Adolescents and Cybercrime: Navigating between Freedom and Control

Simone van der Hof, Tilburg University, Tilburg Institute for Law, Technology, and Society
Bert-Jaap Koops, Tilburg University, Tilburg Institute for Law, Technology, and Society
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Abstract

Online safety for children and adolescents as a policy issue finds itself in a turbulent arena: emerging new mobile and online technologies and applications carry opportunities and risks and constantly bring new challenges. This article explores particularly the field of adolescents and cybercrime against a background of a culture of control combined with an increasing use of new media by youngsters. Based on two particular cases, i.e. 'grooming'—a new development in criminal law where children and adolescents are treated as (potential) victims in need of protection—and 'sexting'—a new development in online risk-taking where adolescents are framed as (potential) offenders in need of repression—we argue that public policy with respect to adolescent behaviour and online risks is tilting towards more control. These developments in cybercrime policy that focus on criminal law as a policy instrument disturb the balance between the freedom of adolescents to develop into responsible and independent adults and controlling online risks. Other, more promising avenues, such as encouraging digital literacy of citizens and protecting those children who are particularly vulnerable, should rather be at the forefront of public policy.

KEYWORDS: cybercrime, adolescents, Internet

Author Notes: Dr. Simone van der Hof is Associate Professor of Law and Technology at TILT – Tilburg Institute for Law, Technology, and Society, Tilburg University, The Netherlands. Prof. Bert-Jaap Koops is Professor of Regulation of Technology at TILT, Tilburg University, The Netherlands.
Introduction

Online safety for children and adolescents is increasingly attracting the attention of academics, policymakers, and other stakeholders, such as educators. This attention is important, because with the growing (mobile) Internet use of ever younger youths, the number of online risks grows (Livingstone et al. 2011). European Union policy initiatives on online safety for children have been undertaken since the late 1990s, with the European Commission Safer Internet Programmes funding numerous projects and awareness-raising initiatives pertaining to educating stakeholders, fighting illegal content, filtering and content labelling (e.g., PEGI)1 and obtaining empirical data on children’s use of the Internet (such as EU Kids Online,2 POG,3 and ROBERT).4 A European network of Safer Internet Centres has been established to share knowledge, carry out awareness-raising initiatives and operate hotlines, to report illegal content like child pornography, as well as operate helplines to advise parents and children on harmful content, harmful conduct, and negative online experiences. Online safety is moreover part of EU cybercrime policy, which among other things addresses the sexual exploitation of children, including online child pornography,5 and abuse of personal data, such as through hacking or identity theft.6 These policy initiatives fit within the broader EU policy on children’s rights that focuses on the empowerment and protection of children under human rights law.7

Online safety as a policy issue finds itself in a turbulent arena: emerging new mobile and online technologies and applications carry opportunities and risks and constantly bring new challenges. Policymakers and stakeholders must therefore keep close account of the socio-technological landscape in which online safety issues arise, as well as regularly update their knowledge base on the online

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1 PEGI is an age-rating system for computer games, see: http://www.pegi.info/en/.
2 See: http://www2.lse.ac.uk/media@lse/research/EUKidsOnline/Home.aspx.
risks and opportunities for youths. Although the fight against illegal and harmful content remains important in EU policy, we see a growing focus on harmful contact and harmful conduct. The most recent Safer Internet Programme, for instance, is particularly directed at harmful conduct, like grooming and cyberbullying.

Safety for children and adolescents, both offline and online, is primarily a responsibility of parents, but where parents cannot or do not sufficiently manage this, it is also a matter of public policy to see that young people are protected. Alongside protecting youths against risks and harm, however, protection also involves fostering self-development and freedom in adolescence. As we will elaborate in this article, adolescent autonomy is relevant for youths to develop into responsible and independent adults. Part of this maturing process involves youths conducting risk-taking and experimental behavior, including online sexual exploration, that as such is perfectly healthy even though it may sometimes involve particular vulnerabilities or harm (Kohnstamm 2009). Somehow, an optimal balance must be found between controlling that which is wrong or involves too high risks, and fostering the freedom and opportunities of the Internet that are essential for adolescent self-development. European e-safety policy tries to strike such a balance not only by repressing harmful behavior but also by stimulating media literacy to improve the resilience of youth. The European Commission’s 2010 Digital Agenda for Europe includes funding awareness-raising initiatives, and stimulating long-term e-skills and digital literacy policies at national levels.

At the same time, online risks are also addressed in policy measures targeted at combating cybercrime. Criminal law is being used to protect (younger and older) youths against potentially harmful behavior. An example is grooming—the solicitation and meeting of minors for sexual purposes—which has been criminalized in various countries, such as the United Kingdom, the Netherlands, and Norway, and in the 2007 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention). Another tendency is that public outcry arises after dramatic online incidents, leading to a criminal law response to adolescent behavior. An example here is the sending and receiving of sexually suggestive or explicit pictures (“sexting”) by adolescents, who are sometimes being framed and stigmatized as sexual offenders.

Thus we see that adolescents’ online behavior is the focus of e-safety policy in general and cybercrime policy more specifically. Whereas general e-safety policy seems to be trying prudently to navigate between freedom and control of adolescent Internet use, cybercrime policy perhaps focuses more one-sidedly on control, through its strong ties with criminal law. In this focus on control, cybercrime policy risks overlooking the importance of allowing adolescents to experiment online, and to learn from possible mistakes they make. And if anti-cybercrime measures focusing on adolescents are one-sided, they may also be ineffective or even counter-productive, as well as disproportionate because they overlook more promising alternatives.

In the cybercrime literature (see, for example, the collection of papers in Wall 2009), relatively little attention is paid to the fact that adolescents, i.e., youths between the ages of 13 and 19, face not only risks but also opportunities in online behavior and that a balance needs to be found between these. We think it important to place anti-cybercrime measures targeted at protecting children and adolescents in the wider context of online safety, and the need for policy to navigate between freedom and control of adolescent online behavior. Our objective here is to critically analyze developments in relation to online risks and opportunities for adolescents, in order to determine how current cybercrime policy navigates between freedom and control, and to determine whether changes may be needed to achieve a more balanced policy. We will address novel crimes or practices, such as online grooming and sexting, that involve adolescents as potential victims, but also as potential offenders. Although we will touch upon relevant legal developments, it is not our intention to provide a detailed legal analysis of these cases, but rather to give examples of the legal impact of these developments and to sketch the broad lines of policy development. The cases help us to answer the following overall question: How can adolescents be protected against potentially harmful online risks without giving up too many of the benefits of Internet use in adolescence?

