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"Sexting" to Minors in a Rapidly Evolving Digital Age: *Frix v. State* Establishes the Applicability of Georgia's Obscenity Statutes to Text Messages

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The capabilities of modern cell phones are advancing at an unprecedented rate, and with these advancements, cell phones now resemble personal computers in numerous ways. Messages, pictures, and videos, which were once transmittable only by computer, can now be sent from one cell phone to another or from a computer to a cell phone and vice versa. While the differences between these two electronic devices may seem increasingly trivial to the average electronics user, these differences are pivotal for the criminal defendant who has used a cell phone to send a sexually explicit text message to a minor. The disparity lies in the scope of Georgia's obscenity statutes and in the extent to which certain statutes have been expanded to apply to cell phones. In *Frix v. State*,[1] the Georgia Court of Appeals applied three obscenity statutes to text messages sent to a minor from a cell phone.[2] The appellate court dismissed two of the three obscenity charges against the defendant based

1. 298 Ga. App. 538, 680 S.E.2d 582 (2009).
2. *Id.* at 538–39, 680 S.E.2d at 584.

on the court's classification of cell phones and cell phone content.[3] Thus, *Frix* laid the foundation for the role cell phones will play in Georgia's obscenity statutes—a role that will likely evolve along with the capabilities of modern cell phones.

I. FACTUAL BACKGROUND

On March 5, 2005, Joseph Britton Frix (Frix) used his cell phone to send multiple sexually explicit text messages to a fourteen-year-old girl whom he knew was a minor.[4] The text messages contained descriptions of sexual acts Frix wished to perform on the young girl.[5] The police were notified, and during their investigation, Frix confessed to sending the messages.[6]

Frix was charged and indicted by a grand jury for the following criminal offenses: electronically furnishing obscene materials to a minor in violation of section 16-12-100.1 of the Official Code of Georgia Annotated (O.C.G.A.)[7] (Count 1); distributing harmful materials to a minor in violation of O.C.G.A. § 16-12-103[8] (Count 2); and engaging in obscene telephone contact with a minor in violation of O.C.G.A. § 16-12-100.3[9] (Count 3).[10]

Following the grand jury proceeding, Frix filed a general demurrer and moved to quash the indictment. In response, the State filed an accusation with Frix's consent, charging Frix with the same offenses but describing the alleged unlawful conduct related to Counts 1 through 3 with greater specificity. When the trial court denied Frix's motion to quash, he applied for and was granted an interlocutory appeal. On appeal, Frix argued that the statutes allegedly violated under Counts 1 through 3 did not prohibit his conduct and, therefore, did not provide fair notice that such conduct was illegal.[11] The Georgia Court of Appeals affirmed in part and reversed in part—reversing the trial court's denial of Frix's motion to quash as to Count 1 (electronically furnishing

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3. *Id.* at 539, 680 S.E.2d at 584.

4. Brief of Appellee at 2, 3, Frix v. State, 298 Ga. App. 538, 680 S.E.2d 582 (2009) (No. A09A0172).

5. Accusation No. 2008CR1373-4 at 2 of 3, *Frix*, 298 Ga. App. 538, 680 S.E.2d 582 (No. A09A0172).

6. Brief of Appellee, *supra* note 4, at 2.

7. O.C.G.A. § 16-12-100.1 (2007).

8. O.C.G.A. § 16-12-103 (2007).

9. O.C.G.A. § 16-12-100.3 (2007).

10. Frix v. State, 298 Ga. App. 538, 538, 680 S.E.2d 582, 584. Frix was also charged with a fourth count of possession of methamphetamine. *Id.* Because this charge was not disputed in the court of appeals, it has been omitted from this Article's analysis.

