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## New Forms of Violence – an Attempt at a Criminal-Law Assessment

Nowe formy przemocy – próba oceny prawnokarnej

This article attempts to look at selected new phenomena that have the characteristics of violence or are more or less associated with violence. The author presents the main characteristics of flaming, sexting (including sextortion), exclusion and happy slapping, while attempting to answer the question of which provisions of the Criminal Code they may involve. The problem of other selected phenomena concerning violence and crimes on the network which have recently gained the attention of the media and researchers, is indicated.

**Keywords:** Criminal Code, violence, internet, cybersecurity

Niniejszy artykuł przedstawia próbę przyjrzenia się wybranym nowym zjawiskom, które noszą cechy przemocy lub bywają z przemocą mniej lub bardziej związane. Autorka prezentuje w nim główne cechy *flamingu*, *sextingu* (wraz z *sextortion*), *exclusion* oraz *happy slappingu*. Próbuje jednocześnie odpowiedzieć na pytanie, z realizacją jakich przepisów Kodeksu karnego wiązać się może ich przebieg. Zasygnalizowany został także problem innych, wybranych zjawisk dotyczących przemocy i przestępstw w sieci, które w ostatnim czasie zyskały zainteresowanie mediów oraz badaczy.

**Słowa kluczowe:** Kodeks karny, przemoc, internet, cyberbezpieczeństwo

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## Introduction

Violence is a phenomenon that seems to have accompanied humans from the very beginning of their functioning in the world. With the development of science and the emergence of new communication tools, the reality around us is changing. Certain phenomena, although they remain the same in terms of type (for example theft), are increasingly taking place using non-traditional, often very complicated mechanisms, which hinders both efforts to protect against potential threats and actions aimed at finding and punishing the perpetrators of specific prohibited acts. One of the problems that arises in the context of the rapid development of technology and the emergence of new forms of violence is the need to answer the question of whether they constitute “only” legally irrelevant, socially undesirable behaviour, which, in addition, is rapidly changing in nature, or whether their constituent actions may fulfil the characteristics of prohibited acts typified in the Criminal Code.

According to A. Olubiński, violence can be understood as “behaviour that harms the freedom of individuals, restricts their development, causes them psy-

cho-physical harm and involves their suffering”.<sup>1</sup> Another approach to define the term is based on the idea that these are “any non-accidental act that harms the personal freedom of an individual or contributes to the physical as well as psychological harm of a person, beyond the social rules of interaction”.<sup>2</sup> A. Brosch admits that defining violence itself is not an easy task, while in the literature the term is often used interchangeably with “aggression”. Following A. Frączek, she cites the statement that in social psychology<sup>3</sup> “aggression or interpersonal violence are intentional acts undertaken by people (...) that threaten or cause harm to the physical, psychological and social well-being of others (i.e. causing pain, suffering, destruction, leading to the loss of respected values”.<sup>4</sup> As noted by B. Siemieniecki, L. Wiśniewska-Nogaj and W. Kwiatkowska, three groups of definitions of violence can be distinguished: those based on the criterion of the intentionality of the action, the essence of the behaviour itself and its consequences.<sup>5</sup> These authors note that violence involves behaviours that are intentional and negatively assessed by society, aimed at gaining advantage, and combined with the deliberate use of force. As a result of violence, the social order is disrupted and moral and legal norms are also violated.<sup>6</sup> Although the concepts of aggression and violence differ, the phenomena interpenetrate.<sup>7</sup> As W. Jedlecka points out, violence affects personal rights and goods, such as, for example, the right to physical integrity or human dignity.<sup>8</sup>

According to J. Wawrzyniak, violence is an increasingly common phenomenon. Furthermore, it is becoming a commodity that is sold on television, in films and computer games.<sup>9</sup> J. Maciejewski points out that the use of violence is generally regarded as a pathological phenomenon. This is because it implies a deviation from the collectively accepted notion of social order.<sup>10</sup> In this article, the concept of vi-

<sup>1</sup> A. Olubiński, *Przemoc jako norma stosunków społeczno-wychowawczych*, “Wychowanie Na Co Dzień” 1996, no. 4–5 (31–32), p. 4.

<sup>2</sup> I. Pospiszyl, *Przemoc w rodzinie*, Warszawa 1994, p. 14.

<sup>3</sup> A. Brosch, *Media społeczne jako przestrzeń przemocy rówieśniczej*, “Kognitywistyka i Media w Edukacji” 2014, no. 1, p. 26.

<sup>4</sup> A. Frączek, *Agresja i przemoc wśród dzieci i młodzieży jako zjawisko społeczne* [in:] *Agresja wśród dzieci i młodzieży. Perspektywa psychoedukacyjna*, eds. A. Frączek, I. Pufal-Struzik, Kielce 1996, p. 37.

<sup>5</sup> B. Siemieniecki, L. Wiśniewska-Nogaj, W. Kwiatkowska, *Agresja – zjawisko, skutki, zapobieganie. Perspektywa pedagogiki kognitywistycznej, psychoprofilaktyki oraz edukacji moralnej*, Toruń 2020, p. 28–32.

<sup>6</sup> *Ibid.*, p. 32.

<sup>7</sup> *Ibid.*, p. 33.

<sup>8</sup> W. Jedlecka, *Formy i rodzaje przemocy*, “Wrocławskie Studia Erazmiańskie” 2017, vol. 11, p. 14.

<sup>9</sup> *Socjologiczne i psychopedagogiczne aspekty przemocy*, ed. J. Wawrzyniak, Łódź 2007, p. 7.

<sup>10</sup> J. Maciejewski, *Przemoc w społeczeństwie. Wybrane aspekty socjologiczne* [in:] *Socjologiczne i psychopedagogiczne aspekty przemocy*, ed. J. Wawrzyniak, Łódź 2007, p. 24.

olence will be treated broadly. Therefore, the understanding of this term will be broader than the one adopted in reference to violence occurring in the description of many types of prohibited acts, most often as a characteristic of a manner of action. In this aspect, violence means primarily the use of physical force, and the most accurate definition of violence is generally agreed to be that formulated by T. Hanausek.<sup>11</sup> However, it is not only the phenomena presented, viewed in themselves and considered through the prism of the characteristics they bear, but also the forms of violence to which they can sometimes lead, that will be the subject of consideration.

The very definition of the term “new forms of violence” poses many difficulties. Any effort to define the semantic framework of the term would – which is obvious – have to start by identifying certain fragments that are points of reference to each other. “New” is as much as “one that has taken the place of the previous one”, “recently made, acquired or just created, established”, as well as “recently existing, just invented” or “next, further”.<sup>12</sup> “Novelty” itself, as we can see, is therefore to some extent a relative concept. Some people will consider as “new” those forms of violence that have gained popularity as a result of a certain “fashion” in recent years, months or even weeks. Others will consider as “new” the forms of violence that have emerged, for example, with the start of a social network or a form of communication, or that have received increasing media attention. Others will consider as “new” forms of violence any pathology related to the functioning of a specific medium, such as the Internet.

Easy and relatively cheap access<sup>13</sup> to the Internet provides enormous educational opportunities and a kind of “window on the world”. On the other hand, however, the Internet often becomes a ground for a wide range of abusive behaviour. The emergence of new ways of spending leisure time, new communication

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On the subject of social pathology see also K. Baszak, *Patologia społeczna i przemoc nieletnich. Wybrane aspekty socjologiczne* [in:] *Socjologiczne i psychopedagogiczne aspekty przemocy*, ed. J. Wawrzyniak, Łódź 2007, pp. 173–182.

<sup>11</sup> T. Hanausek defines violence as “such an action by physical means which, by preventing or breaking the resistance of the forced person, is intended either to prevent the formation or execution of his or her decision of will or, by pressing with the currently inflicted annoyance on his or her motivational processes, to set this decision in the direction desired by the perpetrator”. T. Hanausek, *Przemoc jako forma działania przestępnego*, Kraków 1966, p. 65. Importantly, the Criminal Law currently differentiates between violence against a person and other types of violence (Article 191 and 115 § 9a (1) of the Criminal Code).

<sup>12</sup> L. Drabik, A. Kubiak-Sokół, E. Sobol, *Słownik języka polskiego PWN*, Warszawa 2021, p. 527.

<sup>13</sup> Obviously, one should not forget about entire regions, where we can speak of digital exclusion of citizens and a complete lack of Internet access, as well as of individual social groups for whom access to and use of the Internet is a significant obstacle or – for a variety of reasons – is not possible at all.

platforms and new social networks for making friends and forming relationships brings with it the risk of experiencing various forms of violence, only some of which have been named and described in the literature. Although the development of technology provides a number of mechanisms to strengthen the protection of victims, to make it easier for them to seek help<sup>14</sup> (also anonymously)<sup>15</sup> and to document violations of the law, it also brings with it new forms of harm to the legal interests of both individuals and entire communities.

The seemingly obvious observation that everything that is new today may not surprise us tomorrow needs to be stressed at the outset. Some aspects of everyday life, which some time ago seemed to us to be modern and full of innovations (paying for purchases with a card or watch, unlocking a phone with a fingerprint or using facial recognition), today are already commonplace. Although the judgement in this regard will, of course, always depend on our digital competence and level of knowledge in the area of new technologies, the spread of technological advances and various, often highly advanced innovations must be considered natural. Nor should we ignore the fact that certain forms of violence, which are increasingly being reported in the media, are harmful phenomena that have been known for a long time (in the same or modified form) and have recently been given distinctive names. It is difficult to argue, for example, that the set of behaviours that make up stalking – in various configurations – has not been a problem for a long time, but interest in the phenomenon has definitely increased with the onset of the term encompassing the perpetrator's entire mechanism of action. Efforts to include this harmful phenomenon in the legal framework have also contributed to this. Giving certain groups of behaviours a single, unifying name seems to direct the attention of both researchers and the average media viewer towards considering the phenomena in question as a whole and, consequently, makes it easier to grasp their essence, nature and consequences.