The article is structured as follows. The following section provides the backdrop against which to position cybercrime and online safety for adolescents by highlighting some relevant technological, social, and policy trends. The next two sections address two particular cases, first a development in criminal law where children and adolescents are treated as (potential) victims in need of protection, i.e., online grooming; and a development in online risk-taking where adolescents are framed as (potential) offenders in need of repression, i.e., “sexting.” The next section then moves to the public policy domain in analyzing how freedom and control are balanced in view of adolescent empowerment and protection against online risks. Conclusions are drawn in the final section.
Background

Adolescents and New Technologies

New technologies, like the Internet and (smart) mobile phones, have become an essential and integral part of adolescents’ everyday lives. Ninety-three percent of children aged 9–16 across Europe go online at least weekly, and 60 percent almost daily (Livingstone et al. 2011).11 The online and offline worlds have become fully intertwined in their activities and social interactions, and adolescents continuously and quickly switch between online and offline modes of communications. Van Kokswijk (2007, 40) captures this development in the concept of “interreality,” which he defines as a “mix of the virtual and physical realities into a hybrid total experience.”

Consequently, keeping an eye merely on physical, offline experiences is not enough if parents wish to remain involved in their children’s lives; their children’s online (ad)ventures have become equally important. Parental engagement should be extended to this online reality, which can be rather diverse in the ways in which children use the Internet—including social networking sites, online games, virtual worlds, chat rooms, instant messaging, webcam use, etc.—and where they use it—at home, at school, and basically anywhere with smart phones. Parents often still seem to be much less aware of what happens online than offline; it may therefore be difficult for them to effectively identify particular online risks their children may run.

Youth’s growing use of the Internet does expose them to online risks. These involve a diversity of phenomena that can be categorized into three broad groups: content, contact, and conduct (Livingstone et al. 2011). Content encompasses, for instance, pornographic or aggressive images; contact denotes participation in online activities that lead to potentially risky contacts, like grooming; and conduct includes peer-to-peer communications where youths are perpetrators, victims, or both, like cyberbullying or sexting.

A recent survey by the EU Kids Online project among Internet-using children aged 9–16 across Europe shows that only a minority encounter one or more of these risks, although the risks are increasing with age. However, most of the risky experiences did not seem to be harmful12—at least not in the short term. The survey also revealed that parents are often not aware of their children having experienced any of the risks addressed in the survey. However, digital literacy and safety skills increase with age, and most 11- to 16-year-olds report being able to

11 The research on online risks by Livingstone et al. (2011) involved Europe-wide interviews with 25,142 children between the age of 9–16, and with one of each child’s parents.
12 Note however that it did not measure (possible) harm over a longer period of time.
block messages from persons they do not wish to communicate with (64 percent), find online safety information (64 percent), or adjust privacy settings at social networking sites (56 percent) (Livingstone et al. 2011).

There are several indicators in developmental psychology that suggest that adolescents are particularly receptive or active with respect to risky, albeit not necessarily illegal or anti-social, behavior. Experimental and risk-taking behavior are part of identity and emotional development during adolescence (Kohnstamm 2009). Moreover, adolescents, at ever younger ages, start experimenting with romantic and sexual relations, and the Internet has become an important facilitator to initiate and maintain such social interactions. What boyd (2002, 25) calls “networked publics”—i.e., “publics [regulated by the properties of bits] that have been transformed by networked media, its properties, and its potential”—offer great potential for youth sociality but also has properties (i.e., persistence, replicability, scalability, and searchability) that are potentially risky when exploring, possibly boundary-crossing, sexuality online. The visibility of what you do online is potentially global, and any content (text, pictures, video, audio, etc.) can be effortlessly copied and searched. Once content is published on the Internet, it most often cannot be removed, or only with great effort. If a youth puts sexually explicit content of himself or herself online, this may—as will be further elaborated below—have potentially risky and even harmful unintended and unforeseen consequences due to the features of networked publics. Moreover, the ease of remaining anonymous or impersonating someone online can also trigger anti-social behavior. Fake profiles are, for instance, created to lure unsuspecting victims (Taipei Times 2010), as well as to catch predators (Ortiviz 2009), to defame (Selva 2008) or to humiliate individuals.\(^\text{13}\)

The Culture of Control

It is no coincidence that the EU Kids Online project studies risks of minors who use the Internet. A major social trend is the rise of risk governance (Renn 2008) as an overarching paradigm for regulation in the risk society (Beck 1992). Increasingly, policy problems are framed in terms of risks and the challenges of measuring, assessing, and controlling these risks. Combined with risk aversion, society tends to transform itself into a “safety state” in which safety—the real or perceived absence of danger—is an overarching value that trumps all other considerations (Raab 2005).

\(^\text{13}\) Like Lori Drew who impersonated a teenage boy on MySpace to relentlessly bully her daughter’s ex-friend, Megan Meier, which ultimately drove her to suicide, see Stelter (2008).
Within the context of the risk society, a legal trend of the past two decades in several, although not all, Western countries is a “culture of control” (Garland 2001, 194-195):

“Spatial controls, situation controls, managerial controls, system controls, social controls, self controls—in one social realm after another, we now find the imposition of more intensive regimes of regulation, inspection and control and, in the process, our civic culture becomes increasingly less tolerant and inclusive, increasingly less capable of trust.”

A major element of this culture of control is the use of criminal law as a primary policy instrument, with high levels of incarceration and a trend towards “penal harshness” (Cavadino and Dignan 2006). In fact, increasingly, social domains are being “governed through crime”: not only is crime one of the most important strategic issues on policy agendas, but crime is also used to legitimize interventions that have other motivations, and the technologies and discourses of criminal justice have become visible features in all kinds of institutions, such as border control, domestic relations, and education (Simon 2007, 4). Risk governance is in this respect compounded by a culture of fear, in which a ubiquitous fear of crime is associated with risk aversion, unwillingness to accept harm even where it is accidental, and safety as an end in itself (Furedi 2006).

