM COMMITTEE, Inquiry into Sexting, 2013.

[195]The proposal text affirmed that: "It is a defence to a prosecution for an offence against subsection (1) to prove that: (a) The film or photograph depicts only the accused person; or (b) That, at the time of making, taking or being given the film or photograph, the accused was not more than 2 years older than the minor was or appeared to be; and i) The film or photograph depicts the accused person engaged in lawful sexual activity; or (ii) The film or photograph depicts the accused person and another person or persons with whom the accused could engage in lawful sexual activity (...)". VICTORIAN LAW REFORM COMMITTEE, Inquiry into Sexting, 2013.

[196]This brought up the legislation of the State of Tasmania on defense matters applicable to child pornography. The criminal code of this state Criminal Code Act 1924 (Tas) provides in section 130E (2) a defense applicable where it is proven that the material portraying sexual activity between the accused and the child under 18 years is not an illegal sexual act. CROFTS T., LIEVENS E., Sexting and the law, in WALRAVE M., VAN OUYTSEL J., PONNET K., TEMPLE R., (eds), Sexting: Motives and risks in online sexual self-presentation, op. cit.,

concerning the non-consensual distribution of material intimate.
In the first case, it was decided to insert a new defense within the Crimes Act in section 70A, which actually included the previous ones regarding production (68th century), obtaining (69th century) and possession (70th century) to be applied also to the publication and transmission of child pornography, according to the discipline provided for in the Classification (Publications, Films and Computer Games) Act 1995[197].
In this changed regulatory framework, the first of the exceptions provided for in the new section specifically provides for the hypothesis of the selfie, i.e. the self-production of an intimate image by the minor who, therefore, will not be punishable for the crime of producing pedopornography. Otherwise, the second hypothesis refers to the cases in which the content represents the subject together with another minor (or more) and the exclusion of punishment is circumscribed on the basis of the age criterion, providing that there is a difference between the subjects involved not exceeding two years, and obviously does not apply if the image itself represents a criminal act (i.e. sexual violence). The third hypothesis, on the other hand, goes beyond the boundaries of sexting and removes the minor from the criminal area as he is in turn the victim of a crime depicted in the image. To close, then, the defense system there is the fourth exception that refers to cases in which the image can be said to be pornographic, there is no crime and between the two subjects there is the already mentioned age difference, but the subject does not appear in the image, well being a classic sexting hypothesis.
At the same time two new cases entered the Summary Offences Act, aimed at sanctioning non-consensual distribution (up to two or one year respectively) (sec. 41DA)[198] and the threat of distribution (sec. 41DB)[199] of intimate images or of those contents that portray a person engaged in a sexual activity or in a sexualized context or in the act of showing an intimate area, such as the genital or anal area or the breasts, in the case of a female subject (sec. 40), pornography; and (e) the image does not depict an act that is a criminal offence punishable by imprisonment " whose evaluation is subject to precise standards indicated by the legislator in the nature and content of the image, in the circumstances in which the image was taken and distributed, as well as in light of the age of the subject depicted (sec. 47)200.
The provision of the "contrary to community standards of acceptable conduct" element finds its stated ratio in the need to contain the applicability of the new provisions, which, in the absence of this guarantee mechanism, could have led to involving totally distant contents from the so-called revenge porn, such as, for example, photos sent by a parent to their relatives and depicting the naked infant son.
It must obviously be specified that the hypothesis in which the content relates to an adult, who has given consent to the distribution, as defined in accordance with sec. 40, is subtracted from the area of criminal relevance of the distribution of intimate images of the Crimes Act[201].
Here, therefore, that in the legislative choice of the state of Victoria two guidelines must be read that reflect the duality of the phenomenon itself.
Consensual sexting was thus subtracted from the area of criminal relevance, at least in part. In fact, aware of the possible conflict that could be delineated with federal legislation, since, even if the

