

2019

Stop in the Name of Love: Putting an End to the Felony Prosecution of Adolescent Sexting

Angela Bailey

Laura Heinrich

Follow this and additional works at: <https://open.mitchellhamline.edu/mhlr>



Part of the [Criminal Law Commons](#), [Criminal Procedure Commons](#), [First Amendment Commons](#), [Juvenile Law Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

Bailey, Angela and Heinrich, Laura (2019) "Stop in the Name of Love: Putting an End to the Felony Prosecution of Adolescent Sexting," *Mitchell Hamline Law Review*. Vol. 45 : Iss. 3 , Article 2.
Available at: <https://open.mitchellhamline.edu/mhlr/vol45/iss3/2>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in Mitchell Hamline Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.
© Mitchell Hamline School of Law

**STOP IN THE NAME OF LOVE: PUTTING AN END TO THE
FELONY PROSECUTION OF ADOLESCENT SEXTING**

Angela Bailey and Laura Heinrich[†]

I.	INTRODUCTION	770
II.	BACKGROUND.....	772
	A. <i>Society’s Changing Standards of Sexuality</i>	775
	B. <i>The Growing Challenge for Legal Practitioners</i>	776
	C. <i>Sexting and Child Pornography</i>	778
III.	LEGAL ANALYSIS.....	787
	A. <i>Using the Penumbra Doctrine to Protect Teens</i>	791
	B. <i>Older Teens Should Be Afforded Shelter Under the Equal Protection Doctrine</i>	796
	C. <i>Section 617.247, subdivision 4(a) is Unconstitutionally Vague When Interpreted to Include Sexually Explicit Videos Between Adolescents</i>	798
	1. <i>Minnesota Courts Should Assess a Child’s Knowledge Through the Standard of a Reasonable Juvenile</i>	798
	2. <i>A Reasonable Juvenile Would Not Believe the Character of the Video in Question to be Child Pornography</i>	805
	D. <i>Accepting the Realities of Adolescent Sexuality Through Prohibition of Strict Liability Child Pornography Laws</i>	805
	E. <i>Statutory Interpretation Canons Should Narrow the Child Pornography Statute’s Application to Clearly Predatory Cases</i>	809
	1. <i>The Court Must Interpret an Intent to Possess Element Into Section 617.247 of the Minnesota Statutes</i>	809
	2. <i>Prosecutions Under Section 617.247 Will Lead to an Absurd Result Without an Intent to Possess Element</i> .809	
	4. <i>Section 617.247’s Classification as a Predatory Offense Shows that the Legislature Intended an “Intent to Possess” Element</i>	810
	4. <i>The Statute is Overly Broad Without an “Intent to Possess” Element and Potentially Violates the First Amendment</i>	811

4. <i>Section 617.247's Prohibitions Should Not Include Sexually Explicit Material Exchanged Between Adolescent Peers</i>	813
5. <i>Subdivision 1(a) of Section 624.713 is not a Strict Liability Offense</i>	815
IV. CONCLUSION.....	822

"I raise up my voice—not so I can shout, but so that those without a voice can be heard. . . . We cannot succeed when half of us are held back."—Malala Yousafzai¹

I. INTRODUCTION

The application of criminal sexual conduct statutes to juveniles and young adults often sparks frustration in the criminal defense bar. While the litany of state-sanctioned charging flaws is not limited to those listed here, the following examples give one a sense of why so many defense attorneys are upset: the unavailability of stays of adjudication dispositions—which allow a juvenile to avoid registration as a predatory offender—to extended jurisdiction juvenile offenders;² statutory rape charges imposed on eighteen-year-olds who share a tryst or conceive a child with their fifteen-year-old high school sweethearts;³ mandatory registration as a predatory offender for child sexual abuse survivors who perpetrate a sex crime because they never received therapeutic help from the adults in their

† Angela Bailey and Laura Heinrich are lawyers with the Hennepin County Public Defender's Office. Bailey has specialized in criminal, delinquency, and child protection defense for the last twenty-one years. Heinrich has specialized in criminal defense and appellate law for the last nine years.

1. Malala Yousafzai, *Address at the United Nations Youth Assembly*, YOUTUBE (July 12, 2013), <https://www.youtube.com/watch?v=3rNhZu3tIU> [<https://perma.cc/X3XP-7AC3>].

2. MINN. STAT. § 260B.198, subdiv. 7(a) (2018). Under section 260B.198, subdivision 7 of the Minnesota Statutes, a judge may grant a continuance for youths who plead guilty to an offense. *Id.* During the continuance, the judge may offer remedies like probation and rehabilitative services. *Id.* If the youth complies with probation, the offense is dismissed. *See id.* at subdiv. 6. In criminal sexual conduct cases, this disposition option gives a child an opportunity to avoid the collateral consequences of a finding of guilt, including registration as a predatory offender.

3. MINN. STAT. § 609.344, subdiv. 1(b) (2018).

lives;⁴ and—perhaps worst of all—charging sexually exploited youth with prostitution or related offenses.⁵ These prosecutions are typically explained as a necessary evil, either because they are strict liability offenses or because the charge is a necessary conduit for desperately-needed rehabilitative services. This view, however, offers no solace for those facing the resulting devastation that convictions wreak on their young lives. Loss of employment and housing, permanent estrangement from families, rejection from society at large, and relegation to a lifetime of second-class citizenry are common results of these prosecutions.⁶

The unjust nature of these results is magnified in juvenile court. Although juvenile prosecutions are ostensibly governed by the *parens patriae* doctrine,⁷ judges often impose consequences (such as registration as a predatory offender) that run counter to that protective policy. In light of this reality, one cannot help but conclude that skilled advocacy on a case-by-case basis is insufficient to address this injustice. The real root of the problem is the need for substantive policy changes.