**The Importance of Autonomy During Adolescence**

A tension exists between the culture of control and the emphasis put on the values of individuality and personal freedom in Western society. These values ideally require children to become gradually more autonomous during adolescence by pursuing and acquiring more and more personal freedom in relations with their parents and others (Zimmer-Gembeck and Collins 2006). Parent–child ties are loosened by increasingly allowing adolescents to make their own decisions and coming to rely on themselves, although parents’ positive support also remains important for the development of teens.

As Zimmer-Gembeck and Collins write:

“Achieving autonomy is one of the key normative psychosocial developmental issues of adolescence, and all perspectives on the

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14 Conversely, when children are still dependent, vulnerable, malleable, and incapable of making sound decisions “the deeply ingrained political values of autonomy, responsibility, and liberty simply do not apply to them” (Scott 2000).
development of autonomy emphasize the problematic outcomes that may follow from a lack of appropriate support for autonomy.”

In other words, increasingly allowing adolescents individual freedoms and responsibilities is paramount to becoming an autonomous person, and deficiencies in growing into independence from parents can, eventually, amount to emotional and social harm.

Achieving autonomy by independently committing themselves and shaping their social interactions (including online) is a process of trial and error, in which adolescents sometimes unavoidably have to learn the hard way; likely making mistakes en route. Making mistakes also means being reckless or taking risks, like sending revealing “sexts” to real or fake friends or undressing before a webcam. Adolescents feel invulnerable and are often unaware of the risks involved in these activities. They are also less capable of estimating the more indirect or long-term consequences of their actions, and their willingness to take risks can be augmented by matters that are incredibly relevant in adolescent eyes, such as popularity among peers or seeking the attention of a person they are deeply in love with (Kohnstamm 2009). Parental monitoring therefore remains important during adolescence, albeit in a different, more relaxed form.15

Managing Youth Risk

The risks associated with the increasing use of the Internet by minors call for a public-policy response, particularly since parents are often insufficiently aware of what their children are doing online. The challenge for public policy, however, is to combine the culture-of-control emphasis on risk management with the need to foster adolescents’ autonomy, of which risk-taking seems an inalienable part. The regulatory response to “eYouth” can consist of different types of measures: awareness-raising efforts, stimulating self-regulation and co-regulation, facilitating technological measures, liability, and criminalization and law enforcement (Poullet 2011). Before we analyze directions taken by public policy to address some concrete problems in the following sections, we finish this background sketch with the wider picture of policy responses to risk management of minors.

15 This is also reflected by juvenile law, with adolescents gradually becoming more and more liable for illegal activities (under criminal law) and tortuous actions (under tort law) themselves when they get older, whereas parental liability as well as expectations concerning the intensity of their supervision under tort law at the same time decreases (see, e.g., a Dutch case where the court rejected parental liability for copyright infringement by a 15-year-old son, District court of ’s-Hertogenbosch, September 3, 2009, LJN BJ7462).
Here, the culture of fear seems particularly relevant for the purposes of this article, as “[c]hildren are the first to suffer” (Furedi 2006, xix). The sheer horror of anything happening to a child (fed by rhetorical arguments along the line of: “just imagine if this happened to your own daughter”) leads to more and more controls on the freedom of children and adolescents, in order to minimize the risks they are (feared to be) exposed to in today’s dangerous and crime-pervaded society. These controls are taken on the micro-level by parents trying to keep their children as much as possible in “secure” spaces of the home, SUVs, and supervised buildings; but also on the meso-level by schools (see Simon 2007, 207-231), and on the macro-level in public policy. A telling example of the latter is how young victims of crime (such as Megan Kanka in the United States, James Bulger and Sarah Payne in the United Kingdom, and the “Maas girl” and Savanna in the Netherlands) dominate public and political debate for years, and trigger policies and legislation designed to generically prevent future repetition of such incidents.

At the same time, children also experience the other side of the coin more often, as forms of anti-social behavior are perceived in terms of offending, and dealt with in the context of criminal law. For example, the UK instrument of ASBOs (Anti-Social Behaviour Orders) involves a criminal sanction for people failing to comply with the order; ASBOs can be imposed on children from the age of 10, although they are usually imposed if they are somewhat older. ASBOs potentially lead to imprisonment when the child disobeys the ASBO, even though the anti-social behavior is not in itself criminal (Hewitt 2007, 359-360). Children and adolescents are also included in criminal-justice DNA databases, such as 11-year-old S. from the S. and Marper case who was charged with attempted robbery but acquitted. Although the European Court of Human Rights determined that S. had to be removed from the UK’s National DNA Database, UK legislation has not yet been updated in light of the European ruling; minors can still be included for an extensive period in the database even if they are not definitively convicted of a crime.16 Moreover, the European Court also considers that there is no need for special regulation of minors in terms of DNA database inclusion; the Dutch law mandating database inclusion of all convicts regardless of age does not violate international child-right norms.17

In online interactions we also see criminal law responses to young persons who show aggressive, threatening, defamatory, or abusive types of behavior. An example is the case of two teenage boys who were convicted for theft using

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16 ECtHR December 4, 2008, S. and Marper v. The United Kingdom, Application nos. 30562/04 and 30566/04; see also the UK Government’s consultation paper, Keeping the Right People on the DNA Database, Home Office, May 2009.

17 ECtHR January 20, 2009, W. v. The Netherlands, Application no. 20689/08.
violence, as they molested a 13-year-old boy in order to acquire his RuneScape login data and steal virtual items that he had won in this online game. Another example is so-called “sextortion,” i.e., threatening to expose a person who has been lured or forced to show sexually suggestive poses in front of a webcam, unless more explicit pornographic poses are shown. Youngsters who “sextort” their peers or younger persons expose themselves to criminal liability.

These examples—among many others, for example, measures to create electronic child records and databases of “risky youngsters” (Garrett 2005; Van der Hof and Keymolen 2010)—suggest that the behavior of children and adolescents is being framed increasingly in terms of criminal law, through risk-management approaches focusing on minors as potential victims or potential offenders. This implies that, although “eYouth” policy has a range of measures to choose from (Livingstone and De Haan 2009; Poullet 2011), there may be a tendency for policymakers to concentrate their efforts on repressive approaches. In the following sections, we will argue on the basis of two cases that this tendency indeed exists.