11. *Id.* at 538–39, 680 S.E.2d at 584.

obscene material to a minor) and Count 3 (obscene phone contact with a minor), and affirming the denial of Frix's motion to quash as to Count 2 (distributing harmful material to a minor).[12]

II. LEGAL BACKGROUND

A. *Electronically Furnishing Obscene Material to Minors (Count 1)*

O.C.G.A. § 16-12-100.1[13] was enacted in 1993,[14] and the original statute has remained in effect without subsequent amendments.[15] The statute criminalizes the act of electronically furnishing obscene materials to minors[16] and defines "[e]lectronically furnishes" as "[making] available by electronic storage device, including floppy disks and other magnetic storage devices, or by CD-ROM; or . . . [making] available by allowing access to information stored in a computer, including making material available by operating a computer bulletin board."[17] Material falling within the scope of the statute includes any sexually explicit "picture, photograph, drawing, or similar visual representation," as well as "[a]ny written or aural matter" describing sexually explicit conduct, when such material "lacks serious literary, artistic, political, or scientific value."[18] Violation of this code section results in "a misdemeanor of a high and aggravated nature,"[19] punishable by a fine of up to $5000 or incarceration up to twelve months, or both.[20] Furthermore, the conduct proscribed by this statute is considered a "[d]angerous sexual offense" under O.C.G.A. § 42-1-12(a)(10)(A)(xvi),[21] and a person convicted of such offense must register as a sexual offender.[22] The statute's primary purpose is to penalize individuals who electronically furnish obscene material to minors.[23]

This statute originated when Representative Vinson Wall introduced House Bill 138 (HB 138) to the Georgia General Assembly.[24] The

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12. *Id.* at 539, 680 S.E.2d at 584.
13. O.C.G.A. § 16-12-100.1 (2007).
14. 1993 Ga. Laws 735, 738.
15. *See* O.C.G.A. § 16-12-100.1.
16. *Id.* § 16-12-100.1(b).
17. *Id.* § 16-12-100.1(a)(3).
18. *Id.* § 16-12-100.1(b).
19. *Id.* § 16-12-100.1(c).
20. O.C.G.A. § 17-10-4(a) (2008).
21. O.C.G.A. § 42-1-12(a)(10)(A)(xvi) (Supp. 2009).
22. *Id.* § 42-1-12(e)(2) (Supp. 2009).
23. Glenn D. Baker, *Offenses Against Minors: Prohibit the Electronic Furnishing of Obscene Material to Minors*, 10 GA. ST. U. L. REV. 104, 105 (1993).
24. *See* Ga. H.R. Bill 138, Reg. Sess. (1993).

introduction of HB 138 followed a nationwide sting operation called Operation Longarm, in which three hundred federal, state, and local law enforcement officers raided forty locations seizing "a large amount of data stored on computer equipment which contained child pornography" in the "first ever crackdown on computerized pornography."[25] Wall's sponsorship of the bill began after a large computer pornography ring was discovered in the Atlanta metropolitan area. The situation was brought to Wall's attention when he was shown by some constituents how easily pornography could be accessed from a home computer. Further research revealed that this computerized pornography was free to the public and, for the most part, did not verify the age of the persons accessing the material. In addition, a distribution network was uncovered that converted pornography into floppy disks and sold them on school campuses.[26] HB 138 was introduced to criminalize the selling, loaning, furnishing, or disseminating of harmful sexual material to minors through a computer or computer network.[27]

When first introduced in the House of Representatives, the bill did not contain the current subsection (a), which defines eight terms used within the statute, including the term *electronically furnishes*.[28] However, when presented to the Senate, the Senate Committee on Special Judiciary drafted an alternative version of the bill, which included the eight definitions to reduce ambiguity and to clarify the scope of the statute. This new version was then passed by both the House and the Senate.[29]

This statute represents the General Assembly's first attempt to combat the issue of computer pornography.[30] Rather than placing sole responsibility on parents to monitor and prevent their children from accessing obscene material, the statute places responsibility on the source of the pornography.[31] Wall described HB 138 as "an attempt to bring our pornography laws into the modern century."[32]

Since the enactment of the statute, convictions have been sustained for conduct involving more than just computer pornography, ostensibly

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25. Baker, *supra* note 23, at 104–05.
26. *Id.* at 105.
27. Ga. H.R. Bill 138, Reg. Sess. (1993).
28. Baker, *supra* note 23, at 106–07.
29. *Id.* at 107.
30. *Id.*
31. *Id.*
32. *Id.* at 107–08 (internal quotation marks omitted) (quoting Ben Smith III, *Computer Porn, Foster Parent Bills OK'd in House*, ATLANTA J. & CONST., Feb. 4, 1993, at D3).