Some forms of violence, it seems, can also die out. Mechanisms that cease to be profitable for the perpetrators of violence in one aspect or another undergo a certain metamorphosis or disappear altogether. As can be guessed, in a situation where the level of knowledge represented by society reaches a high level and, consequently, it is "immune" to certain behaviours undertaken by perpetrators, the latter will seek to achieve their goals in a different way, abandoning ineffective treatments or modi-

<sup>14</sup> M. Walrave and W. Heirman mention a phenomenon referred to by psychologists as the "mild disinhibition effect", involving the disappearance of inhibitions during online communication with benefits such as a sense of relief or increased trust in the interlocutor, M. Walrave, W. Heirman, *Skutki cyberbullyingu – oskarżenie czy obrona technologii?*, "Dziecko Krzywdzone. Teoria. Badania. Praktyka" 2009, vol. 8, no. 1, p. 14.

<sup>15</sup> For example, by describing one's problems on Internet forums, hiding behind a specific nickname and asking for advice and support from users who have encountered similar situations. Likewise, it seems possible to contact anonymously (without mentioning the person's name) organisations working to combat the types of violence in question.

fying them in an appropriate manner.<sup>16</sup> New ways of undertaking various actions considered to be manifestations of violence, including the prohibited acts typified in the Criminal Code, depend to a large extent on the inventiveness of the perpetrators themselves. The availability of technical means and new technologies, as well as the digital competence they possess, is one thing. “Ingenuity” and “creativity”, which often occurs first in individual cases and then in a series of behaviours undertaken by different perpetrators, may determine that a peculiar “novelty” becomes over time an almost “traditional” form of violence, which does not arouse much surprise.

In this article, in order to outline the issue of legal qualification of hitherto unknown behaviours, selected new forms of violence will be presented, and the term “new forms of violence” will denote such manifestations which either have appeared relatively recently or, despite the fact that they have been present in the social space for some time, have been named recently. Within the framework of at least a cursory discussion of the phenomena indicated here, it is worth considering to what extent they may fulfil the criteria of prohibited acts typified by the Criminal Code, and to what extent they may remain legally irrelevant events. As it has already been emphasised, the presented types of activity will be presented in order to outline their specific features and initial setting against the background of the legal regulations in force, rather than to provide an exhaustive analysis of the issues related to them. In fact, each of the forms presented deserves much more attention and constitutes a topic worthy of further development.

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<sup>16</sup> This can be illustrated, for example, by the numerous media messages raising public awareness of the “fake policeman” and “fake grandson” methods of fraud. However, new patterns of action are constantly being developed by the perpetrators. These include the “fake prosecutor” and “fake judge” methods, as well as the “coronavirus” method, which takes advantage of the fear of the COVID-19 pandemic and has various forms. On the latter method, the perpetrators see *Nowa metoda działania oszustów! Do nieuczynnych celów wykorzystują pandemię COVID-19! Nie daj się oszukać!*, <https://www.policja.pl/pol/aktualnosci/213418,Nowa-metoda-dzialania-oszustow-Do-nieczynnych-celow-wykorzystuja-pandemie-Covid-19-.html>, published on 21 I 2022, accessed on 9 XI 2022, and also *UWAGA – CSIRT NASK ostrzega przed kolejnymi oszustwami związanymi z pandemią COVID-19*, <https://www.gov.pl/web/baza-wiedzy/uwaga--csirt-nask-ostzega-przed-kolejnymi-oszustwami-zwiazanymi-z-pandemia-covid-19>, published on 26 VIII 2021, accessed on 9 XI 2022, which describes a mechanism that involves informing, via SMS, about an ostensible date for the next COVID-19 vaccination or a win in the National Vaccination Programme Lottery. The purpose of such messages was to encourage the recipient to click on a link sent by the perpetrators to install malicious software on their phone. Yet another example of how criminals react to a changing situation is the “census” method which exploited the fact that Poland is conducting the National Population and Housing Census in 2021. The perpetrators, posing as enumerators, attempted to extort the data of people who were supposed to take part in the census. There are many similar cases of various practices used by fraudsters.

The forms of violence that can currently be described as new are numerous. Behaviour that can be categorised as such is constantly appearing and will continue to appear in society. Although many of them have already been described in the relevant literature, it can be assumed that a considerable number of phenomena remain undescribed. Some harmful activities may simply not have penetrated public opinion and researchers' awareness. Other, often unconventional, forms of violence may be so incidental (occurring in isolated cases) that one could speak of a new example or examples of violence rather than new forms of violence. It would therefore be unnecessary or premature to give them a name and define a conceptual framework.

Some of the phenomena indicated, depending on the definition adopted and the form under which they occur, may constitute both legally irrelevant events and – under certain conditions – constitute offences stipulated in the Polish Criminal Code.<sup>17</sup> The following will be briefly described below: flaming, sexting (including sextortion), exclusion and happy slapping. The problem of offences committed in computer games will also be mentioned, as well as other selected phenomena (apart from attempts to classify them), to which more and more attention is being devoted in the literature or in media coverage.<sup>18</sup>

## Flaming

Flaming is defined in the literature as having fiery debates that use epithets instead of reasonable arguments.<sup>19</sup> According to N. E. Willard, “flaming is a heated, short-

<sup>17</sup> The Act of 6 June 1997 – the Criminal Code, uniform text: Journal of Laws of 2022, item 1138, as amended, hereinafter referred to as the “CC”.

<sup>18</sup> J. Pyżalski, in the book *Agresja elektroniczna i cyberbullying jako nowe ryzykowne zachowania młodzieży*, in the chapter entitled *Bullying jako specyficzny rodzaj przemocy rówieśniczej*, cites a classification of the types of cyberbullying, which includes phenomena such as flaming, outing, happy slapping and exclusion, see footnote 68. Sexting is discussed by S. Bębas in terms of “risky behaviour among children and adolescents using digital technologies”, see S. Bębas, *Sexting – nowe zagrożenie wśród dzieci i młodzieży*, “Labor et Educatio” 2015, no. 3, p. 432. Ł. Wojtasik draws attention to the fact that this phenomenon should be perceived in conjunction with, inter alia, peer violence with the use of electronic media (and thus cyberbullying or – as the author points out, referring to J. Pyżalski's typology – cyberbullying or electronic aggression). The consequence of sexting can also be, as he points out, “classic” peer violence, Ł. Wojtasik, *Seksting wśród dzieci i młodzieży*, “Dziecko Krzywdzone. Teoria. Badania. Praktyka” 2014, vol. 13, no. 2, p. 82–83. On electronic aggression, see also J. Pyżalski, *Elektroniczna agresja rówieśnicza – ustalenia empiryczne ostatniej dekady* [in:] *Uzależnienia behawioralne i zachowania problemowe młodzieży. Teoria. Diagnostyka. Profilaktyka. Terapia*, ed. J. Jarczyńska, Bydgoszcz 2014, pp. 33–47.

<sup>19</sup> D. Siemieniecka, M. Skibińska, K. Majewska, *Cyberagresja – zjawisko, skutki, zapobieganie*, Toruń 2020, p. 33.

lived argument that occurs between two or more protagonists. Flaming generally includes offensive, rude and vulgar language, insults, and sometimes threats. A longer series of such messages is called a “flame war”.<sup>20</sup> She points out that flaming usually takes place in spaces such as discussion forums, games or chat rooms, with those observing the situation sometimes trying to spark and sometimes to extinguish the ongoing war. Participants involved in an exchange of views may also use threats of violence against each other.<sup>21</sup> J. Pyżalski defines flaming as “one of the types of electronic aggression involving a sharp exchange of views in an Internet chat room or forum” and notes that the participants involved often do not know each other.<sup>22</sup> In their attempts to define flaming, various authors emphasise slightly different aspects of this phenomenon. A. Naruszewicz-Duchlińska defines the phenomenon as an online quarrel, which is characterised by an exceptional intensity of aggressiveness “deviating from the level of an ordinary polemic”.<sup>23</sup> Sources on this form of violence, available on the Internet, indicate, *inter alia*, that flaming is characterised by a rapid escalation of aggression, while the aim of the so-called flamer, i.e. the person who starts the argument, is to win the conflict, and he or she may even pretend interest just to escalate the exchange of views and ultimately win the argument.<sup>24</sup> It is also pointed out that those involved in a “flame war” do not take into account any norms or feelings of the other person.<sup>25</sup> Flaming is also sometimes associated with the phenomenon of trolling, which can consist in a deliberate provocation, e.g. by ridiculing or insulting those engaged in conversation on a forum.<sup>26</sup>

The legal qualification of flaming may take different forms, depending on the nature of the actions undertaken by the flamer. In its “classic” form, when all the activity of the perpetrator consists in provoking online quarrels and “teasing” the parties

<sup>20</sup> N.E. Willard, *Cyberbullying and cyberthreats: Responding to the challenge of online social aggression, threats, and distress*, Illinois 2007, p. 5.