[197]Sec. 70AAA "Exceptions to child pornography offences (1) Sections 68, 69 and 70 do not apply to a minor (A) if-(a) the child pornography is an image; and (b) the image depicts A alone or with an adult; and (c) the image is child pornography because of its dep iction of A. (2) Sections 68, 69 and 70 do not apply to a minor (A) if-(a) the child pornography is an image; and (b) the image depicts A with another minor; and (c) the image is child pornography because of its depiction of A or another minor; and (d) where the image is child pornography because of its depiction of a minor other than A, at the time at which the offence is alleged to have been committed-(i) A is not more than 2 years older than the youngest minor whose depiction in the image makes it child pornography; or (ii) A believes on reasonable grounds that they are not more than 2 years older than the youngest minor whose depiction in the image makes it child (...)".
[198]Sec. 41DA " (1) A person (A) commits an offence if-(a) A intentionally distributes an intimate image of another person (B) to a person other than B; and (b) the distribution of the image is contrary to community standards of acceptable conduct. (2) A person who commits an offence against subsection (1) is liable to level 7 imprisonment (2 years maximum). (3) Subsection (1) does not apply to A if-(a) B is not a minor; and (b) B had expressly or impliedly consented, or could reasonably be considered to have expressly or impliedly consented, to-(i) the distribution of the intimate image; and (ii) the manner in which the intimate image was distributed".
[199]Sec. 41DB " (1) A person (A) commits an offence if-(a) A makes a threat to another person (B) to distribute an intimate image of B or of another person (C); and (b) the distribution of the image would be contrary to community standards of acceptable conduct; and (c) A intends that B will believe, or believes that B will probably believe, that A will carry out the threat. (2) A person who commits an offence against subsection (1) is liable to level 8 imprisonment (1 year maximum). (3) For the purposes of this section, a threat may be made by any conduct and may be explicit or implicit".
[200]GANS J., Modern criminal law of Australia, op. cit.
[201]GANS J., Modern criminal law of Australia, op. cit.

proposed defense had been accepted at the state level, this could not exclude that the minor was prosecuted according to the provisions of the Criminal Code 1995, the Commission underlined the urgency to intervene in order to ensure uniformity between the various jurisdictions, an urgency perceived with greater significance in the case of non-consensual sexting or porn revenge.

So the first reflections matured at the state level immediately exert a certain influence also at the federal level. In fact, already in December 2013 the Senate decided to confer the task of assessing the phenomenon of sexting between minors to the Commission on Cyber Safety[202], which had already expressed itself on the point in 2011 in its High-Wire Act: Cyber-Safety and the Young report, although without reaching significant conclusions[203].

The work conducted by the Commission made it clear that the phenomenon ended up creating important frictions with the child pornography legislation, with potentially severe consequences for the children involved. It was suggested by some that the timing had matured for a modification of this discipline that would lead to an exclusion from the context of its applicability of episodes of consensual sexting, thus subtracting minors from this punitive regime. It was reported that in these cases the logic of counter-exploitation underlying the pedophile action was missing and that had led to the inclusion of the aforementioned cases in the list of criminally relevant conduct[204]. The adoption of a legislative solution that allowed to distinguish the phenomena at stake was also encouraged on the already declared injury of the principles of offensiveness and proportionality.

The solution adopted a few years earlier by the federal legislator through the Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010, i.e. the recognized discretion granted to the Attorney General regarding the possibility of proceeding against the under-18-year-old minor seemed to have been a mere palliative. In fact, he had not eliminated at the root the possibility for a minor to be prosecuted for child pornography in the event of sexting episodes.

Since other cases of child pornography could not be recalled, they ended up remaining the only option, however unavoidable, applicable. To this must be added how the already mentioned more than diversified legislative panorama in turn contributed to determining a framework of general inefficiency[205]. Here, therefore, that what was recommended by the Law Commission of the State of Victoria, which had not yet been transformed into law, but which appeared in any case as a model that could also be taken at a federal level, was fully taken up.

On the other hand, it came from others, and first of all from the Public Prosecutor's Office, who argued that the Commonwealth system was to be considered sufficient, especially in light of the 2010 reform that had made it possible to adapt the legislation on child pornography to the needs of contemporary reality[206]. Legislation which, if read in conjunction with the rules on the criminal liability of minors, prepared an adequate response to the phenomenon.

The debate thus developed led the Commission to affirm its inability, also in light of the recent nature of the phenomenon, to make any recommendations on the matter, especially with regard to any changes in the federal legislation on child pornography and the inclusion of a new case aimed at sanctioning the non-consensual distribution of intimate content[207]. The matter was thus postponed.

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[202]It was the Commission created in 2010 with the specific task of dealing with problems related to the use of technologies.