The Expansion of Criminal Law: Online Grooming

Grooming is a method used by sex offenders to establish a trust relationship with a minor in order to meet in secret and eventually have sex with him or her. In this respect, grooming is an old phenomenon: the family friend who regularly visits a family and plays with the children, increasingly “sharing little secrets” and establishing a bond that the child does not dare break, even when the secret slowly but surely comes too close for comfort. In these cases, however, there is always the possibility of the parents finding something odd in the family friend’s behavior and keeping a close eye on them. This may be different in online situations, where, as we have seen, parents know less of what their children are doing and consequently may not notice the establishment of an online trust relationship with a stranger, possibly involving online exposure to sexual material or forms of “sextortion.”

18 Appeal Court of Leeuwarden, November 10, 2009, LJN BK2773.
19 See, e.g., Appeal Court of ’s-Hertogenbosch February 27, 2007, LJN AZ9818, convicting a 19-year-old man for sextortion.
20 An example of such a risk-management approach is the ProKid project used by the Dutch police in identifying youth (potentially) at risk of delinquent behavior or victimization.
To address this, the Lanzarote Convention has criminalized online grooming. This Convention was drafted by the Council of Europe to address the need for “a comprehensive international instrument focusing on the preventive, protective and criminal law aspects of the fight against all forms of sexual exploitation and sexual abuse of children.” The convention entered into force in July 2010 and, as of March 2011, has been ratified by 11 member states. It is a binding instrument for the ratifying countries, who have to implement the convention’s provisions into national law. The European Union is also considering similar legislation, in the form of a binding Directive for all EU member states, but this is still at the proposal stage (EC 2010).

As the Explanatory Memorandum (§155) to the Lanzarote Convention observes:

“The negotiators felt it was essential for the Convention to reflect the recent but increasingly worrying phenomenon of children being sexually harmed in meetings with adults whom they had initially encountered in cyberspace, specifically in Internet chat rooms or game sites.”

Article 23 criminalizes online grooming as

“the intentional proposal, through information and communication technologies, of an adult to meet a child (…) for the purpose of committing [a sexual offence], where this proposal has been followed by material acts leading to such a meeting.”

It is noteworthy that the Convention does not address offline grooming: the contact has to be established online. This is because, as the Explanatory Memorandum (§159) stresses,

“[i]n view of the particular danger inherent in the use of such technologies due to the difficulty of monitoring them the negotiators wished to focus the provision exclusively on the most dangerous method of grooming children which is through the Internet and by using mobile phones to which even very young children increasingly now have access.”

Here, the mention of (very) young children may have been used to underpin the need for criminalization, even though it is not obvious that the mere use of

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21 This criminalization is followed in the European Union policy to combat sexual abuse of children, see the Proposal for a Framework Decision, above note 5, p. 6. 
22 See: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=201&CM=1&DF=&CL=ENG.
mobile phones by very young children is a risk factor for grooming. One could imagine that grooming strangers whom a child has not met offline need at least chat and mail facilities on top of voice and texting contact to establish a trust relationship with young children, and hence that (unsupervised) Internet use rather than mobile phones is a relevant risk factor. In that respect, the mention of “very young children” carries an impression of rhetoric rather than evidence-based arguments.

The limitation to online grooming is different from an earlier legislative measure taken in the United Kingdom. The Sexual Offences Act 2003 in England and Wales and Northern Ireland, in article 15, has criminalized both online and offline grooming, defined as a person intentionally meeting, or travelling to meet, a minor \(^{25}\) with the intention of doing something that would constitute a sexual offence, if they have met or communicated with the minor on at least two earlier occasions. \(^{24}\)

Grooming is an inchoate offence: it is an example of behavior that is criminalized not because it is harmful in itself but because it precedes actually harmful behavior, in the hope that the target offence—sexual abuse, the making of child-pornography recordings—can be prevented. The preparatory act of arranging a meeting and, for example, buying a train ticket and boarding the train, constitutes a crime, regardless of whether the meeting takes place. \(^{25}\) This fits with the trend of growing criminalization that is observable in many areas, not least where technology-related behavior is concerned (Koops 2009).

It remains to be seen, however, how effective this criminalization will be, in terms of added value over existing criminalization of (attempted) actual child abuse. Criminalization of online grooming as a preparatory crime, i.e., before actual child abuse has taken place, only makes sense if we can expect groomers to be caught in time, before actual abuse during a meeting occurs. Offenders could be caught (if the country’s legislation allows entrapment) if they communicate with and meet an undercover police officer, rather than the child they thought they were grooming. Although this increases the prevention of child abuse, of course not all groomers can be caught by covert Internet investigation officers, and moreover, entrapment is not allowed in all jurisdictions. The real challenge in the criminalization of grooming, in our view, lies in preventing the children who

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\(^{23}\) The provision covers minors under 16 (or, in Northern Ireland, under 17), where the perpetrator does not reasonably believe that the person is 16 (or 17, respectively) or over. See article 15(1)(c)-(d) and (3) of the UK Sexual Offences Act, c. 42.

\(^{24}\) See also the similar article 1 Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005, requiring contact at least once before (arrangement of) the meeting.

\(^{25}\) Interestingly, the Norwegian criminalization of grooming goes one step further in requiring that the perpetrator “has arrived at the meeting or a place where the meeting place can be observed” (article 201a Norwegian General Civil Penal Code, quoted in Davidson 2011, 11).
communicate with groomers from falling victim to contact abuse. This can happen if the child tells its parents of the proposed meeting and the parents sense danger, or if the groomer’s communications are being monitored; which presupposes probable cause of an existing offence that legitimizes monitoring the groomer’s communications. Both are possible, but not immediately likely. The trust bond in grooming (“it’s our little secret”) is precisely aimed at preventing the child from telling its parents about the meeting. In this respect, the plea of the mother of a grooming and murder victim, Ashleigh Hall, seems vital:

“[j]ust put the message out that please, parents whose kids are on Facebook, please ask them to tell you who they’re talking to. You just don’t know who is behind that photo” (BBC News 2010).

Whether children will really tell their parents, however, if asked who they are talking to, and chatting and camming with, remains to be seen. In the only published grooming case to date in the Netherlands (where grooming has been penalized as of January 1, 2010 in art. 248e Dutch Criminal Code), the meeting had already taken place, involving sexual abuse of the victim. The perpetrator was not only convicted for grooming but also for sexual abuse of a minor and possession of child pornography.26 On the other hand, in a case currently before the courts, a 37-year-old man was arrested in his home after he had proposed via MSN that a 12-year-old girl should meet him, and had sent her an itinerary and travel schedule. A decision in the case has not yet been published; newspaper reports suggest that the man’s communications had been monitored by the police, in order that they might intervene at the moment he arranged a meeting (Du Pré 2010).