<sup>21</sup> *Ibid.*, pp. 5–6. This author also points out that flaming can take place between individuals and small groups of people, see *ibid.*, p. 5. She also mentions a phenomenon referred to as “baiting”, which means “posting messages with the intention of creating an online argument”, see *ibid.*, p. 6.

<sup>22</sup> J. Pyżalski, *Agresja elektroniczna wśród dzieci i młodzieży*, Sopot 2011, p. 153.

<sup>23</sup> A. Naruszewicz-Duchlińska, *Intencjonalne językowe zakłócenia komunikacji internetowej (trolling, flaming, hejting)*, “Prace Językoznawcze” 2014, vol. XVI/4, p. 90.

<sup>24</sup> *Flaming, czyli “wojna na obelgi”*, <https://cik.uke.gov.pl/edukacjatop/klikam-z-glowa/artykuly-edukacyjne/flaming-czyli-wojna-na-obelgi,14.html>, published on 30 VII 2018, accessed on 9 XI 2022.

<sup>25</sup> *Grooming, patostreamy i spółka. Na co narażone są dzieci? W internecie na dzieci czyha o wiele więcej zagrożeń*, nn-k, <https://www.edziecko.pl/Junior/7,170190,24789763,grooming-patostreamy-i-spolka-na-co-narazone-sa-dzieci-w.html>, published on 20 V 2019, accessed on 9 XI 2022.

<sup>26</sup> K. Knol, *Świat bez zasad? – normatywność online* [in:] *Cyberbullying. Zjawisko, konteksty, przeciwdziałanie*, ed. J. Pyżalski, Łódź 2012, p. 153.



to the conflict, very often the criteria of any of the prohibited acts stipulated in the Criminal Code will not be fulfilled. As indicated in the literature, flaming may also include threats – in which case the possible liability of the perpetrator under Article 190 § 1 of the CC should be considered – and also may consist in directing insults at a given person. In the latter situation, we may be dealing with the offence of insult as defined in Article 216 § 1 of the CC (an example of this may be a situation in which a person, in the framework of flaming, directs insults at another person via instant messaging),<sup>27</sup> on the other hand, in some cases – with the offence of insult committed by means of mass communication under Article 216 § 2 of the CC (when, for example, the perpetrator engages in an aggressive exchange of opinions taking place on a publicly accessible website in a place intended for comments or in a discussion forum of an “open” nature).<sup>28</sup> One should also not lose sight of Article 216 § 3 of the CC. According to this provision, the court may waive punishment when the insult was caused by provocative behaviour of the wronged party or if the wronged party responded to the offender’s behaviour with a breach of the personal inviolability or with a reciprocal insult. The application of this provision is very likely in the case of flaming, as provocation and reciprocal insults seem to be part of the course of this phenomenon.<sup>29</sup> As part of flaming, the perpetrator may also commit defamation under Article 212 § 1 or 2 of the CC.<sup>30</sup> Criminal liability for, for example, incitement to insult, defamation, persistent harassment, breach of the personal inviolability or other prohibited acts typified in the Criminal Code cannot be excluded either.

<sup>27</sup> See J. Raglewski [in:] *Kodeks karny. Część szczególna*, t. II, cz. II, *Komentarz do art. 212–277d*, eds. W. Wróbel, A. Zoll, Warszawa 2017, Art. 216, thesis 22, where the author, as an example of direct insult, points, inter alia, to directing an insulting statement to the recipient via instant messaging.

<sup>28</sup> See footnote 30.

<sup>29</sup> Importantly, it is possible for both provocation and retaliation to occur within the same case. In such a case, the extent of the mutually inflicted harm will have to be individualised and assessed accordingly, J. Raglewski [in:] *Kodeks karny. Część szczególna, op. cit.*, Art. 216, thesis 39.

<sup>30</sup> The treatment of the Internet as a means of mass communication is not an obvious issue. As J. Raglewski rightly points out, due to the variety of forms of communicating and obtaining information via the Internet, it is impossible to automatically qualify every defamatory communication under article 212 § 2 of the CC. It is one thing to post information on publicly available websites or blogs and another to use instant messaging. As the author goes on to note, as far as Internet chats are concerned, in the event that it takes place “in a specific, not very numerous circle of participants”, then they cannot be classified as means of mass communication, J. Raglewski [in:] *Kodeks karny. Część szczególna, op. cit.*, Art. 212, thesis 42. As it seems, what will be decisive in this respect is the abstractly understood accessibility of a given chat room (and not how many chat members it gathers at any given time). A chat room enabling a virtually unlimited number of people to participate will be of a different nature, whereas a chat room restricted to strictly defined Internet users will be of a different nature.



## Sexting<sup>31</sup>

Sexting is generally understood as the sending of sexually explicit material, which is often related to the person sending it, e.g. contains nude photographs of that person.<sup>32</sup> It is also indicated that this phenomenon involves the sending of one's own images or videos via digital devices, and young people treat these activities as good fun and a form of entertainment.<sup>33</sup> S. Bębas notes that this behaviour "has become a new form of expression of sexuality in adolescents, for whom experimentation with their own sexuality is particularly tempting".<sup>34</sup> According to J.V. Ouytsel, M. Walrave, K. Ponnet, and J.R. Temple, "in its broadest sense, sexting can be defined as the sending of self-made sexually explicit text messages, images, and videos through the computer or the mobile phone"<sup>35</sup>. J. Wolak and D. Finkelhor point out that the term "sexting" is used by researchers and the media to describe a type of sexual communication that includes both images and text messages. Their transmission can take place via electronic media and mobile phones.<sup>36</sup> The literature also indicates that the behaviour constituting sexting may also include receiving, sending or forwarding addresses of erotic websites and, therefore, unwanted contact with pornography. In addition, there is a type of sexting involving real-time contact between people, where, in addition to the textual exchange of information, users engage in sexual behaviour using a webcam and microphone for communication.<sup>37</sup> The phenomenon of sexting<sup>38</sup> will be dis-

<sup>31</sup> In the Polish-language literature on the subject, the term can be found spelled both in a polonised version as "seksting" and in a form referring to the English-language term "sexting".

<sup>32</sup> J. Pyżalski, *Agresja elektroniczna*, *op. cit.*, p. 85.

<sup>33</sup> Ł. Tomczyk, *Materiały dotyczące seksu i zjawisko sekstingu* [in:] J. Pyżalski, A. Zdrodowska, Ł. Tomczyk, K. Abramczuk, *Polskie badanie EU Kids Online 2018. Najważniejsze wyniki i wnioski*, Poznań 2019, p. 139.

<sup>34</sup> S. Bębas, *Sexting*, *op. cit.*, p. 431.

<sup>35</sup> J.V. Ouytsel, M. Walrave, K. Ponnet, J.R. Temple, *Sexting* [in:] *The International Encyclopedia of Media Literacy*, red. R. Hobbs, P. Mihailidis, G. Cappello, M. Ranieri, B. Thevenin, 2019, p. 1, see <https://onlinelibrary.wiley.com/doi/epdf/10.1002/9781118978238.ieml0219>, <http://hdl.handle.net/1854/LU-8608477>, accessed on 9 XI 2022. These authors point out that approaches to sexting, including those presented by researchers, are changing. While the first studies on the subject framed the phenomenon occurring among adolescents as deviant, it is increasingly noted that sexting, when consensual, can be considered a normal part of young people's development. It can also be a component of a romantic relationship occurring between adults, *ibid.*, pp. 1–2.

<sup>36</sup> J. Wolak, D. Finkelhor, *Sexting: A typology*, "Crimes Against Children Research Center" 2011, no. 3, p. 2.

<sup>37</sup> S. Bębas, *Sexting*, *op. cit.*, p. 434.

<sup>38</sup> On sexting, see e.g. V.C. Strasburger, H. Zimmerman, J.R. Temple, S. Madigan, *Teenagers, Sexting, and the Law*, "Pediatrics" 2019, vol. 143, no. 5, pp. 1–9. In their article, these

cussed in this article not so much because it always and in every form constitutes violence, but rather because of the forms of violence it can sometimes lead to.

It is worth considering the consequences,<sup>39</sup> which this type of activity may entail. While, as a rule, it is not illegal<sup>40</sup> for two adults to send each other text messages with sexual overtones or erotic photos, sending such photos, films, drawings or messages to minors must be assessed as a form of violence, penalised under the Criminal Code. Pursuant to Article 200 § 3 of the CC, a person who presents pornographic content to a minor under 15 years of age or makes pornographic objects available to him or her or disseminates pornographic content in a way allowing such a minor to become acquainted with it is subject to the penalty of deprivation of liberty for up to 3 years. It is worth stressing that the consent of a minor under 15 years of age to the actions described in Article 200 of the CC, such as presenting pornographic content or performing a sexual act, must be deemed legally irrelevant.<sup>41</sup> His or her possible approval of an adult sending him or her material of this nature will therefore be irrelevant.<sup>42</sup> Therefore, under certain conditions, sending to a minor under 15 years of age pictures or films constituting pornographic content will meet the criteria of Article 200 § 3 of the CC as presenting pornographic content. It cannot be excluded that the content will be already “ready to receive” by a minor and will not require any special activity on his or her part aimed at

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authors distinguish between “consensual teen sexting” and “nonconsensual teen sexting”, see *ibid*, p. 3, R.M. Kowalski, S.P. Limber, P.W. Agatson, *Cyberbullying. Bullying in the digital age*, Wiley-Blackwell 2012, pp. 68–70, S. Wójcik, K. Makaruk, *Seksting wśród polskiej młodzieży. Wyniki badania ilościowego*, Warszawa 2014, pp. 1–16, available on: [https://fdps.pl/\\_Resources/Persistent/c/c/8/f/cc8fee410093693294ae8b7fbf39b2c0d9322b41/Wojcik\\_Makaruk\\_Seksting\\_wsrod\\_polskiej\\_mlodziyzy.pdf](https://fdps.pl/_Resources/Persistent/c/c/8/f/cc8fee410093693294ae8b7fbf39b2c0d9322b41/Wojcik_Makaruk_Seksting_wsrod_polskiej_mlodziyzy.pdf), accessed on 9 XI 2022. N. Kroker, *O sekstingu wśród młodzieży*, “Problemy Opiekuńczo-Wychowawcze” 2018, no. 7, pp. 16–21, Ł. Wojtasik, *Seksting*, *op. cit.*, pp. 79–98, M. Bereźnicka, J. Rokitowska, *Seksting. Wiedza, doświadczenia i opinie młodzieży*, Kraków 2021. These authors also presented the results of their own research on sexting. Interestingly, in the opinion of 77% of the young people surveyed, sexting is not safe, 35% of the respondents thought it should be legal from the age of 18, while as many as 24% were in favour of the permissibility of this behaviour after the age of 21., see *Eidem*, *op. cit.*, pp. 162–163, 169–171.