expanding the scope of the statute to include e-mail and text messages.[33] In *Ward v. State*,[34] a man was convicted for electronically furnishing obscene material to a minor in violation of O.C.G.A. § 16-12-100.1 after he sent pornographic material to a fifteen-year-old girl via e-mail.[35] In *State v. Lee*,[36] a man was convicted under O.C.G.A. § 16-12-100.1 after police found four pornographic photographs on the victim's cell phone that were sent from the defendant's cell phone.[37] Although the trial court's decision in *Lee* was subsequently appealed to the Georgia Court of Appeals, the applicability of O.C.G.A. § 16-12-100.1 was not at issue.[38]

Prior to the enactment of O.C.G.A. § 16-12-100.1, Florida was the only state that criminalized the selling or loaning of pornography to minors via computer.[39] Florida Statutes section 847.0138[40] prohibits transmitting—defined as sending via "electronic mail"—harmful material to minors by electronic device.[41] Similarly, an Alabama statute prohibits transmitting obscene material to minors via computer, specifically indicating a "computer communication system" as the prohibited means of transmission.[42] Georgia is the only state to make the distinction between *electronic storage device*[43] and *electronic device*.[44] In contrast to the definition of *electronic storage device* stated above, O.C.G.A. § 16-12-100.2[45] specifically defines *electronic device* to include cell phones.[46]

B. Unlawful Distribution of Harmful Material to Minors (Count 2)

O.C.G.A. § 16-12-103[47] was originally enacted in 1983.[48] This Act made it illegal to sell or loan to a minor for monetary consideration:

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33. Although *Frix* established that text messages do not fall within the meaning of O.C.G.A. § 16-12-100.1, convictions were sustained for obscene material sent to minors in cell phone text messages prior to the ruling in *Frix*. *See* State v. Lee, 295 Ga. App. 49, 49, 670 S.E.2d 879, 880 (2008).

34. 299 Ga. App. 826, 683 S.E.2d 894 (2009).

35. *Id.* at 826, 683 S.E.2d at 895.

36. 295 Ga. App. 49, 670 S.E.2d 879 (2008).

37. *Id.* at 49, 670 S.E.2d at 880.

38. *See id.*

39. Baker, *supra* note 23, at 105.

40. FLA. STAT. ANN. § 847.0138 (Supp. 2010).

41. *Id.*

42. ALA. CODE § 13A-6-111(a) (LexisNexis 2005).

43. O.C.G.A. § 16-12-100.1(3)(A).

44. O.C.G.A. § 16-12-100.2(b)(2) (2007).

45. O.C.G.A. § 16-12-100.2 (2007).

46. *Id.*

47. O.C.G.A. § 16-12-103 (2007).

48. 1983 Ga. Laws 1437, 1441.

> (1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors; or (2) Any book, pamphlet, magazine, *printed matter however reproduced*, or sound recording which contains any matter enumerated in paragraph (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to minors.[49]

Enacted under the same Act,[50] O.C.G.A. § 16-12-105[51] provides that a violation of O.C.G.A. § 16-12-103 is to be treated as a "misdemeanor of a high and aggravated nature,"[52] punishable by a fine of up to $5000, incarceration up to twelve months, or both.[53] It is unclear whether a violation of O.C.G.A. § 16-12-103 requires that the defendant register as a sex offender because, whereas other obscenity statutes are specifically identified, O.C.G.A. § 16-12-103 is not listed under the definition of "dangerous sexual offense" contained in O.C.G.A. § 42-1-12(a)(10)(A).[54]

In February 1984, the General Assembly made a minor amendment to the statute,[55] and in April 1984, the statute was broadened to apply not only to selling and loaning material to minors, but to any furnishing or disseminating of materials to a minor.[56] The April amendment also inserted additional provisions for motion pictures, misrepresentation of age by minors under the age of eighteen or by their parents or guardians, and public displays.[57] In 1996 the statute was amended to include a provision regarding admission to motion pictures for persons under the age of twenty-one, and to remove the age of eighteen from the misrepresentation provisions, so that such provisions would apply to persons up through the age of twenty-one.[58] Most recently, in 2005 the statute was amended to include a provision relating to video game rating systems.[59]

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49. O.C.G.A. § 16-12-103(a) (emphasis added).
50. 1983 Ga. Laws at 1441.
51. O.C.G.A. § 16-12-105 (2007).
52. *Id.*
53. O.C.G.A. § 17-10-4(a).
54. *See* O.C.G.A. § 42-1-12(a)(10)(A).
55. 1984 Ga. Laws 22, 43.
56. 1984 Ga. Laws 1495, 1500.
57. 1984 Ga. Laws at 1500–01.
58. 1996 Ga. Laws 273, 275–76.
59. 2005 Ga. Laws 1261, 1261–62.