[203]In fact, despite the results obtained, the Commission did not expose itself by promoting specific recommendations. It was believed, in fact, that the phenomenon still unexplored, required further investigation also by the scientific community itself. This passage was considered indispensable and insurmountable in order to be able to develop specific intervention strategies. JOINT SELECT COMMITTEE ON CYBER SAFETY, High-Wire Act: Cyber-Safety and the Young, 2011.

[204]The Australian Law Council affirmed that: "whilst sexting may not always be innocuous or victimless, nor something to be encouraged or condoned…sexting by young people (that is, those aged under 18 years) is not necessarily the type of predatory and exploitative behaviour sought to be targeted by laws that are designed to criminalise child pornography activity" LAW COUNCIL OF AUSTRALIA, Inquiry into options for addressing the issue of sexting by minors, 2013.

[205]Which is precised that: "under the current framework, a young person can be charged both under the Commonwealth and their State's legislation. In many situations the State's legislation differs greatly from the related Commonwealth offences, where the relevant cut off age for child exploitation and child pornography material is lower than it is for the Commonwealth offences. Furthermore, the inconsistency in laws dealing with sexual behaviour (...)". JOINT SELECT COMMITTEE ON CYBER SAFETY, Options for addressing the issue of sexting, 2013.

[206]In this sense see the: Attorney-General's Department affirms that: "recent reforms introduced by the Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010 were 'designed to ensure that child sex-related offences in areas of Commonwealth responsibility remain comprehensive and able to deal with contemporary forms of offending'. The Commonwealth child sex-related offence regime has been comprehensively reviewed and updated to ensure it is adapted to suit modern forms of offending, including sexting. The Commonwealth approach upholds community interest in preventing the circulation of sexually explicit images of minors by young people and avoids problematic legislative distinctions between legal and illegal forms of sexting-related behaviour (...)". JOINT SELECT COMMITTEE ON CYBER SAFETY, Options for addressing the issue of sexting, 2013.

[207]Among the conclusions we read clearly how: "the evidence provided to the committee during this inquiry indicates that sexting has become a

Shortly thereafter, however, the recommendations made by Victoria's Law Commission became law and this reform was quickly followed by as many interventions in other state jurisdictions[208]. Thus an increasingly less uniform picture was emerging, which saw a clear contrast with respect to the discipline of federal rank. On the other hand, the growing media attention towards the phenomenon must be added, above all in its non-consensual version and with reference also to the adult subject.
On the basis of these requests, the Commonwealth also began to take an interest in the matter again, but with exclusive reference to the non-consensual variant of sexting. The opportunity was seized on the occasion of the aforementioned amendment made to the Enhancing Online Safety Act 2015 by the Enhancing Online Safety (Nonconsensual Sharing of Intimate Images) Bill, which entered into force in December 2017[209].
In hindsight, already on the occasion of the discussion that originated on the parliamentary inquiry Options for addressing the issue of sexting by minors of 2013, precisely on the basis of the recommendations of the Law Reform Commission of Victoria, part of the doctrine had expressed itself in favor of the typing of the non-consensual distribution of intimate images. However, not so much as a criminal offense, but as a civil offense, aimed at protecting the privacy of the subjects involved. But the debate in this sense, had not taken big steps forward until the advance of the phenomenon convinced the Commonwealth to submit the issue to the examination of the Constitutional Affairs Commission in November 2015[210], whose recommendations later merged into the final report "Phenomenon colloquially referred to as "revenge porn""211.
The Australian Federal Police (AFP) itself admitted that in fact these did not find a concrete application. In particular, in these criminal cases, no role is assigned to the consent of the victim, which instead appears to be central in this regard, like the expectation of privacy accrued by the victim and the intent that must move the action of the perpetrator. It was, moreover, an awareness already underlined on the occasion of the bill, the so-called Criminal Code Amendment (Private Sexual Material) Bill 2015, presented in September 2015 by the Australian Labor Party, which precisely proposed an amendment to the Criminal Code Act 1995.
Numerous were the voices that rose in support of the creation of a new case. Among these, the Commonwealth Director of Public Prosecutions (CDPP) himself who stated that in this way some of the existing law would be filled.
The commission was thus convinced to recommend to the Federal Parliament the adoption of an urgent reform[212], a recommendation that found expression in the aforementioned Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act, which entered into force on 1 September 2018, through which Section 474.17A, entitled Aggravated offences involving private sexual material-using a carriage service to menace, harass or cause offence[213], has been included in the federal penal code, and for this reason directed to those conducted using the technological tool in order to threaten, harass or cause offense characterized by the involvement of private sexual images, which implies the distribution, diffusion, promotion or publication.