Another issue related to the effectiveness of criminalization is whether it can be proven that the meeting has the purpose of having sex or making child pornography images, which is a requirement both in the Lanzarote and in the UK provision. This will require considerable circumstantial evidence. The fact that a suspect has booked a hotel room and carries a hand-held video camera will not be enough to prove intent of sexual abuse, as both can equally well be elements of a tourist trip to another city. The prosecution will likely need to show some recorded statements by the suspect indicative of their intent; sometimes, incriminating records may be available,27 but this will not always be the case.

26 District Court Middelburg November 3, 2010, LJN BO2782.
27 In the Dutch case (ibid.), the MSN chats of the defendant with the victim, copies of which were found stored on the defendant’s laptop, contained very explicit mention of his intentions with respect to the proposed meeting. The defense that these statements were made in the “virtual space” of a children’s social-networking site (Habbo) and hence were fantasy and not real was
It therefore remains to be seen how effective such a criminalization will be, aimed as it is at preventing actual child abuse. The criminalization of online grooming may seem, at first sight, to be unrelated to this article’s theme of navigating between freedom and control of young people. Catching and prosecuting groomers does not as such imply that potential victims face more control. However, a closer analysis suggests that there are two ways in which the criminalization does seem to lead to an increasing control and monitoring of children’s and adolescents’ online behavior. First, the criminal provision presupposes that intervention is possible when youngsters arrange to meet face-to-face people they have met online, before the actual meeting takes places. (The criminalization would otherwise have no added value over existing penalizations of child abuse.) This requires monitoring of the online communications of young people and their communication partners, or stimulating them to tell people in advance of their offline meetings. Most children do tell someone where they are going if they have made online appointments, but they tell peers rather than parents (Livingstone et al. 2011). The criminal law approach to grooming therefore comes with a focus on increased parental (or police) supervision of online behavior, aimed at intervention when a contact crime threatens. This is not in itself wrong, but it differs in focus from alternative measures, such as education and self-regulatory instruments such as “red buttons” on online platforms (Gottschalk 2011, 96), which foster youngsters’ empowerment rather than supervision. We will return to this in the discussion of policy implications below.

The second way in which criminalization of online grooming could lead to more control relates to these alternative measures. In the spectrum of regulatory interventions—from awareness-raising and self-regulation to criminalization—criminal law is classically seen as a last resort, an *ultimum remedium*. The stress in European policy, of both the Council of Europe and the EU, placed on the importance of criminalizing online grooming therefore creates the impression that other, less drastic, measures are not sufficiently effective. In other words, the criminalization sends out a signal to parents and online service providers that education and self-regulation will not suffice to control the risks of children and adolescents falling victim to groomers, and that instead more monitoring is necessary. Also, on a policy level, where the public awareness of new risks of minors on the Internet has opened a policy window for intervention, Europe-wide criminalization could close the policy window too soon, before other policy options have been fully developed in practice. Governments might now lie back after passing a law to criminalize online grooming, and forego the option of

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considered unconvincing by the court. See District Court Middelburg November 3, 2010, LJN BO2782.

Published by Berkeley Electronic Press, 2011
stimulating other measures that approach the problem from a different, more child-empowering, angle.

Criminal Law and Novel Risky Behavior: Sexting

Most youths nowadays have mobile phones to stay in touch with their peers, parents, and others. Text messaging is particularly popular because it is a cheap and easy way of contacting others, and it can be used at locations where talking on the phone is not allowed or possible—such as in class rooms or movie theatres. The increasing sophistication of mobile phones has meant that they can also now be used for taking pictures, making or watching movies, surfing the Internet, sending emails, and playing games. Mobile phones thus allow one to take and distribute pictures, leading to the new phenomenon of “sexting”—sending or receiving sexually explicit or suggestive images or videos (although texts are still an option) via mobile phone (Hinduyu and Patchin 2010).

This phenomenon has become quite common among adolescents. A 2009 survey by MTV and Associated Press Poll shows that a third of 18–24-year-olds and a quarter of 14–17-year-olds have been involved in sexting. This applies to almost half of young people who are sexually active. Two-thirds of those sending sexts have been pressured by another person to do so at least once. Girls are slightly more likely to have sent a naked picture or video of themselves. Most sexts are shared in romantic relationships, but one-third have sent sexts to people they only know online, and a quarter have sent sexts to people they fancy (MTV 2009). In the 2011 EU Kids Online survey, the term “sexting” was not used, but 15 percent of European youths aged 11–16 had seen or received online sexual messages in the past 12 months, but a mere 3 percent of these had posted or sent such messages (Livingstone et al. 2011).

Sexting can be seen as part of the process of growing up and exploring sexuality—although obviously adults are also involved in sexting. People use technology to show themselves in sexual poses, even when their sexual partner is not present. Sexting might even add to the excitement or the closeness of the

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relationship that people experience. Based on the 2009 MTV Survey, young people involved in sexting are likely to describe it as “flirty,” “exciting,” “hot,” “fun,” and “trusting” (MTV 2009). According to the 2010 EU Kids Online survey, of all children who use the Internet, only 4 percent have been bothered by seeing or receiving sexual messages (corresponding to 25 percent of those who have seen or received these sexual messages; Livingstone et al. 2011).

With sexting it is important, however, to distinguish between self-sexting (sending sexts of yourself) and peer-sexting (sending sexts of others, mostly one of your peers). Sexting often starts with someone sending their own sexts, with the situation getting out of hand when sexts are forwarded to third parties. Sexting can go awry, for instance, when a relationship turns sour or romantic advances remain unrequited, or when recipients of sexts think it is fun to play a prank: the chances are that these sexually explicit images and videos are forwarded to people to whom they were not originally intended. Sending sexts means these pictures leave the control sphere of the original maker and that those on the receiving end can easily and quickly share them with many others. This in itself can be embarrassing or harmful for youths, but viral sexting—the uncontrolled spreading of sexts via mobiles and social networks—is often accompanied by verbal harassment of peers and others. The combination can lead to dramatic consequences, like teenage suicide, such as happened in the cases of two teenage girls—Jesse Logan and Hope Witsell (Kotz 2009)—after nude pictures were circulated among their peers—in one case by the ex-boyfriend, in the other a boy the girl fancied—and the girls were verbally terrorized. But there are other, equally unfortunate incidents as well.