<sup>39</sup> When considering criminal liability for offences stipulated in Chapter XXV of the Penal Code “Offences against Sexual Liberty and Decency”, one should not lose sight of the possibility of a mistake on the part of the perpetrator, as well as the possibility of the occurrence of the so-called “Romeo and Juliet casus”. Due to the extent of the topic, these issues will be omitted from this article.

<sup>40</sup> Assuming that this does not involve, for example, the dissemination of pornographic content with the participation of a minor or pornographic content involving the depiction of violence or the use of an animal, or the commission of other unlawful acts.

<sup>41</sup> M. Bielski [in:] *Kodeks karny. Część szczególna*, t. II, cz. I, *Komentarz do art. 117–211a*, eds. W. Wróbel, A. Zoll, Warszawa 2017, Art. 200, thesis 9.

<sup>42</sup> *Confer ibid*, thesis 19.

becoming familiar with it,<sup>43</sup> e.g. a live broadcast will be transmitted to him or her without having to click on any links and without prior warning of the perpetrator.

The question of the consequences for those who engage in this form of communication when intimate photos, films or conversations concerning them are made public should also be emphasised. The material sent may, without the knowledge and will of the addressee, be forwarded – and thus not only reach the person to whom it was originally addressed – or be placed online, from where it will be extremely difficult to remove it. It may also be the case that the sexting content is delivered to this person's friends, triggering a series of name-calling, taunting and ridiculing comments<sup>44</sup> or, having fallen into the wrong hands, will be used, for example, to blackmail the person in question. Indeed, according to Ł. Tomczyk, sexting can take the form of voluntary or forced sexting, with the latter form being referred to as "sextortion".<sup>45</sup> In my opinion, only voluntary behaviour should be considered as sexting, excluding those forms of contact that are the result of pressure or even threats from other people. J. W. Patchin and S. Hinduja define the phenomenon known as sextortion as "the threatened dissemination of explicit, intimate, or embarrassing images of a sexual nature without consent, usually for the purpose of procuring additional images, sexual acts, money, or something else".<sup>46</sup> These authors point out that this form of violence is not only experienced by adults, but also by children.<sup>47</sup> They also mention the difference between "sextortion" and "revenge porn", where the latter term tends to mean making erotic content about the victim public with the intention of humiliating him or her (e.g. nude photos). The aim of the perpetrator's actions is therefore different from that in the case of sextortion.<sup>48</sup> Ł. Tomczyk, R. Szotkowski and

<sup>43</sup> On the meaning of "presenting", see footnote 63.

<sup>44</sup> Confer M. Dziewanowska, *Sexting – wyzwanie dla prawa i rzeczywistości*, "Niebieska Linia" 2012, no. 2, <https://www.niebieskalinia.pl/aktualnosci/aktualnosci/sexting-wyzwanie-dla-prawa-i-rzeczywistosci>, published on 30 IV 2012, accessed on 9 XI 2022. As the author noted with regard to the phenomenon of sexting, the practice adopted by adolescents aimed at flirting, showing affection to each other and establishing sexual relations has also taken the form of a tool used in the harassment of unwary individuals.

<sup>45</sup> See Ł. Tomczyk, *Materiały*, *op. cit.*, p. 151, and also the literature cited by the author: J. W. Patchin, S. Hinduja, *Sextortion Among Adolescents: Results From a National Survey of U.S. Youth*, 2018, "Sexual Abuse" 2020, vol. 32, no. 1, pp. 30–54 oraz Ł. Tomczyk, R. Szotkowski, K. Kopecký, *Zachowania ryzykowne dzieci i młodzieży związane z udostępnianiem i odbiorem materiałów o charakterze seksualnym – wybrane wyniki badań czeskiego Centrum Prewencji Ryzyka Wirtualnej Komunikacji z lat 2010–2017*, "Dziecko Krzywdzone. Teoria. Badania. Praktyka" 2017, vol. 16, no. 3.

<sup>46</sup> J. W. Patchin, S. Hinduja, *Sextortion*, *op. cit.*, p. 31.

<sup>47</sup> See *ibid.*

<sup>48</sup> See *ibid.*, p. 33.

K. Kopecký note that sextortion is linked to obtaining, through manipulation and extortion, various kinds of benefits, such as money or photos. They also point to a peculiar algorithm of the phenomenon, which operates in several phases.<sup>49</sup> The consequences of sexting, in general, include, for example, the risk of becoming a victim of cyberbullying, harassment or humiliation, weakening of one's reputation in a certain environment, or uncontrolled dissemination of given material via the Internet.<sup>50</sup> S. Bębas also points out that it is not uncommon for photos sent by a given person to end up online, where they are used by paedophiles. There may also be reactions from victims affected by photos being made public without their consent, such as self-mutilation or attempts to change their appearance.<sup>51</sup>

When assessing the criminal law value of the behaviour constituting sexting,<sup>52</sup> it should be noted, as in the case of other forms of violence, that the legal qualification of the perpetrator's behaviour (if any subsumption of this behaviour is possible at all) will depend in each case on the realities of the specific factual situation. As already mentioned, it is difficult to accept that a consensual exchange of messages with strong sexual overtones or photos of an intimate nature between adults constitutes a phenomenon to which criminal law would apply. If, however, a similar interaction were to develop into behaviour that was unacceptable to one of the parties, e.g. harassing, producing certain effects on the recipient, then the perpetrator's responsibility<sup>53</sup> for the offence of stalking under Article 190a § 1 of

<sup>49</sup> Ł. Tomczyk, R. Szotkowski, K. Kopecký, *Zachowania ryzykowne, op. cit.*, pp. 111, 112–113. These authors distinguished the following stages in relation to young users: 1. Establishing peer contact, very often by means of a fake profile. Use of manipulative techniques, 2. Assessment by the perpetrator of the information sent, positive comments, complimenting photographs, 3. Acquisition of as much information as possible on the victim's real life, 4. Intensification of contacts, sending photographs, also of a pornographic nature. Possible requests to the victim for such content, 5. An attempt by the victim to stop the communication. Blackmail by the perpetrator involving different areas of the individual's life, e.g. threats to inform parents about the child's activities, for more, see *ibid*, pp. 112–113.

<sup>50</sup> K. Kopecký, *Sexting among Czech Preadolescents and Adolescents*, "The New Educational Review" 2012, vol. 28, no. 2, p. 45; Ł. Tomczyk, R. Szotkowski, K. Kopecký, *Zachowania ryzykowne, op. cit.*, p. 114. These were just some of the phenomena indicated by respondents in the 2011 survey. They also included, relating to young online users, the risk of sexual exploitation by those with paedophilic/violent tendencies, as well as the risk of kidnapping, murder or suicide.

<sup>51</sup> S. Bębas, *Sexting, op. cit.*, pp. 432, 439.

<sup>52</sup> The issue of legal liability for sexting is mentioned by, for example, Ł. Wojtasik, *Seksting, op. cit.*, pp. 92–93 and M. Bereznička, J. Rokitowska, *Seksting, op. cit.*, pp. 63–68.

<sup>53</sup> Some authors also advocate the possibility of adopting an attempted offence of stalking, see e.g. K. Nazar, *Uporczywe nękanie oraz kradzież tożsamości [in:] Przestępstwa przeciwko wolności*, ed. M. Mozgawa, Lublin 2020, pp. 314–315, M. Mozgawa [in:] *System prawa karnego*, t. 10, *Przestępstwa przeciwko dobrom indywidualnym*, ed.

the CC could be considered.<sup>54</sup> In certain circumstances, the use of other provisions, including Article 202 of the CC, may also be involved, as will be discussed below. Yet another example of a prohibited act typified in the Criminal Code that may be committed by the perpetrator “on the occasion” of sexting is identity theft under Article 190a § 2 of the CC. It is possible to imagine a factual situation in which the subject of a prohibited act who engages in this form of activity uses the information he or she has acquired and impersonates another person using his or her image, other personal data or other data by means of which he or she is publicly identified, with the aim of causing material or personal damage. In this case, sexting as such is not so much a phenomenon that fulfils the criteria of the indicated offence, but rather a “way to an end”, a behaviour that – for example in the situation of virtual acquaintanceships – may be aimed at obtaining the victim’s personal data. Similarly, the perpetrator who engages in the exchange of erotic photos or messages may him or herself use the profile of an individual he or she has taken over and use his or her data, for example, pretending to be the victim’s former or current partner.<sup>55</sup>

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J. Warylewski, Warszawa 2012, p. 464, Nb. 213. P. Furman sees the issue differently. As she states, it is difficult to unequivocally draw the line between the commission of the offence of stalking and the direct intention to commit it, which poses a real threat to a legal interest. In view of this, “an attempt to commit the offence of stalking is not really possible, as the perpetrator’s behaviour will either still be acceptable by social norms or will already constitute the commission of the act”, P. Furman, *Próba analizy konstrukcji ustawowej przestępstwa uporczywego nękania z Art. 190a k.k. Zagadnienia wybrane*, “Czasopismo Prawa Karnego i Nauk Penalnych” 2012, vol. 3, p. 64.