C. *Obscene Phone Contact with a Child (Count 3)*

O.C.G.A. § 16-12-100.3[60] was enacted in 2000,[61] and the original version of the statute has not been amended.[62] This statute prohibits a person over the age of seventeen from engaging in obscene phone contact with a minor.[63] Phone contact is obscene when it "involves any aural matter containing explicit verbal descriptions or narrative accounts of sexually explicit nudity, sexual conduct, sexual excitement, or sadomasochistic abuse which is intended to arouse or satisfy the sexual desire of either the child or the person."[64] A person convicted under this statute has committed "a misdemeanor of a high and aggravated nature,"[65] punishable by a fine of up to $5000, incarceration up to twelve months, or both.[66] Similar to the conduct under O.C.G.A. § 16-12-100.l, the conduct prohibited under this statute is considered a "dangerous sexual offense," and a conviction requires registration as a sexual offender.[67]

With this legal history serving as a backdrop, *Frix v. State*[68] was a case of first impression for the court of appeals regarding the applicability of these three statutes to material sent to a minor from a cell phone. Based on the court's construction of the statutes, *Frix* established that obscene text messages violate O.C.G.A. § 16-12-103, but not §§ 16-12-100.1 or 16-12-100.3.[69]

III. COURT'S RATIONALE

In *Frix v. State*,[70] the Georgia Court of Appeals reversed the defendant's conviction on Count 1, holding that his conduct did not constitute "[e]lectronically furnishing obscene material to [a] minor[]" under O.C.G.A. § 16-12-100.1,[71] because text messages are not included in the meaning of *electronically furnished* as defined by the statute.[72] With no prior case law interpreting the applicability of O.C.G.A. § 16-12-100.1

60. O.C.G.A. § 16-12-100.3 (2007).
61. 2000 Ga. Laws 1237, 1238.
62. *See* O.C.G.A. § 16-12-100.3.
63. *Id.* § 16-12-100.3(b).
64. *Id.*
65. *Id.* § 16-12-100.3(c)(1).
66. O.C.G.A. § 17-10-4(a).
67. O.C.G.A. § 42-1-12(a)(10)(A)(xvi).
68. 298 Ga. App. 538, 680 S.E.2d 582 (2009).
69. *Id.* at 539, 680 S.E.2d at 584.
70. 298 Ga. App. 538, 680 S.E.2d 582 (2009).
71. O.C.G.A. § 16-12-100.1 (2007).
72. *Frix*, 298 Ga. App. at 539–40, 680 S.E.2d at 584–85.

to text messages, the court began its analysis by interpreting the text of the statute.[73] The court recognized that unambiguous text should be construed in light of its plain meaning, while ambiguous text should be construed to accomplish the statute's purpose.[74] Additionally, criminal statutes "must be strictly construed against the State."[75]

Concluding that subsection (B) of O.C.G.A. § 16-12-100.1(a)(3), regarding information stored in a computer, does not encompass text messages sent via cell phones, the court focused its analysis on whether transmitting material as a text message constitutes making such material "available by electronic storage device" under subsection (A) of the statute.[76] While conceding that modern cell phones have the capacity to store vast amounts of private electronic information, including "incoming and outgoing calls, address books, calendars, voice and text messages, e-mail, video, and pictures,"[77] the court did not find this conclusive evidence that cell phones constitute electronic storage devices.[78] Rather, the court evaluated the phrase *electronic storage device* based on the context of the statute as a whole, focusing on the language that immediately follows the phrase: "*including* floppy disks and other magnetic storage devices, or by CD-ROM."[79] Although the term *including* can be used as a term of expansion or limitation,[80] the court followed Georgia Supreme Court precedent establishing that when "a general term [such as 'electronic storage device'] is followed by the word 'including,' which is itself followed by specific terms, the intent may be one of limitation."[81] Thus, the court held that the term *including* limits the meaning of electronic storage devices exclusively to floppy disks and CD-ROMs.[82]

Further, the court distinguished floppy disks and CD-ROMs from cell phones by explaining that floppy disks and CD-ROMs are used to store material that can be accessed via computer, while cell phones are communication devices that can store material that can be accessed

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73. *See id.* at 540, 680 S.E.2d at 585.