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regular activity for many minors (young people aged under 18 years). The emergence of new technologies has facilitated the creation and transmission of sexual content through electronic media. 2.50 Much of this activity takes place between consenting young people and is therefore relatively benign (...)". JOINT SELECT COMMITTEE ON CYBER SAFETY, Options for addressing the issue of sexting, 2013.

[208]See in particular: Crimes (Intimate Image Abuse) Amendment Bill 2017 of Australian Capitol Territory.

[209]The choice of the federal legislator cannot fail to be read also in the light of the various legislative interventions, first of all the New Zealand one, the aforementioned Harmful Digital Communications Act, as well as the Criminal Justice and Courts Act 2015 (UK) or the Protecting Candians from online Act.

[210]The mandate concerned: "the phenomenon colloquially referred to as 'revenge porn', which involves sharing private sexual images and recordings of a person without their consent, with the intention to cause that person harm; b. the impact this has on the targets of revenge porn, and in the Australian community more broadly; c. potential policy responses to this emerging problem, including civil and criminal remedies; d. the response to revenge porn taken by Parliaments in other Australian jurisdictions and comparable overseas jurisdictions; and e. any other related matters". LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE, Phenomenon colloquially referred to as 'revenge porn', 2016.

[211]GANS J., Modern criminal law of Australia, op. cit.

[212] The recommendations presented by the Commission include: "Taking into account the definitional issues discussed in this report, the committee recommends that the Commonwealth government legislate, to the extent of its constitutional power and in conjunction with state (…) images without consent; and threatening to take and/or share intimate images without consent, irrespective of whether or not those images exist". LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE, Phenomenon colloquially referred to as "revenge porn", 2016.

[213]Sec. 474.17A "Standard aggravated offence (1) A person commits an offence against this subsection if: (a) the person commits an offence (the underlying offence) against subsection 474.17(1); and (b) the commission of the underlying offence involves the transmission, making available, publication, distribution, advertisement or promotion of material; and (c) the material is private sexual material. Penalty: Imprisonment for 5 years (...)".

17.Concluding remarks

Cyberbullying is in fact a term that includes within a vast range of different behaviors. An element that must necessarily be kept in mind when one falls on the legal side of the matter. In spite of scientific divergences, the aforementioned multiplicity can be brought to unity by recognizing the presence of recurring elements such as aggression, intentionality, repetitiveness, together with the obvious use of electronic and digital communication means.

It is on this point that the long-standing question arises whether it is a mere digital translation of the phenomenon or rather a new reality, on the etiology of which the reflection is still embryonic. If, as mentioned above, cyberspace has a strong influence on relational dynamics, even criminal and deviant ones, it is not surprising that this type of youthful aggression also changes its forms. However, this cannot flatten in the context of a mere transfer of bullying to the online sphere. It is evident that cyberbullying, as a particular variation of the more general phenomenon of online aggression or cyber aggression, has relevant peculiarities. Coming out of the dynamics of the school yard, it is in fact omnipresent (in time and space). The audience of possible victims, such as that of the attackers, who can take advantage of identity manipulation, is indefinite and infinite, no longer attributable to those imbalances of power embodied in the bully victim relationship. How indefinite and infinite is the public that assists, sometimes making themselves complicit, with clicks, of subsequent victimizations, which can, as happened, reach more than tragic, if not fatal, outcomes.

The result is a phenomenon that escapes the categories, too extensive and indeterminate, whose boundaries soon lap, to faces including them, other phenomena. And that's how cyberbullying is sometimes also stalking, sometimes it's hate speech, sometimes it's offended, sometimes it's harassment. Sometimes, it has been said, it is sexting. In reality, sexting is something else. Even more recent than cyberbullying, against which an antecedent does not seem to discount, the phenomenon is in fact linked to the theme of sexuality. Sexuality and cyberspace, sexuality and minors. Two aspects that stir up new fears in the first case, ancient and rooted in the second. It is not by chance that it is one of the aspects of human life where it is better understood how technology no longer acts only as a medium, but as a real space.