<sup>54</sup> Although the possibility of fulfilment of the criteria of the provisions included in the Act of 20 May 1971 of the Code of Petty Offences, uniform text: Journal of Laws 2022, item 2151, is not a subject of this study, mention should also be made of the possible liability of the perpetrator for the offence of malicious disturbance under Article 107 of the Code of Petty Offence.

<sup>55</sup> Only in passing, reservations should be expressed with regard to the use by the legislator in Article 190a § 2 of the CC of the phrase “in order to inflict material or personal damage upon him or her”, determining the necessity for the perpetrator to act with direct specific intent. Moreover, the current *de lege lata* structure of the provision unnecessarily includes the requirement that the person impersonated by the perpetrator must be the same person to whose detriment he or she acts. On the objections to a similar typification of the offence of identity theft confer M. Mozgawa [in:] *System prawa karnego*, *op. cit.*, pp. 470–471, Nb. 224, K. Nazar, *Uporczywe nękanie*, *op. cit.*, pp. 351–352, M. Budyn-Kulik [in:] *Kodeks karny. Komentarz do zmian wprowadzonych ustawą z dnia 25 lutego 2011 r. o zmianie ustawy – Kodeks karny*, 2011, LEX, Art. 190(a), thesis 69, A. Lach, *Kradzież tożsamości*, “Prokuratura i Prawo” 2012, no. 3, p. 33, K. Sowirka, *Przestępstwo “kradzieży tożsamości” w polskim prawie karnym*, “Ius Novum” 2013, no. 1, pp. 71–73, see P. Palichleb, *Zmiany art. 190a k.k.*, “Ius Novum” 2021, vol. 15, no. 4, p. 58. Due to the indicated structure of the provision, it may not be possible to use it in similar situations.

Sexting, taking initially the form of a “game” on the principles of “fair play” may transform, as it has already been mentioned, into the dissemination of the image of a naked person or a person in the course of sexual activity without his or her consent, e.g. by uploading the photo or film to the Internet (posting it on a publicly available website). It also appears to be possible that in a message containing an image of a naked person or of a person in the course of sexual activity<sup>56</sup> the live event is recorded by the perpetrator through the use of a trick such as taking screenshots or recording the victim’s account, despite a prior agreement not to record the activity.<sup>57</sup> In such factual situations, Article 191a § 1 of the CC may apply.<sup>58</sup>

<sup>56</sup> For example, during masturbation, see A. Zoll [in:] *Kodeks karny. Część szczególna*, t. II, cz. I, *Komentarz do art. 117–211a*, eds. W. Wróbel, A. Zoll, Warszawa 2017, Art. 191(a), thesis 14.

<sup>57</sup> According to M. Królikowski, the deceit referred to in Article 191a of the CC must be understood in its context and may manifest itself, inter alia, in putting a person into a state of intoxication or ostensibly undertaking medical or artistic acts. As the author points out, a deceit on the basis of the indicated provision should be understood broadly. Thus, it will mean misinformation and exploitation of a mistake relating to “important motivational premises guiding the behaviour of the wronged person or leading to limitation of the ability to self-determination in the disposal of one’s intimate image”, see M. Królikowski [in:] *Kodeks karny. Część szczególna*, t. I, *Komentarz do artykułów 117–221*, eds. A. Wąsek, R. Zawłocki, Warszawa 2010, pp. 863–864, Nb. 10. A broad understanding of a deceit was also supported by J. Warylewski. On the basis of the interpretation of Article 197 of the CC, he expressed the view that it should be considered inappropriate to limit a deceit only to the perpetrator’s aiming to cause consent to be given, which would not have been given if it were not for the deceit. In his opinion, such cases, as well as situations consisting in the perpetrator’s aiming to prevent the victim from expressing his or her objection, should be considered as a deceit, J. Warylewski [in:] *Kodeks karny. Część szczególna*, t. I, *Komentarz do art. 117–221*, ed. A. Wąsek, Warszawa 2006, pp. 816–817, Nb. 49. According to A. Zoll, on the basis of Article 191a § 1 of the CC, the use of a deceit should be understood as the creation or exploitation of a situation in which a given person is not aware of the recording of his or her image as naked or in the course of sexual activity, A. Zoll [in:] *Kodeks karny. Część szczególna, op. cit.*, Art. 191(a), thesis 8. “Recording”, according to this author, can take place by means of all possible technical devices, *ibid*, thesis 10. According to M. Mozgawa, a person who records an image of a naked person or a person in the course of sexual activity, e.g. with a brush or a pencil, does not commit the offence under Article 191a of the CC, M. Mozgawa [in:] *Kodeks karny. Komentarz aktualizowany*, M. Budyn-Kulik, P. Kozłowska-Kalisz, M. Kulik, M. Mozgawa, 2022, LEX, Art. 191(a), thesis 9.

<sup>58</sup> On the interpretation of Article 191a of the CC, see e.g. M. Mozgawa, K. Nazar-Gutowska, *Utrwalanie lub rozpowszechnianie wizerunku nagiej osoby – Art. 191a k.k. (analiza prawnokarna i praktyka ścigania)*, “Prawo w Działaniu. Sprawy Karne” 2014, no. 19, pp. 7–40. The results of a nationwide empirical study presented by the authors,



Consideration should also be given to the situation where a person knowingly engages in an exchange of pornographic images or films with a minor. The individual provisions placed by the legislator in Article 202 of the CC could then find their application. For example, if the perpetrator, in order to disseminate, recorded<sup>59</sup> (e.g. by recording a live transmission on a mobile phone or a camera), stored<sup>60</sup> (e.g. by placing collected materials on a computer hard drive) or possessed<sup>61</sup> (e.g. in an e-mail inbox)<sup>62</sup> content obtained by him or her with the

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which took place in all prosecution units in Poland and concerned the year 2012, showed, *inter alia*, that the dissemination, referred to in the provision, predominantly takes place by means of the Internet, while the less frequent recording takes place mainly by means of a mobile phone. The means generally used is a deceit see *ibid*, p. 20. M. Mozgawa, analysing the Article 191a of the CC, pointed to an interesting problem concerning the question whether the recording, mentioned in the provision, refers only to the image of a person physically existing, e.g. in front of a camera, or perhaps also to a reproduced image, i.e. one that has already been recorded. In the author's opinion, the question of whether the recording was of primary or secondary nature is irrelevant in view of the fulfilment of the criteria of the offence in question, because the consequence of a similar action is that an unauthorised person comes into possession of such an image, M. Mozgawa, *Kilka uwag na temat przestępstwa utrwalania wizerunku nagiej osoby lub osoby w trakcie czynności seksualnej (Art. 191a k.k.)* [in:] *Nauki penalne wobec szybkich przemian socjokulturowych. Księga jubileuszowa Profesora Mariana Filara*, t. I, eds. A. Adamski, J. Bojarski, P. Chrzczonowicz, M. Leciak, Toruń 2014, pp. 424–425.

<sup>59</sup> According to M. Mozgawa, recording means the registration of specific content on an appropriate material medium. According to this author, the essence of recording is the possibility to later reproduce a given image, M. Mozgawa [in:] *Kodeks karny. Komentarz aktualizowany*, *op. cit.*, Art. 202, thesis 9.

<sup>60</sup> As M. Bielski points out, storing pornographic content means keeping it intact for later viewing, M. Bielski [in:] *Kodeks karny. Część szczególna*, t. II, cz. I, *Komentarz do art. 117–211a*, eds. W. Wróbel, A. Zoll, Warszawa 2017, Art. 202, thesis 35.

<sup>61</sup> As stated by the Supreme Court in its judgment of 17 May 2017, III KK 478/16, LEX no. 2307113 (thesis), "The determinant of possession referred to in Article 202 § 4a of the CC should be the possibility to act in a manner characterised in civil law by the possessor as the person actually in possession of the thing. However, it must not be forgotten that the verb criterion of possession mentioned in the provision of Article 202 § 4a of the CC refers only to specific pornographic content and not to objects containing such content. The possessor of pornographic content within the meaning of Article 202 § 4a of the CC is not only the person who disposes of its carrier, but also the person who, having gained access to such content through ICT systems, using IT tools allowing processing and transmission of data, becomes, within the IT network, its actual disposer."