In the United States, a strict application of existing anti-child pornography laws has led to the criminalization of these activities. In some states consensual sexting among adolescents is prosecuted under traditional child pornography laws. Teenagers have been arrested for taking nude pictures of themselves and texting them to classmates or putting them online (Associated Press 2008; 2009).

29 Intentional sexting schemes also emerge, see Washington (2010).
30 One in five (17 percent) has forwarded sexts to another person and more than half of those forwarded the sext to more than one person (MTV 2009).
31 See Bosker (2009); Jesse Logan’s mom on YouTube: http://youtu.be/VLTj3WBmY1k.
32 A related phenomenon that recently hit the Dutch media is “bezemen” (“brooming”), a term which literally means sweeping with a broom but is nowadays also used for a particular form of online harassment where girls are branded—mainly by boys—as hookers in rude and nasty videos on YouTube or social networking sites. The consequences for these girls can be severe, especially if their (email) address and phone number are displayed. See Algemeen Dagblad (2010). Compare also the case of a Rutgers freshman who committed suicide after someone streamed online a stealthily made webcam video of his having gay sex in his room; see Wiener-Bronner (2010).
Others have been faced with child pornography or obscenity charges for distributing sexually explicit pictures of others (Porter 2008; Pilkington 2009; Irvine 2009). This begs the question: sexting can be risky and harmful, but is it morally wrong, and if so, should it be subject to criminal liability?

In a lawsuit filed by the American Civil Liberties Union, the Appeal Court ruled that the Wyoming County District Attorney could not charge three teenage girls with child pornography (Miller et al. v. Skumanick). In the sexting cases under scrutiny, the teenagers were offered the option of successfully attending an educational program, in which case—and only then—the child pornography charges would be dropped. The court, however, warranted the fundamental right to raise a child without undue state interference as sheltered by the due process clause of the Fourteenth Amendment, which particularly encompasses the parents’ “responsibility to inculcate moral standards, religious beliefs, and elements of good citizenship” (p. 24). One of the parents especially had a problem with “[t]he program’s teachings that the minors’ actions were morally ‘wrong’ and created a victim” (p. 24). The court moreover found that compelling a minor to write that what they did was morally wrong violates their First Amendment freedom of speech. The Miller case particularly focuses on the educational program, but the question whether making the sending of sexts illegal in itself violates freedom of speech is an important one as well.

The Miller case obviously cannot answer the question whether sexting is morally wrong; it rather shows that people have quite different moral beliefs. Most people would not necessarily consider adolescents’ sexting pictures of themselves as morally wrong (but rather, foolish), while the (im)morality of sexting pictures of others will depend on the circumstances. Moreover, even if sexting is considered morally wrong, it is still a question whether it should be subject to criminal liability. Would criminalization of sexting help, in light of the tendency in adolescence to take risks in order to seek the boundaries of the relationship between oneself and the outside world? In the Netherlands, due to policy guidelines by the council of chief public prosecutors—in line with the culture of control—requiring enforcement of the child pornography legislation also with respect to 16–17-year-olds, we see a recent tendency in criminal investigative policy to abandon the distinction between (pre)puberal and post-puberal child pornography, and to prioritize police investigations on both of them. Given that sexts often fulfill the definition of child pornography, it makes us wonder how the police—and subsequently the judiciary—will deal with them.


and whether (and if so, how) they will distinguish between teenage foolishness and teenage sexual abuse. The investigative policy guidelines take a broad approach, including pictures that in any way suggest sexual abuse and states:

“children up to the age of 18 years cannot foresee the (long term) consequences of participating in producing and distributing such material [i.e. sexual images, author note], and must therefore be protected by law, notwithstanding their possible consent at the time of participation.”\(^{35}\)

This implies that criminal policy seems to be shifting towards criminalizing situations of teenage sexual foolishness, although in practice we have to wait and see how this works out. The overall question remains as to whether sexting should be addressed by a criminal law response in the first place.

A more general question raised by policy developments with respect to sexting is whether law enforcement and policymakers are merely struggling to fit a new phenomenon into existing paradigms or whether at the same time an opportunity is being seized to exert more control over adolescent activities. Although research is necessary to further test our findings, this case nonetheless provides indications that point to a curtailing of adolescent freedoms, either in order to prevent them from risk and harm, or because of moral objections and reservations towards sexting.

**Policy Implications: Navigating Between Freedom and Control**

Although new forms of adolescent risk-taking emerge, the basic pattern of their behavior remains the same: adolescents seek and cross boundaries, and they experiment in order to explore themselves, their relationships, and their surroundings. Dealing with risk-taking behavior requires walking a tightrope to balance freedom and fostering of autonomy where possible, with control and repression where needed if risks become too high. The tightrope has to be walked by all parents, but the state has a role to play as well, in the case of parental failure or where public or societal interests require intervention (Scott 2000; Buss 2004). What are the policy implications of the technological developments involved in changes in adolescent behavior, now that the old dilemma of dealing with adolescent behavior acquires new salience through phenomena such as online grooming and sexting?

\(^{35}\) Ibid., 11. Translation author’s own.
The above discussion of recent developments suggests that public policy with respect to adolescent behavior and online risks, in terms of the balance between freedom and control, is tilting towards more control. Where youngsters are framed as potential offenders, increasing control is perceptible in the tendency of states to consider criminal liability for adolescents sending “sexts” of themselves or others. But also where children and adolescents are perceived as potential victims of cybercrime, the emphasis put on a criminal law approach can lead to more control and supervision of adolescents to the detriment of other, more empowering measures. As was argued in the discussion on online grooming, the focus on criminalization sends out a signal that youngsters’ online contacts should be monitored, rather than that they themselves should become more aware and resilient, and it could close a policy window too soon of stimulating educational and self-regulatory measures.

The shift towards more control is of course not restricted to online behavior, but fits in a broad social trend. As boyd (2008) states: “teenagers’ freedoms and rights continue to erode, and teenagers are more marginalised today than they were a century ago” (with reference to Hine 1999). Up to about 10 or 20 years ago, students frequently hitch-hiked to save transport costs, but as Furedi (2006, xx) observes, the “idea of getting into a car with a stranger has become stigmatized. Instead of regarding it as an act of offering a ride as a sociable, even altruistic gesture it is now interpreted as a prelude to a crime.” Schools increasingly apply “fortress tactics” where students are reframed “as a population of potential victims and perpetrators. At its core, the implicit fallacy dominating many school policy debates today consists of a gross conflation of virtually all the vulnerabilities of children and youth into variations on the theme of crime” (Simon 2007, 209). Individuals, including youths, are increasingly subjected to technological surveillance (Rooney 2010), and products are available for parents and schools to track online behavior or shadow youths physically. Mobile phones also seem to prevent the umbilical cord from being detached, because they allow parents to contact their offspring anywhere, and at any time. Online profiles of their children, if accessible to them, can obviously give parents a quite detailed picture.