It is not surprising that young people are involved in it, combining two different statuses that of the digital native, a constant user of the network, and that of the preteen/teenager, by nature attracted by the discovery and investigation of the self and the other. And it is obviously here that Baumanian fear emerges even more than in cyberbullying. After all, the theme of sexuality, of a biological nature, inevitably clashes with the world of morals, law and religion which stigmatize and marginalize, above all what is not known, or in any case condition its evolution and social perception. Here in this dynamic between delictum and peccatum the phenomenon of sexting emerges accompanied by a growing moral panic and a pressing social anxiety.

Phenomenon that, if again compared to the aforementioned cyberbullying, it weighs even more on the weight of its recent character, which on the one hand sees a limited scientific interest and on the other a certain terminological confusion. Sexting is in fact cloaked in a chaos that invades the signifier and the meaning, with heavy repercussions on the level of legal discourse, which, in dealing lightly with the theme (on the few occasions in which it deals with it), blows up definitions and terms between them different to indicate the same concept or, conversely, uses the same term for as many different meanings. Wanting to break a lance in favor, it must be said how a difficulty of conceptualization is also found in the constant search for scientific literature for a taxonomy that does it justice.

If, however, pornography is considered, not without criticism, habitus of the adult individual, as a possible declination of sexuality, this cannot be said for the minor for whom it is in fact delictum et peccatum. So what is sexting? Is it pornography or something?

The heart of the matter lies in consensuality, which becomes an indispensable distinctive feature. Here, the own or primary sexting, following the classification proposed by Calvert, is covered entirely by the consent that denotes the production (sometimes self-production) and the sharing of the content within the couple or relational dynamics. In this sense, it could be considered as one of the manifestations of intimacy that Homo internecticus can enjoy. Next to cyber sex, there would also be cyber porn.

Consensuality can disappear in the hypotheses in which the content thus produced is then shared with third parties both through instant messaging applications (such as WhatsApp and Messenger) or

in the public square of social media (such as Facebook or Instagram). It is therefore no longer the pleasure of intimate sharing that moves the person who acts. There has often been talk of pornographic revenge, which has led to the successful term revenge porn, which has entered the media language of recent years. In hindsight, there are several reasons that can move towards such conduct, which would be reductive and limiting to limit to revenge.
Therefore, sexting also incorporates two different phenomena: on the one hand, the actual sexting and on the other, what one prefers to define in more neutral terms as a non-consensual distribution of intimate images. In the middle is the consensus, which settles, or which is entrusted to settle, the issues that arise and that also affect the adult, but which become even more relevant with reference to the minor.
If for the adult the critical issues emerge in the hypotheses without consensuality, which actually turn into situations of abuse, for the minor the problematic profiles go back to the actual sexting, on which the moralisms related to minor sexual relationship and on the other the tensions towards the protection of the same from the risk not only of a non-consensual distribution of intimate images, defined in this case also as sexual cyberbullying, but from the involvement of said contents in the child pornography circuit.
It is quite evident that the aforementioned Copernican revolution also unfolds its effects in this sense. The result is a change of perspective for a legislator accustomed to protecting minors from the dangers of abusing adults, first of all child pornography, which has become rampant with the spread of the Internet. Now the reflection is placed in a modified reality also on the level of the intersubjective relationship. Hence the need to reflect and rethink the protection tools, which must be able to respond both to the promotion needs of the child and to protect the child through mechanisms that respond to the needs dictated by a world such as the current one that is not only collapsed of reality, but of different space-time dynamics. And, as always happens when moral panic and social anxiety outline the boundaries of old and new fears, criminal law comes to the test. In the face of general insecurity, the tool is invoked which in itself responds precisely to the purpose of protecting the security of the individual and the peaceful coexistence of the associates. The legislator is looking for the maximum rigor of the penalty as the only panacea able to stem the social alarm and respond to security needs. It is well known, however, how we deal with often emphasized needs, the result of a process of construction and social representation. Moreover, as Giddens would say, insecurity and risk are in fact marks typical of modernity[214]. This results in socially constructed expectations of protection that contrast with the company's ability to protect these issues. An imbalance that inevitably ends up enhancing sensitivity towards perceived risks and thus producing security frustration.
Insecurity, risk and collective action are closely linked.
To play an important role in the construction of moral panic is certainly the media factor, which emphasizes the theme by framing it in terms of threat. Thus, the representation provided by the media, thanks to the emphasizing and distorting effect of this narrative, affects the perception of the individual, stirring anxieties and consequent requests for response. A picture that is captured with greater significance when the minors are involved. It is through this interpretative lens that the phenomena of cyberbullying and sexting must be read, as well as the involvement of the legislator in the dynamics created by them. There is immediate evidence of this in the comparative survey conducted.
It is no coincidence that the first instances of criminalization led in the contexts considered to an effective check up of the applicable legislation in an attempt to find deficiencies and shortcomings (mostly technological). In this sense, the investigations and parliamentary debates that preceded the aforementioned legislative measures move, on the basis of an alleged inefficiency of the system in providing adequate safeguards. What emerges is a reference to a range of different criminal cases, aimed at protecting the most disparate legal assets such as integrity, reputation, honor, confidentiality, identity, but also the inviolability of computer systems, up to the good of life, in the most extreme cases. Leaving aside this last hypothesis, to be relegated to the area of exceptionalism, together with the so-called IT crimes, which are only tangentially relevant in fact, the attention is essentially concentrated, regardless of the reference system, in the cases of harassment, threat, stalking , defamation.
The theme allows us to abandon the boundaries prescribed by the phenomenon to reach much wider, distinct and meaningful shores of reflections. This leads to the inevitable reflection on the value of