<sup>62</sup> Likewise M. Bielski [in:] *Kodeks karny. Część szczególna*, t. II, cz. I, *Komentarz do art. 117–211a*, eds. W. Wróbel, A. Zoll, Warszawa 2017, Art. 202, thesis 36.

participation of a minor, presented<sup>63</sup> or disseminated it<sup>64</sup>, if only by posting materials sent to him or her in the form of photographs or videos on a generally accessible pornographic website, then we could talk about the fulfilment of the provision of Article 202 § 3 of the CC. In a situation where “only” pornographic content with the participation of a minor is recorded, the subject of a prohibited act would be subject to criminal liability as provided for in Article 202 § 4 of the CC. On the basis of Article 202 § 4a, storing, possessing or gaining access to pornographic content with the participation of a minor is also penalised.

When a person engages in sexting with a minor, the possible fulfilment of Article 200a of the CC must also be considered. One cannot exclude a situation in which the perpetrator takes part in a similar form of exchange of “information” in order to commit the offence specified in Article 197 § 3(2) or Article 200, as well as in the production or recording of pornographic content, aiming, by means of misleading a minor under 15 years of age, exploiting a mistake or incapacity to grasp the situation properly or by means of an unlawful threat, at a meeting with him or her (Article 200a § 1 of the CC).<sup>65</sup> In this case, sexting would appear to be a kind of prelude to the fulfilment of the criteria of the offences indicated.

<sup>63</sup> According to M. Mozgawa, presentation is “any means of enabling the reception of pornographic content, i.e. showing, displaying, familiarising, acquainting”, M. Mozgawa [in:] *Kodeks karny. Komentarz aktualizowany, op. cit.*, Art. 200, thesis 10. According to V. Konarska-Wrzošek, presentation is as much as “making familiar by showing or verbally transmitting certain content, e.g. by playing films or other image or sound carriers, live staging, showing photographs, drawings, paintings, reading texts, etc.”. As the author rightly points out, the essence of presentation is the direct transmission of the content in question in such a form that it can be familiarised without additional effort, V. Konarska-Wrzošek [in:] *Kodeks karny. Komentarz*, eds. V. Konarska-Wrzošek et al., Warszawa 2018, Art. 202, thesis 2.

<sup>64</sup> The interpretation of the criterion “disseminates” in relation to Article 202 of the CC, but also in relation to other criminal offences specified in the Criminal Code, poses certain difficulties. One should mention the view presented by M. Bielski, which assumes that “disseminating” pornographic content means that the perpetrator engages in behaviours which potentially enable other persons to become acquainted with it, regardless of whether this may be an unlimited or a limited number of persons and whether the content is freely available or whether it requires some specific actions on the part of potential recipients. Significantly, according to the author, making the content generally available means at least potentially making it available to a wider, and not necessarily unspecified, circle of people, whereas in the situation where the perpetrator assumes in advance that the material will be made available to strictly defined recipients, assuming that it will not be made available to others, there will be no question of fulfilling the criterion of dissemination, M. Bielski [in:] *Kodeks karny. Część szczególna*, t. II, cz. I, *Komentarz do art. 117–211a*, eds. W. Wróbel, A. Zoll, Warszawa 2017, Art. 202, thesis 24.

<sup>65</sup> If an attempt is made to juxtapose sexting with the content of Article 200a § 1 of the CC, it will obviously be a case of establishing contact with a minor under 15 years of

The perpetrator may, for example, pretend to be a peer of the victim and, taking advantage of the victim's trust in him or her on the basis of their supposedly "similar" age, attempt to meet the victim. Similarly, sexting may involve propositioning a minor under the age of 15 for sexual intercourse, submission to or performance of another sexual act or participation in the production or recording of pornographic content via an IT system or telecommunications network. If the perpetrator intends to carry out the proposal, then Article 200a § 2 of the CC may apply.

In certain situations, engaging in sexting with a minor under 15 years of age may also result in sexual intercourse with such a person or in committing another sexual act with such a person or causing such a person to submit to such an act or to perform it (Article 200 § 1 of the CC). The behaviours comprising sexting will in this case be a "way to an end" and a means of gaining the trust of a minor. The perpetrator, having established a "friendly" relationship with the victim, may also lead him or her to submit to such acts with a third person, record the event and send him the recording.<sup>66</sup> Moreover, it is conceivable that the subject of a prohibited act will, for example, successfully encourage or coerce a minor under the age of 15 to send him or her a recording of him or her masturbating on him or herself, performing it on another person or submitting to such an act.

A person who engages in an exchange of content constituting sexting with a minor may also, for example, perpetrate the presentation to a minor under the age of 15 of the performance of a sexual act for the purpose of his or her own sexual satisfaction or the sexual satisfaction of another person (Article 200 § 4 of the CC). Such presentation does not have to involve the direct involvement of the perpetrator but may instead show other persons performing the indicated acts.<sup>67</sup>

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age by means of an ICT system or a telecommunication network, as referred to in this provision.

<sup>66</sup> The offence under Article 200 § 1 of the CC is not a personal crime. As M. Bielski points out, a person who fulfils the criteria of this prohibited act will be a person who has sexual intercourse or performs another sexual act with a minor below the age of 15, as well as a person who leads such a minor to have sexual intercourse or another sexual act with third persons. However, the author himself points to the view, present in legal scholarship, on the personal (since the 2004 amendment) nature of the offence of paedophilia with regard to sexual intercourse, whereby even if this view were adopted, the perpetrator would be subject to criminal liability for incitement or aiding paedophilia in the situation of inducing a minor under 15 years of age to have sexual intercourse with a third person or facilitating sexual intercourse with such a minor, M. Bielski [in:] *Kodeks karny. Część szczególna*, t. II, cz. I, *Komentarz do art. 117–211a*, eds. W. Wróbel, A. Zoll, Warszawa 2017, Art. 200, thesis12.

<sup>67</sup> *Ibid*, theses 24, 26. Significantly, the author is of the opinion that the view assuming that the presentation of the performance of sexual acts refers only to live presentation is wrong. According to M. Bielski, the presentation of the performance of a sexual act

At this point, it should be considered to what extent the situations presented above fit into the definition of sexting. If we assume that sexting is a voluntary form of exchange of sexually suggestive messages or erotic photographs between adults, then these cases would constitute crimes “*per se*”, unrelated to this type of activity. However, if we are inclined to assume that sexting is a broader phenomenon, unfortunately including, for example, interaction with minors (as well as – which requires a broader analysis beyond the framework of this study – taking place between minors), we will have to conclude that certain forms of sexting will exhaust the criteria of prohibited acts typified in the Criminal Code.

## Exclusion

Exclusion can be defined as the deliberate removal of someone from a contact list, a group or a circle of friends. This phenomenon can also take the form of not allowing a specific individual to join a given circle of people.<sup>68</sup> Although on the surface this behaviour may appear to be of little consequence to the addressee, in many situations it can lead to alienation and can be a kind of introduction to other forms of violence. It can also co-exist with the other forms of violence mentioned. This phenomenon seems to affect children and adolescents in particular, who spend a considerable amount of their free time online. As R.M. Kowalski, S.P. Limber and P.W. Agatson note, whether we consider the online space or the offline world, children always experience “being in” or “being out”<sup>69</sup> – if they are not in a group (clique), they are outside it (in-group and out-group).<sup>70</sup> According to N. E. Willard exclusion means “intentionally and cruelly excluding someone from an online group”.<sup>71</sup> This author points out that exclusion is associated with deciding who is a member of an in-group and who is an outcast. Consequently, the emotional charge of this phenomenon can be intense. As she points out, exclusion can take place, for instance, in an online gaming environment or via instant messaging and concerns the ostentatious removal of someone from a buddy list.<sup>72</sup>

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may take place by means of a specific electronic medium, such as the Internet, and it may be a live broadcast as well as through a playback, e.g. through a pornographic film, see *ibid*, thesis 28.

<sup>68</sup> Confer J. Pyżalski, *Agresja elektroniczna, op. cit.*, p. 128. This author, discussing flaming (flame war), harassment, impersonation, outing, cyberstalking, happy slapping, denigration, exclusion, refers to the typification of cyberbullying proposed by R.M. Kowalski, S.P. Limber and P.W. Agatson, *Cyberbullying, op. cit.*, adding technical aggression to this division as well, see J. Pyżalski, *Agresja elektroniczna, op. cit.*, pp. 125–129.

<sup>69</sup> In the original: “in” or “out”.

<sup>70</sup> R.M. Kowalski, S.P. Limber and P.W. Agatson, *Cyberbullying, op. cit.*, p. 66.

<sup>71</sup> N.E. Willard, *Cyberbullying, op. cit.*, p. 256.

<sup>72</sup> *Ibid*, pp. 9–10.

As it seems, it is difficult to qualify exclusion as a behaviour fulfilling the criteria of any offence typified in the Criminal Code. However, one should not lose sight of the contents of Article 190a § 1 of the CC, which, as a result of the amendment made in the Act of 31 March 2020 amending the Act on Special Solutions Related to Prevention, Counteracting and Combating COVID-19, Other Infectious Diseases and Crisis Situations Caused by Them and Certain Other Acts,<sup>73</sup> acquired a new wording.<sup>74</sup> New criteria referring to the effect, which may be caused to the victim by the offender's behaviour, were added to the contents of this provision. Punishment for the crime specified in Article 190a § 1 of CC is to be imposed not only on a person who by stalking another person or a person close to him or her arouses a feeling of threat justified by the circumstances or significantly invades his or her privacy, but also on a person who by his or her actions causes a feeling of humiliation or anguish justified by the circumstances on the part of the victim. This change seems to make it possible to apply Article 190a § 1 of the CC to all those cases in which it is not necessarily the case that a feeling of threat or significant invasion of privacy is aroused on the part of the victim but that a feeling of humiliation or anguish is aroused in him or her.<sup>75</sup> These situations may involve, *inter alia*, actions by the perpetrator such as intriguing, inciting the environment, harassing and humiliating a given person, which may result, *inter alia*, in exclusion from a particular group.<sup>76</sup> Obviously, the responsibility of a person who commits exclusion for the offence under Article 190a § 1 of the CC will also depend on the fulfilment of other criteria of the indicated provision. Therefore, the subject of the offence will have to commit harassment of a given person or a person close to that person, which will be persistent and which will cause the consequences specified in the regulation – a feeling of threat, humiliation or anguish justified by the circumstances or a significant violation of privacy. Consequently, a one-off removal of someone from a friends list or a specific group will generally not be deemed to be a manifestation of stalking. However, it is possible that such behaviour may co-occur with other manifestations of persistent stalking.