However, surveillance has two faces: control and care (Lyon 2001). Not only can surveillance technologies systematically track unacceptable or even illegal behavior, they can also be used to watch over the welfare of individuals, software such as Net Nanny (www.netnanny.com) supports parents in controlling their children’s Internet usage, schools deploy biometrics to regulate entrance to their premises or CCTV to monitor school security (e.g., www.safeschoolcctv.co.uk), RFID chips are implemented to encounter child kidnapping and mobile phone tracking devices allow parents to locate their children (www.findyourchild.net).
such as children and adolescents, by keeping an eye on their needs and safety. If surveillance operates in a way that reflects the gradually growing needs of adolescents for freedom, we expect that it would encourage adolescent development. Mobile phones not only allow parents to monitor their children’s actions, but teens can also be given more freedom to go out and shape their social lives as they see fit, because they can call to say they’re running late or ask for help. Again it remains important for them to know they can talk to their parents and to actually do so. Overall, however, the social climate, together with the availability of surveillance technologies for parents and others, suggest that youth’s personal freedom to develop free from monitoring is curtailed to a certain extent in today’s technology-pervaded society. Adolescents do not escape the broader tendencies of surveillance in the emerging culture of control.

The shift towards control of adolescent online behavior, as demonstrated by the cases we have discussed, disturbs the balance between freedom and control more than seems warranted by the technological and social developments, for three reasons. First, current policy pays too little attention to the other side of the coin: fostering autonomy of youths by allowing them to experiment and shape their lives according to their own decisions as they grow older. Given the importance of the process of acquiring autonomy and independence during adolescence, young people cannot be overly protected in secure spaces under ubiquitous supervision, which acts as a straitjacket on their personal development. Only in extreme cases, where adolescents take high risks for themselves or when they substantially harm others—for example, if sexting is part of an intentional bullying scheme directed at a particular person—is strict control warranted. Even then, however, it is not evident that control should take the form of intervention through criminal law.

This is due to the second reason why the shift towards control is regrettable—more control is not likely to be effective. Adolescents’ sense of right and wrong, as well as their ability to act upon this sense, is immature (Smetana and Turiel 2005); criminalization is unlikely to stop them from doing things merely because they are “wrong.” To be sure, adolescents’ behavior can be risky or harmful to themselves and others, but this can better be dealt with in the private sphere of parental autonomy, and the freedom of youths to personally develop themselves. Moral standards are developing as they grow up, and youths need guidance by parents and others. Making mistakes, however, can be part of that development, and the consequences of mistakes can often be overcome with sensibility and affection. Taking a criminal law approach and increasingly supervising behavior that is typical for adolescents does not help youths in maturing soundly, nor will it prevent incidents from happening. Moreover, strict control and criminalization can also be counterproductive. For some youths, crossing moral or legal boundaries is part of their experimentation and peer-
pressure processes. For example, ASBOs are deemed ineffective by some as “[p]arents (like some professionals) commonly argued that ASBOs functioned as a ‘badge of honour’, rather than addressing the causes of the behaviour” (Youth Justice Board 2006). Moreover, surveillance measures meet with resistance, and youths have a range of means to actively circumvent control.37

The third reason why the shift towards more control is tilting the balance too much is that there are more promising alternatives than current policy seems to foster. Most prominently, a more generically successful approach is to make children and adolescents more resilient in dealing with online risks, rather than installing pervasive security and control measures. A useful analogy is the risk that a swimming pool poses to young children:

“Technology—in the form of fences around pools, pool alarms, and locks—can help protect children from drowning in swimming pools. However, teaching a child to swim—and when to avoid pools—is a far safer approach than relying on locks, fences, and alarms to prevent him or her from drowning.” (Thornburgh and Lin 2002, 224)

Stimulating digital literacy and safety skills should therefore be a primary policy objective. This is all the more relevant, since youngsters are increasingly likely to access the Internet from other devices than home or school computers, and hence their usage can be monitored less by teachers or parents (Livingstone et al. 2011). Moreover, parents’ knowledge of the risks their children are (or are not) exposed to online is not always correct; therefore, Livingstone et al. (2011) recommend that “one clear policy priority is to increase levels of parental awareness in the case of those children who do encounter risks through their online activities.”

Besides stimulating digital literacy and safety skills for both youngsters and parents, there is also a role for self-regulatory management of online technologies and services (Livingstone and De Haan 2009; Livingstone et al. 2011). The virtual world Habbo Hotel,38 for instance, employs moderators to actively monitor this online community and logs chats if alerted by children. They have installed a language filter, which scans all conversations for abusive, racist, or sexist speech, and personal data, such as phone numbers and email addresses. Habbo Hotel, however, is also focused on younger children, which makes active monitoring more appropriate here. Social networking sites, such as Facebook, have safety

37 Surveillance in turn leads to surveillance neutralization strategies, see Marx (2006). Cf the novel Little Brother by Doctorow (2008) on surveillance and the erosion of civil rights in the aftermath of a terrorist attack and the ensuing resistance by teens.

38 See: http://www.habbo.nl.
policies which provide users with extensive Frequently Asked Questions on how
to deal with safety problems. They also allow them to block unwanted content or
contacts or (anonymously) report these with so-called “abuse buttons” to the
administrator, so that content can be removed.39 A Norwegian initiative is to
include a “red button” on children’s websites, which children or others can “push”
if they experience abusive behavior; this results in an automatic message to a
police service that is available on a 24/7 basis (Gottschalk 2011, 96). Some
websites also provide links to Internet safety support organizations that educate
youths and parents on online risks.40 Social networking sites therefore provide
users with instruments and information to deal with problems themselves. What
remains a matter for further scrutiny, however, is how effective these self-
regulatory initiatives, or more generally, e-safety, policies are. Do they protect
children sufficiently and solve their problems adequately? Are they in the best
interests of children, given that encouraging online safety may not be the primary
focus of these companies? Or is there a role for co-regulation involving public
policy to set boundary conditions for online safety policy or other forms of
cooperation between industry and the state?41 These are questions that have to be
taken up by policymakers. This requires a policy approach to minors and the
Internet that is much broader than the focus on criminal law approaches that
appears to guide current responses to developments such as sexting and online
grooming.