74. *Id.* (citing State v. Brown, 250 Ga. App. 376, 378–79, 551 S.E.2d 773, 775 (2001)).

75. *Id.* (quoting *Brown*, 250 Ga. App. at 379, 551 S.E.2d at 775)).

76. *Id.* at 540–41, 680 S.E.2d at 585.

77. *See id.* at 541, 680 S.E.2d at 585.

78. *Id.*

79. *Id.* (quoting O.C.G.A. § 16-12-100.1(a)(3)(A)).

80. BLACK'S LAW DICTIONARY 763 (6th ed. 1994).

81. *Frix*, 298 Ga. App. at 541, 680 S.E.2d at 586 (alteration in original) (emphasis added) (quoting Berryhill v. Ga. Cmty. Support & Solutions, Inc., 281 Ga. 439, 441, 638 S.E.2d 278, 280–81 (2006)).

82. *Id.* at 541–42, 680 S.E.2d at 586.

without the use of a computer.[83] In other words, the mediums differ because with floppy disks and CD-ROMs, the recipient of information must be given the device and then use a computer to access the information; whereas with text messages sent via cell phones, the information is readily accessible to the recipient without exchanging the phone or requiring the use of a computer.[84] Therefore, the court concluded that sending a text message does not constitute making its content available "by electronic storage device" under O.C.G.A. § 16-12-100.1(a)(3)(A).[85]

According to the court, if the Georgia General Assembly had intended the definition of *electronic storage device* to include *all* devices capable of storing electronic information, a number of phraseology techniques could have been used when it drafted the statute at issue.[86] For instance, because courts should construe statutory language to avoid rendering any of the language superfluous,[87] the General Assembly could have omitted listing specific examples altogether.[88] In the alternative, the General Assembly could have included the phrase *but not limited to* to clarify its intent that the word *including* be used in its expansive capacity.[89] In fact, the General Assembly employed this expansive use of the word *include* in the subsection immediately following the one at issue, thus lending support for the court's conclusion that the limiting use of the word was intended in O.C.G.A. § 16-12-100.1(a)(3)(A).[90]

Finally, to the extent O.C.G.A. § 16-12-100.1(a)(3)(A) is deemed ambiguous, the court relied on the rule of strict construction, under which the ambiguity is construed in the defendant's favor.[91] Therefore, even if the court concluded that the broad construction of the statute was reasonable and included cell phones as electronic storage devices, the equally reasonable construction excluding cell phones would be favored under the rule of lenity.[92]

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83. *Id.*
84. *See id.*
85. *Id.* at 542, 680 S.E.2d at 586.
86. *Id.*
87. *Id.* (quoting *Berryhill*, 281 Ga. at 441, 638 S.E.2d at 281).
88. *Id.*
89. *Id.* (quoting *Berryhill*, 281 Ga. at 442, 638 S.E.2d at 281).
90. *Id.*
91. *Id.*
92. *Id.* The rule of lenity provides that, "where two reasonable interpretations of a penal statute exist—one inculpating and the other exculpating, or one imposing a harsher or longer punishment and the other imposing a milder or shorter punishment—a court must adopt the interpretation that favors the defendant." LINDA D. JELLUM & DAVID

As for Count 2, the court upheld Frix's conviction for unlawful distribution of harmful material to a minor under O.C.G.A. § 16-12-103,[93] after concluding that the statute's phrase *printed matter however reproduced* applies to text messages.[94] The court classified text messages as printed matter because they include words or numbers that are read by the recipient.[95] The court viewed the General Assembly's use of the phrase *however reproduced* as evidence that the particular medium of printed material was irrelevant in terms of satisfying the statute.[96]

Frix argued that the statute should only apply to the production of *tangible* materials.[97] However, the court interpreted the plain meaning of the statute, with its use of the broad words *furnish* and *disseminate*, as encompassing delivery by any method, including electronic transmission.[98] After establishing that Frix's conduct fit within the statute, the court further concluded that the plain language of the statute was sufficient to give a reasonably intelligent person fair notice that his contemplated actions were prohibited under the statute.[99]