<sup>73</sup> This was done in Article 13(2) of the indicated Act, Journal of Laws 2020, item 568, as amended.

<sup>74</sup> On the amendment of Article 190a § 1 of the CC, see e.g. M. Budyn-Kulik, *Nowe znamiona nękania z art. 190a § 1 Kodeksu karnego*, "Palestra" 2020, no. 9, pp. 22–34, P. Palichleb, *Zmiany art. 190a k.k., op. cit.*, pp. 51–72, K. Nazar, *Uporczywe nękanie, op. cit.*, pp. 322–324. Although the author commented on the changes provided for in the Act of 13 June 2019 declared unconstitutional by the Constitutional Tribunal, her observations referred to the criteria of humiliation and anguish provided for in the provision at the time. With regard to the further course of the indicated draft, see <https://www.sejm.gov.pl/sejm8.nsf/PrzebiegProc.xsp?no.=3451>, accessed on 9 XI 2022.

<sup>75</sup> Confer P. Palichleb, *Zmiany art. 190a k.k., op. cit.*, p. 66, J. Kosonoga [in:] *Kodeks karny. Komentarz*, ed. R.A. Stefański, Warszawa 2021, Art. 190a, thesis 19.

<sup>76</sup> P. Palichleb, *Zmiany art. 190a k.k., op. cit.*, p. 66.

## Happy slapping

According to J. Pyżalski, happy slapping is a specific type of electronic aggression that involves a sequence of actions by the perpetrator. This form of violence usually consists of two parts – at the beginning, the perpetrator attacks the victim by provoking, hitting or insulting (the event is recorded by the perpetrator or another person), and later, during the second part, the material is published on the Internet or electronically disseminated in another way. The targets of similar actions are both people known to the assailant and completely random people. As the author goes on to point out, this phenomenon is relatively new – it first appeared in the press in 2005, and its origins are the activities of young people travelling on London trains. The most common form of attack was precisely slapping the victim, hence the name happy slapping. Over time, this form of violence began to change its nature, with increasingly tragic consequences for its victims.<sup>77</sup> R. M. Kowalski, S. P. Limber and P.W. Agatson note that perpetrators of happy slapping record and post attacks on a particular person online to increase their humiliation – so that they can be viewed and commented on.<sup>78</sup>

Acts of violence constituting happy slapping will generally be qualified as breaching personal inviolability – in the case of slapping another person, Article 217 § 1 of the CC will apply. It is worth noting that the behaviour consisting in the breach of personal inviolability is often combined with the fulfilment of the criteria of an insult, typified in Criminal Code in Article 216 § 1 – this will be the case when, *inter alia*, a given person is slapped.<sup>79</sup> When the assailant takes other, more drastic actions, there may also be damage to health of a certain type. When the perpetrator's behaviour leads, for example, to depriving another person of sight, hearing, speech, ability to procreate or to other serious disabilities, we will be dealing with causing grievous bodily harm under Article 156 § 1 of the CC.<sup>80</sup>

<sup>77</sup> J. Pyżalski, *Agresja elektroniczna*, *op. cit.*, pp. 97–98, *confer* R.M. Kowalski, S. P. Limber, P.W. Agatson, *Cyberbullying*, *op. cit.*, pp. 67–68. These authors also mention drastic cases of happy slapping that went beyond slapping the other person and ended, for example, in the death of the victim.

<sup>78</sup> R.M. Kowalski, S.P. Limber, P.W. Agatson, *Cyberbullying*, *op. cit.*, p. 67.

<sup>79</sup> J. Raglewski [in:] *Kodeks karny. Część szczególna*, *op. cit.*, Art. 217, thesis 21, M. Surkont, *Znieważenie z art. 181 k.k. a inne postacie zniewagi*, "Nowe Prawo" 1981, no. 2, p. 53.

<sup>80</sup> This will occur, for example, in a situation where the assailant, as part of happy slapping, douses the person in question with a substance which, upon reaching the eyes, causes blindness. Obviously, it is also possible for other cases to occur which, according to the wording of Article 156 § 1 of the CC, are qualified as forms of grievous bodily impairment, such as, *inter alia*, causing total or substantial permanent incapacity to work professionally or permanent, substantial mutilation or deformation of the body.



In a situation where the death of a person occurs as a result of the assailant's behaviour and his or her causing grievous bodily harm, then Article 156 § 3 of the CC will apply.<sup>81</sup> The consequences caused by the perpetrator may also take the form of moderate or slight health impairment (Article 157, § 1 or 2 of the CC), when, for example, on the part of the victim of happy slapping there occurs an infringement of bodily organ functions or disorder of health other than specified in Article 156, § 1 of the CC (medium health impairment), or an infringement of bodily organ functions or disorder of health lasting no longer than 7 days (slight health impairment).<sup>82</sup> This form of violence may also fulfil the criteria of an unlawful threat<sup>83</sup> (Article 190 § 1 of the CC), breach of home inviolability<sup>84</sup> (Article 193 of the CC) or defamation (Article 212 of the CC). The latter qualification may be connected in particular with posting recorded films on the Internet, which, under certain conditions, may be connected with the offence of defamation by means of mass communication (Article 212 § 2 of the CC). It is also possible to imagine a situation in which the perpetrator, through the acts of happy slapping, commits abuse<sup>85</sup> (Article 207 of the CC) or stalking<sup>86</sup> (Article 190a § 1 of the CC).

## Other selected phenomena

Nowadays, when a significant part of the activities of many people – including leisure activities – has moved to the virtual world, the issue of responsibil-

<sup>81</sup> In such a situation, the perpetrator is liable to a prison sentence of five years or more, 25 years' imprisonment or life imprisonment.

<sup>82</sup> Medium health impairment will occur, for example, if the victim of slapping is hospitalised for two weeks as a result of the beating (assuming no grievous bodily impairment was caused), while slight health impairment will occur, for example, when, as a result of an attack on the victim, injuries are left on the victim's body, but disappear after a few days (less than seven).

<sup>83</sup> E.g. during the act of happy slapping, the aggressor threatens the victim that he or she will carry out attacks, such as slapping, on him or her in the future. The criteria of Article 190 § 1 of the CC will obviously be met if the threat gives rise to a justified fear in the threatened person that it will be fulfilled.

<sup>84</sup> E.g. the assailant breaks into the victim's home in order to carry out happy slapping there and to upload the recording "made more interesting" in this way to the Internet.

<sup>85</sup> As noted by M. Mozgawa, psychological abuse can occur, inter alia, when the victim is berated, mocked or humiliated, *confer* M. Mozgawa [in:] *Kodeks karny. Komentarz aktualizowany, op. cit.*, Art. 207, thesis 4. Acts of happy slapping may therefore constitute a component of abuse, although, of course, the other criteria of Article 207 of the CC must also be fulfilled in order to speak of the commission of this offence.

<sup>86</sup> E.g. the perpetrator (assuming the fulfilment of all the criteria of Article 190a § 1 of the CC), as part of the harassment, persistently posts a number of recordings online showing attacks on the victim.

ity for the behaviour of individuals in computer games becomes a considerable problem.<sup>87</sup> This issue has recently been addressed by A. Łosek<sup>88</sup> and seems to be a subject of media interest<sup>89</sup> and a huge research field. In addition to the behaviours mentioned in this paper, there are many other activities that should be addressed. Among them, by way of example only, one can mention the phenomenon of stealthing, whereby a man stealthily removes a condom during intercourse. The issue of this behaviour has recently been addressed in the relevant literature<sup>90</sup> by M. Głuchowski<sup>91</sup>, M. Bocheński and M. Żebracki.<sup>92</sup> This phenomenon is also mentioned by R. Krajewski<sup>93</sup>, M. Grudecki<sup>94</sup> and M. Romańczuk-Grącka.<sup>95</sup> For example, M. Głuchowski writes about this phenomenon as follows: “Stealthing is the practice of a man secretly removing a condom during a sexual intercourse and continuing the intercourse with an unaware partner. The partner thus consents to a protected sexual intercourse and, after the man removes the condom, continues the intercourse without resistance in the mistaken belief that

<sup>87</sup> See e.g. J. Kulesza, *Gra “Second Life” – wirtualny świat, realne przestępstwa?*, “Prokuratura i Prawo” 2009, no. 3, pp. 23–40.

<sup>88</sup> A. Łosek, *Odpowiedzialność karna za czyny popełnione za pośrednictwem gier komputerowych – wstęp do problematyki*, “Prokuratura i Prawo” 2022, no. 2, pp. 65–107.