Finally, another useful alternative approach to the current generic control
measures is to focus on those sub-groups of children and adolescents that are
particularly vulnerable. Surveys show that only a relatively small number of
youths face serious risks or are bothered by what they experience online. Current
public policy is perhaps focusing on the wrong risks: policymakers as well as
parents seem most concerned about online grooming, yet it is only a very small
number of youngsters who suffer harm or are bothered by meetings with strangers
they have met online. Children use the Internet to widen their circle of friends,
rather than to meet adults deliberately or inadvertently (Wolak et al. 2008, quoted
in Livingstone et al. 2011). Livingstone et al. (2011, 85, 93-94) found that out of a
large sample of over 25,000 children who use the Internet, 30 percent made

13 are not allowed to subscribe to Facebook.
40 Examples of such organizations are the Child Exploitation and Online Protection Centre
(CEOP; http://www.ceop.police.uk) and the UK Council for Child Internet Safety
(http://clickcleverclicksafe.direct.gov.uk/).
41 See, for instance, the 2008 Joint Statement on Key Principles of Social Networking Sites
Social Networking Principles for the EU, at:
contact with someone they did not previously know offline, only 9 percent of them met a contact offline, and 1 percent (251 children) were bothered by this experience. Three percent of these children said they had been hurt physically, and 11 percent said the other person did something sexual to them; 10 percent said something else bad happened. To be sure, every child reporting being bothered by a sexual experience during such a meeting is one too many. The question is, however, what is the most promising approach to preventing such incidents. Seeing that it concerns 0.11 percent (i.e., 11 percent of 1 percent) of all children studied, and moreover only 8 percent of the unknown people children met offline were adults (aged 20 years or older), while the others were generally peers, the risk of online grooming does not seem significantly greater than the overall risk of children being sexually abused by people in their physical surroundings (see Wolak et al. 2008). In this light, it is questionable whether criminalization of online grooming significantly increases the protection of children. A more fruitful approach may be to target policy at the groups of children that are most vulnerable to grooming: those who show disinhibited behavior in online contacts with people they have not met offline. Vulnerability factors are a negative self-image, parental problems or disrupted care, difficulties at school, loneliness, self-harm, and concurrent sexual abuse (Davidson 2010). These factors suggest that those most likely to become a victim of online grooming are youths who already face a number of problems in their physical environment, and who are also more at risk of offline abuse. Therefore, it may be more fruitful for policymakers to reinforce efforts to combat child abuse in general, based on insights into victimhood risk factors, rather than to create new technology-specific policies targeted at online risks.

Conclusion

Adolescents merit special attention in Internet policy. Current cybercrime policy is concerned with particular online risks young people are exposed to, for example online grooming and sexting, and other issues such as exposure to harmful or illegal content. While paying attention to online risks of children and adolescents is useful, the opportunities of the Internet for the development of young people should not be neglected. The key question is how adolescents can be protected

42 The report does not indicate whether these meetings were with adults, minors, or peers.
43 Cf Livingstone 2011 at 95: “It seems (...) unlikely that the internet is responsible for a substantial increase in the likelihood of face-to-face meetings with strangers.”

http://www.psocommons.org/policyandinternet/vol3/iss2/art4
DOI: 10.2202/1944-2866.1121
against the risks of potentially harmful online behavior, without giving up too many of the benefits of Internet use.

The online opportunities for self-expression and the online risks that adolescents are confronted with require a re-calibration of the balance between supervision or control and freedom of adolescents, and of the roles of the various actors involved—notably children, parents, and the state\textsuperscript{44}—to render justice to the importance of adolescents’ autonomy while protecting individual and social welfare. The prime responsibility in protecting youths lies with parents and increasingly also with youths themselves; in some instances, the state too has an interest or duty to step in (Scott 2000).

The way the state takes up this responsibility in cybercrime policy is perhaps understandable, but there is considerable room for improvement. Current policy is tilting too much towards criminal law approaches and surveillance, as it focuses almost exclusively on controlling risks through repression and supervision while disregarding the opportunities that the Internet also offers to people growing up today, including resilience-building skills.

The emphasis on control, visible both in policies to protect youth from risks and in policies targeted at potential juvenile offenders, curbs the possibilities of youngsters to develop themselves, to experiment, to make mistakes and to learn from those mistakes in a productive way. Policies based on criminal law may be ineffective and sometimes counterproductive, and alternative approaches merit careful consideration before policymakers resort to criminal law. Most importantly, the most promising approach is to try and make children and adolescents more resilient, by fostering digital literacy and safety skills. This also applies to parents, whose digital literacy can be improved as well. It is also necessary to raise awareness with parents of what actually happens to their children in online behavior. This awareness should not be constructed based on pervasive and ubiquitous monitoring; rather, parental awareness can be raised by focusing on the trust bond between parents and children, and creating an atmosphere of openness in which the children will not hesitate to tell their parents of important or scary things they experience online.

To conclude, the role of public policy in protecting adolescents from harm while fostering their opportunities for self-development is twofold. First, policy can stimulate digital literacy of children and parents through targeted awareness-raising campaigns and particularly through financing or otherwise stimulating projects that train safety skills of children online. Policy should first and foremost try to make youngsters resilient in using the Internet and facing all its risks and opportunities. Second, for those risks that are too high to leave to the overall

\textsuperscript{44} Obviously other people and institutions—such as siblings, peers, and schools—are relevant as well, but for the sake of clarity we focus here on the major actors.
resilience of children and parents, notably when considerable harm may follow, policy should try to take measures that focus on decreasing these risks. This can include co-regulatory efforts to raise the effectiveness of online safety policy by industry, and criminal law efforts as a last resort. As we have argued, however, this need not merely entail Internet-specific policy measures such as specially created cybercrime law and policy, since the children who are particularly vulnerable to online risks seem to be the children who are already vulnerable to abuse offline. Apart from creating evidence-based policies targeted at online risks where needed, then, policymakers may do well simply to reinforce efforts to combat child abuse in general.

References