Finally, the court reversed Frix's conviction for Count 3, holding that Frix's text messages did not constitute obscene phone contact with a minor.[100] The State conceded in its appellate brief that the defendant's conduct did not fit within this statute.[101] O.C.G.A. § 16-12-100.3 (b)[102] requires that the phone contact be "aural," and because a text message is not capable of being heard, the court concluded it does not fall within the meaning of the statute.[103]

Therefore, with the court's decision that obscene text messages violate O.C.G.A. § 16-12-103, but not O.C.G.A. §§ 16-12-100.1 or 16-12-100.3,[104] *Frix* represents an important case for interpreting Georgia's obscenity laws and creates precedent that implicates a number of

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CHARLES HRICIK, MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES 477 (2d ed. 2009).

93. O.C.G.A. § 16-12-103 (2007).
94. *Frix*, 298 Ga. App. at 543–44, 680 S.E.2d at 587.
95. *Id.* at 543, 680 S.E.2d at 587.
96. *Id.* at 544, 680 S.E.2d at 587.
97. *Id.* at 543, 680 S.E.2d at 587.
98. *Id.*
99. *Id.* at 544, 680 S.E.2d at 587.
100. *Id.*, 680 S.E.2d at 587–88.
101. Brief of Appellee, *supra* note 4, at 6.
102. O.C.G.A. § 16-12-100.3(b) (2007).
103. *Frix*, 298 Ga. App. at 544–45, 680 S.E.2d at 588.
104. *Id.* at 545, 680 S.E.2d at 588.

possibilities for the future of obscenity statutes as they relate to cell phones.

IV. IMPLICATIONS

Previously left to the discretion of the prosecutor, the rulings issued by the Georgia Court of Appeals in *Frix v. State*[105] establish clear guidelines for prosecuting criminal defendants under O.C.G.A. §§ 16-12-100.1,[106] 16-12-100.3,[107] and 16-12-103.[108] According to these guidelines, a defendant who sends a sexually explicit text message to a minor using a cell phone may be charged with distributing harmful material to a minor in violation of section 16-12-103. However, because such conduct does not fall within the statutory meaning of sections 16-12-100.1 or 16-12-103, charges under these statutes would be inappropriate.

Applying this interpretation, a person sending a message to a minor from a cell phone violates only one of Georgia's obscenity statutes, whereas a person sending an identical message to a minor from a computer violates an additional statute simply due to the medium through which the message is sent. Although based on a seemingly accurate construction of the language of the statutes at issue, the result seems strange in a modern era of daily technological advances, which renders messages sent from cell phones and computers nearly indistinguishable. As aptly noted in the appellee's brief in *Frix*, "the average person would know that cellular phone text messages are no different than instant messages on a computer."[109] In many ways, cell phones have become analogous to small computers.[110] Cell phones can store information, send e-mails, and access Internet websites. In addition, numeric cell phone keypads are becoming increasingly obsolete and are being replaced by touch screens and alphabetic keyboards with the layout of traditional typewriters, known as QWERTY keyboards,[111] features that make cell phones even more similar to computers. Given these capabilities, the court's differential treatment of cell phones under Georgia's obscenity laws seems tenuous and suggests further evolution to come in this area of law. *Frix*, therefore, may prove to be merely an interim case that calls to the attention of the Georgia General Assembly

105. 298 Ga. App. 538, 680 S.E.2d 582 (2009).
106. O.C.G.A. § 16-12-100.1 (2007).
107. O.C.G.A. § 16-12-100.3 (2007).
108. O.C.G.A. § 16-12-103 (2007).
109. Brief of Appellee, *supra* note 4, at 4.
110. *See id.*
111. Peter Svensson, *The Rise of the Cellphone QWERTY*, THE ASSOCIATED PRESS, Apr. 7, 2009, *available at* http://hamptonroads.com/2009/04/rise-cellphone-qwerty.

the need for further expansion so that cell phones, with their ever-increasing capabilities, are on par with their computer equivalents when determining violations of Georgia's obscenity laws.