<sup>89</sup> See e.g. K. Żączkiewicz-Zborska, *Uwaga na włamywaczy komputerowych – mogą ukraść magiczne miecze*, “Prawo.pl.” 2022, <https://www.prawo.pl/prawo/oszustwo-komputerowe-wlamanie-i-oszczerstwo-w-grach-wirtualnych,515134.html>, published on 14 V 2022, accessed on 9 XI 2022, T. Broński, R. Nogacki, *Więzienie za “kradzież” wirtualnych przedmiotów*, “Gazeta Prawna” 2017, <https://prawo.gazetaprawna.pl/artykuly/1078059,kradziez-wirtualnych-przedmiotow-kary.html>, published on 15 X 2017, accessed on 9 XI 2022.

<sup>90</sup> Authors who have taken an interest in stealthing are also mentioned by M. Głuchowski, see M. Głuchowski, *Stealthing – karalność zdjęcia prezerwatywy bez wiedzy partnerki*, “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2022, vol. 3, p. 101.

<sup>91</sup> *Ibid.*, pp. 99–116.

<sup>92</sup> M. Bocheński, M. Żebracki, *Stealthing as a form of rape – findings to date and future prospects for research*, also available in a Polish-language version: “*Stealthing*” jako forma przestępstwa zgwałcenia – dotychczasowe ustalenia i przyszłe perspektywy badawcze, “Problems of Forensic Science” 2021, vol. 125, pp. 29–50.

<sup>93</sup> R. Krajewski, *Podstęp przy przestępstwie zgwałcenia*, “Studia Prawnoustrojowe” 2018, no. 40, pp. 261–272.

<sup>94</sup> M. Grudecki, *Podstęp jako znamię przestępstwa zgwałcenia a uboczne motywy podjęcia decyzji o obcowaniu płciowym*, “Studia Prawnoustrojowe” 2022, no. 55, pp. 73–83.

<sup>95</sup> M. Romańczuk-Grącka, *Pojęcie i funkcje przymusu psychicznego w prawie karnym*, Warszawa 2020. This author strongly advocates the qualification of similar behaviour as fulfilling the criteria of Article 197 of the CC. (bringing about sexual intercourse by deception). She also mentions that the first conviction for stealthing took place in 2017 in Switzerland and generated widespread interest worldwide, *ibid.*, p. 224.

the man is still wearing it.”<sup>96</sup> M. Bocheński and M. Żebracki mention that this practice can also take the form of damaging the condom.<sup>97</sup> Conduct of this kind has been assessed by individual authors, inter alia, with regard to the possibility that it fulfils the criteria of Article 197 of the CC (rape). Without going into a detailed consideration of stealthing and at the same time referring to the cited references<sup>98</sup> (much has already been written on this subject, but the phenomenon still appears to be a huge area for research), voices approving the qualification of secret removal of a condom during intercourse as rape should be considered legitimate. In all these situations, in which – whether explicitly or implicitly – the other party to the sexual contact agrees only to a specific form of intercourse (with the use of a condom), without consenting to unprotected sexual contact (this takes place after the perpetrator undertakes fraudulent actions consisting in the secret removal of a condom), it should be considered that the criteria of the indicated prohibited act have been fulfilled. Liability of the perpetrator under Article 161 of the CC is also not excluded when, knowing that he is infected with HIV, he directly exposes another person to such infection (§ 1) or knowing that he is affected by a venereal or infectious disease, a serious incurable or real life-threatening disease, he directly exposes another person to infection with such a disease (§ 2). The Criminal Code also provides for a more severe threat of punishment when the individual committing the act referred to in § 2 exposes a number of persons to infection (§ 3).<sup>99</sup>

Among other phenomena, only worth mentioning in passing here, which deserve further discussion, one can also point to “outing”. This involves passing on to other people private content relating to the victim, which has come into the possession of the person concerned in various circumstances (whether by gaining the victim’s trust or by stealing it from his or her telephone or computer).<sup>100</sup>

<sup>96</sup> M. Głuchowski, *Stealthing – karalność zdjęcia*, *op. cit.*, p. 100.

<sup>97</sup> M. Bocheński, M. Żebracki, *Stealthing as a form of rape*, *op. cit.*, s. 30 (42).

<sup>98</sup> On the ongoing changes in the understanding of the nature of rape, see J. Błachut, M. Grzyb, *Jeżeli kobieta mówi “nie”, to co to oznacza?* [in:] *Nauki penalne wobec szybkich przemian socjokulturowych. Księga jubileuszowa Profesora Mariana Filara*, t. II, eds. A. Adamski, J. Bojarski, P. Chrzczonowicz, M. Leciak, Toruń 2014, pp. 339–350.

<sup>99</sup> In the case of Article 161 § 1 of the CC, a penalty of the deprivation of liberty of 6 months to 8 years is provided for the perpetrator, in the case of Article 161 § 2 of the CC, a penalty of the deprivation of liberty of 3 months to 5 years, and in the case of Article 161 § 3 of the CC – a penalty of the deprivation of liberty from 1 to 10 years.

<sup>100</sup> J. Pyżalski, *Agresja elektroniczna*, *op. cit.*, p. 127, see also e.g. R.M. Kowalski, S.P. Limber and P.W. Agatson, *Cyberbullying*, *op. cit.*, p. 65, N.E. Willard, *Cyberbullying*, *op. cit.*, pp. 8–9. As shown by the results of research conducted within the framework of the European Cyberbullying Intervention Project (ECIP) programme “Cyberbullying in adolescence: investigation and intervention in six European Countries”, European DAPHNE III programme, presented by J. Pyżalski (573 students of lower second-

It seems that qualifying outing, like the stealthy removal of a condom during an intercourse, as colloquially understood violence or aggression may raise certain doubts. A broader reflection, in many cases set perhaps more in a sociological/criminological perspective than in the field of criminal law, is also required on the phenomenon of challenge fashion constantly appearing on the Internet, with very often harmful and sometimes even tragic consequences for those who engage in it. Examples of this include the “blackout challenge”, which involves driving oneself unconscious, the “skull-breaker challenge”, which involves “tripping” someone who jumps up in such a way that he or she falls to the ground,<sup>101</sup> or the “hot water challenge”, i.e. dousing oneself or another person with boiling water as well as drinking boiling water through a straw.<sup>102</sup> These events are recorded by those taking up the challenge and uploaded online.

## Conclusion

In a world of rapid development of new technologies and, consequently, of new forms of communication between individuals, it is becoming increasingly difficult to create any typologies or studies dealing with recently emerging forms of violence. What appears to us as new today may already have only a historical value tomorrow. Identifying all the harmful behaviours that emerge at a given point in time seems to be a task that is not only very difficult, but downright impossible. It is worth bearing in mind that many of the “new” forms of violence are not only offences but also legally irrelevant phenomena that have been known for a long time, only in a new version. Some of them, especially when they occur in their extreme form, can easily be classified under the existing provisions of the Criminal Code. It would not only be unreasonable but also disastrous to require the legislator to react quickly to all harmful phenomena that bear the characteristics

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ary schools participated in the first phase of the research), approximately 11% of respondents indicated that their account had been hacked and secrets concerning them stolen in the six months preceding the survey, J. Pyżalski, *Gimnazjaliści online: dobre i złe wiadomości z polskiej części wyników European Cyberbullying Intervention Project* [in:] *Cyberbulling. Zjawisko, konteksty, przeciwdziałanie*, ed. J. Pyżalski, Łódź 2012, pp. 21–22, 34.

<sup>101</sup> *Groźne internetowe wyzwania*, <https://www.gov.pl/web/niezagubdzieckawsieci/grozne-internetowe-wyzwania>, published on 27 I 2021, accessed on 9 XI 2022.

<sup>102</sup> See *Challenge w sieci*, <https://cik.uke.gov.pl/edukacjatop/klikam-z-glowa/artykuly-edukacyjne/challenge-w-sieci,30.html>, published on 20 I 2020, accessed on 9 XI 2022, B. Grygiel, *Dzieciaki poparzone wrztkiem. Kolejne wyzwanie na YouTube, kolejni poszkodowani*, <https://www.focus.pl/artykul/kolejne-ofiary-poparzen-wrzatkciem-winowajca-jest-challenge-na-youtube-170905014136>, published on 3 IX 2018, accessed on 9 XI 2022.

of violence. We must not lose sight of the fact that the introduction of new types of prohibited acts into the Criminal Code must always be preceded by appropriate analyses and consultations in such a way that a well-thought-out reaction is not replaced by an inept attempt to solve with criminal law instruments what cannot be solved with these instruments. Finding a legal qualification of the phenomena indicated in this study is not always a simple matter. It is not always necessary to use the instruments of criminal law. It should also be borne in mind that one of the areas in which efforts should be made to prevent undesirable behaviour is the sphere of education and constant raising of awareness of Internet users. In a world in which there is an increasing number – as M. Prensky wrote – of digital natives who speak a different language from the older generation of digital immigrants<sup>103</sup>, what comes to the fore is the need to select the content and forms of teaching in such a way that any training in this area produces the best possible results.

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<sup>103</sup> M. Prensky, *Digital Natives, Digital Immigrants Part 1*, “On the Horizon” 2001, vol. 9, no. 5, pp. 1–6, M. Prensky, *Digital Natives, Digital Immigrants Part 2: Do They Really Think Differently?*, “On the Horizon” 2001, vol. 9, no. 6, pp. 1–6, see also J. Pyżalski, *Agresja elektroniczna*, *op. cit.*, pp. 25–30.

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