[214]COHEN S., Folk devils and moral panics: The creation of the mods and rockers, Psychology Press, New York, 1972.

criminal law in cyberspace, a space, once again, atteritorial, aspatial, and above all fast, quick in its manifestations. A connotation that inevitably falls on the level of protection and, therefore, of the determination of the response tools.
The clutch with sexting is evident, a clutch, as we said, raised by jurisprudential practice. Moreover, the descriptions thus provided may well apply to those proper to the phenomenon, especially if we consider that all the aforementioned disciplines protect the under-eighteen-year-old minor. A broader protection that responds perfectly to the logic of protection of abuse, in line with supranational obligations, the result of an era in which the child limited, because there was no other way, his sexual freedom to sexual acts. It was not in fact conceivable that pornography could be a practice exercisable by the minor, also thanks to the tendential consideration in a negative key also of adult pornographer. For this reason, the rules on child pornography do not present any mechanism of salvation that removes the minor from the area of punishment as those conduct mentioned are an expression of the consensuality of a private experience. The role of consensus of the child emerges with arrogance, a theme that again forces us to reflect beyond the phenomenon. As we know, the participation of the minor in social life is guaranteed, but in some cases subject to conditions, given its nature of being in the making. This is how there is an age to express one's sexual consent and now also for the digital one, differently identified in the legal systems considered. As far as pornography is concerned, this does not find consideration in this graduation of relevance of the minor in the context of the company's action. A fact that has been alternatively considered as a foreclosure to the minor of the possibility of manifesting his sexual freedom or as a condition to be kept in light of the deviant or in any case particularly risky character of the behavior. But, in the writer's opinion, the evidence today clearly shows how it cannot be defined as deviant, since deviant defines what is contrary to social rules, but it is evident how these are changing. Rather, continuing along this road has the effect of limiting the rights of the child, a limitation that cannot be justified tout court, without alternative solutions, in light of the highest interest in protection from pedophile risk.
The large picture described has acknowledged a problem resulting from our time, whose treatment cannot be postponed further. Evidence of which can also be found in the growing attention of the supranational community, which can be seen in the recent reports promoted respectively by the Monitoring Commission of the Budapest Convention, for cyberbullying, and by that of Lanzarote, for sexting, which has been mentioned. At this point one wonders what the prospects should be towards, at least for the European context. Otherwise, for sexting we hope to take a position that will gather the hand outstretched by the Lanzarote Convention by setting up a specific cause of non-punishment in terms of child pornography, in order to avoid that jurisprudence enters again in interpretative paths beyond borders.
That absolute role recognized by the State as the only subject assigned to the prevention of crimes is breaking down, as never before, in view of the aforementioned trilaterality, does the protection of minors pass through a multi-stakeholder approach. Moreover, wanting to remember once again that, with respect to offensive facts, criminal law cannot be applied where a reliable political-criminal strategy has not been outlined before, involving different sectors of the legal system to prevent and manage similar facts.

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