To better understand the ramifications of the court's decision, consider the following two scenarios. In Scenario 1, a man sends a sexually explicit e-mail message to a minor using his computer. This conduct would be subject to criminal charges under both O.C.G.A. § 16-12-100.1 and § 16-12-103. In Scenario 2, a man sends a sexually explicit text message to a minor using his cell phone. Even if the messages sent in Scenarios 1 and 2 are identical in terms of content, the man in Scenario 2 would only be in violation of O.C.G.A. § 16-12-103. Further, if the two cases were before a judge who prefers consecutive sentencing, the man in Scenario 2 would receive a more lenient sentence for essentially the same conduct as the man in Scenario 1.[112] Also, subject to whether O.C.G.A. § 42-1-12[113] is deemed to require registration as a sex offender for violation of O.C.G.A. § 16-12-103, the man in Scenario 1 would be required to register with the sex offender database while the man in Scenario 2 might not. This result is difficult to rationalize given the similarities between modern text and e-mail messages. The content of an e-mail message can be sent via text message in identical form, so that the material viewed by the recipient is the same through either medium. Therefore, if the primary purpose behind the obscenity statutes is to protect the recipient from the harmful effects of viewing the obscene material, should it really matter which medium is used to send the material if the content viewed is identical and equally harmful?

To justify the inconsistent treatment of cell phones, the court in *Frix* discussed the difference between transmittal via floppy disks and CD-ROMs and transmittal via text messages.[114] According to the court, transmittal by floppy disk or CD-ROM requires making the device available so that the recipient may access its content from a computer, while transmittal by text message does not require "furnishing the phone itself to another person or allowing another person to have access to the phone."[115] The implications of this distinction, however, again lead to inequitable results when applied to an actual fact pattern. For example,

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112. From a consecutive sentencing standpoint, the man in Scenario 1 would be convicted of two misdemeanors of high and aggravated nature and could be fined up to $10,000 or incarcerated up to twenty-four months (the combined total for the two misdemeanors). In contrast, the man in Scenario 2 would only be convicted of one misdemeanor of high and aggravated nature and could only be fined up to $5000 or incarcerated up to twelve months.

113. O.C.G.A. § 42-1-12 (Supp. 2009).

114. *Frix*, 298 Ga. App. at 541–42, 680 S.E.2d at 586.

115. *Id.* at 542, 680 S.E.2d at 586.

if a person sends a message to a minor through a text message, as opposed to loading the same message onto a floppy disk and physically producing the device to the minor, that person has chosen a method of transmission that is not only less cumbersome but also avoids a possible additional conviction for furnishing obscene material to a minor under O.C.G.A. § 16-12-100.1. In effect, the court is declaring that a simpler mode of transmission of identical content will receive a less severe punishment by satisfying only one obscenity statute as opposed to two.

The purpose of O.C.G.A. § 16-12-100.1 further suggests that the statute may be expanded in the future to include cell phones. The primary purpose behind the enactment of the statute was to penalize individuals who transmit obscene material to minors by electronic means.[116] If the same material can be transmitted electronically in identical form through a cell phone or a computer, the distinction between which type of electronic device is used to transmit the material seems irrelevant and without rational justification.

Finally, the distinction may result from a generational gap between the older generation on the appellate court panel and the younger generation, which has grown up in an era in which cell phones are viewed as a necessity of life, capable of meeting all daily communication needs. Older generations grew up using e-mail as the primary mode of electronic communication. In contrast, today's youth are growing up in a world in which the interaction between cell phones and websites such as Twitter and Facebook continues to gain popularity as a means to communicate, while e-mail accounts are rarely used.[117] Moreover, most modern cell phones can send messages in a variety of forms–texts, instant messages, e-mails, and even Facebook posts.[118] The distinction Georgia's obscenity statutes create may become obsolete as the gap between the generations' familiarity with modern cell phones narrows and knowledge of evolving cell phone capabilities increases among all generations.

In conclusion, although *Frix* establishes clear precedent for the application of Georgia's obscenity statutes to text messages, the implications from the application of this precedent suggest the possibility of more changes to come. Specifically, the capabilities of modern cell phones and their similarities to e-mail messages suggest a strong likelihood that text messages will eventually be equated with e-mail

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116. Baker, *supra* note 23, at 105.

117. Chad Lorenz, *The Death of E-Mail: Teenagers are Abandoning their Yahoo! And Hotmail Accounts. Do the Rest of Us Have To?*, SLATE MAG., Nov. 14, 2007, *available at* http://www.slate.com/id/2177969/pagenum/all/.

118. *Id.*

messages in terms of applying these statutes so that messages sent to minors through either medium will receive the same punishment under Georgia law.

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