Ideally, such policy changes would entail a comprehensive revamping of the criminal sexual conduct code as applied to juveniles, for the code, as it stands now, has not adjusted to changing social mores regarding adolescent sexual behavior, nor has it fully considered collateral consequences or alternative, less destructive

4. Sara Kathryn Lawing, *Predictors of Recidivism in Adolescent Offenders*, 1404 U. OF NEW ORLEANS THESIS AND DISSERTATIONS 1, 6 (2011) (“One study estimated that nearly 40–80% of adolescent sex offenders are victims of sexual abuse compared to estimates of 16% non-sex offenders.”) (internal citations omitted).

5. MINN. STAT. § 609.321, subdiv. 8 (2018) (defining prostitute as “an individual who engages in prostitution by being hired . . . by another individual to engage in sexual penetration or sexual contact,” without including any age-based exception or distinction related to abuse survivors).

6. See David Feige, *Shawna: A Life on the Sex Offender Registry*, THE MARSHALL PROJECT (Sept. 17, 2017, 10:00 PM), <https://www.themarshallproject.org/2017/09/17/shawna-a-life-on-the-sex-offender-registry> [<https://perma.cc/RB35-2LEX>] (noting that five years after a guilty plea, an individual was still unable to find a job or housing).

7. *Parens patriae* is Latin for “parent of his or her country.” *Parens patriae*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, esp. on behalf of someone who is under a legal disability to prosecute the suit.”).

means of correcting problematic sexual behaviors. However, such an effort would take a collective multidisciplinary effort that goes beyond the capacity of this article. Instead, this article attempts to address one of the most egregiously unjust areas of juvenile sexual offender prosecution: the widespread use of child pornography statutes to prosecute adolescents for sexting.

Minnesota courts and prosecutors must stop applying the child pornography statute to prosecute sexting between adolescent peers, particularly those who are sixteen years of age or older because it violates the purpose of the statute, is unconstitutionally vague, and violates the equal protection doctrine. Further, sexts between peers should not be classified automatically as child pornography under a strict liability analysis, but instead they should be screened to assess the alleged offender's actual knowledge of its content and character as child pornography. Moreover, resulting prosecutions should be limited to clearly predatory cases.

This article begins by outlining the societal changes in our country's teenagers precipitated by technology and changing moral values, as well as the growing challenge this presents to legal practitioners. Next, this article dissects Minnesota's child pornography statutes and highlights constitutional challenges that can be made when the statutes are unjustly applied to juveniles who are not motivated by sexually predatory intent.

II. BACKGROUND

Experts posit that part of the tension in this area of criminal sexual conduct law as currently applied to adolescent offenders is balancing the legitimate state interest in protecting society at large from sexual predators, against the competing goal of protecting children—with all of their inherent developmental deficiencies—when they engage in illegal sexual behaviors.⁸ These juvenile offenders may engage in behaviors comparable to adults, but they are

8. See, e.g., Anna High, *Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class*, 69 ARK. L. REV. 787, 787 (2016) (considering the “implications of using statutory rape laws against minors to target ‘bad sex’” and contending “that even in relation to ‘bad sex,’ there are serious policy and constitutional objections to the use of statutory rape laws against a member of the class they are designed to protect”).

nonetheless vulnerable due to their young age.⁹ Anna High articulated this complexity when she stated:

The problem of when and how to use the law to regulate youthful sexual encounters is both urgent and analytically complex. Juveniles today are immersed in an online world that grants unprecedented access to sexual imagery and discourse. Sexual development is a significant and natural aspect of the transition to adulthood, but society and the law rightly recognize that children and teenagers are a relatively vulnerable and immature population. [Child sex regulations] respond to this tension with a generalization, setting an age of consent at which adolescents are deemed mature enough to make safe and meaningfully consensual decisions about sex. These laws create a protected class whose sexual autonomy and privacy interests are restricted in order to protect them from power imbalances and harmful decision-making.¹⁰

The need to protect children should not be limited to child sexual assault victims, however. Instead, such protections should also extend to children and young adults accused of sexual crimes. Children and young adults are unique and set apart from their adult counterparts for a reason—a lack of maturity and brain development that impedes self-control and sound judgment.¹¹ Cases like *Roper v. Simmons*¹² highlight that punishment of children is not about retribution in its purest sense, but rather correction. For juvenile offenders, there is a prevailing hope for full rehabilitation because their inherent developmental deficiencies make them less mature but still receptive

9. *Id.*

10. *Id.* at 787–88.

11. See Sarah-Jayne Blakemore & Trevor W. Robbins, *Decision-Making in the Adolescent Brain*, 15 NATURE NEUROSCIENCE 1184, 1184 (2012), https://pingpong.ki.se/public/pp/public_courses/course05588/published/1538082531331/resourceId/24877934/content/UploadedResources/T10%20-%20Decision-making%20in%20the%20adolescent%20brain-1.pdf [<https://perma.cc/CP77-BRUV>] (suggesting that “that decision-making in adolescence may be particularly modulated by emotion and social factors, for example, when adolescents are with peers or in other affective (‘hot’) contexts”).

12. 543 U.S. 551, 569–70 (2005) (holding that imposing the death penalty against a minor was an unconstitutional violation of the Eighth Amendment).

to change and improve.¹³ Therefore, they are less than fully responsible for their actions.¹⁴ Accordingly, until their brains are fully developed, which experts posit does not happen until age 25,¹⁵ they should be afforded certain protections not generally available to competent adults. As Justice Kennedy stated in the majority opinion of *Roper*, “[w]hen a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.”¹⁶

What should be the response of the criminal justice system in graphic and explicit sexting cases perpetrated by adolescent offenders? Diversion with rehabilitative services should be the first consideration for these youths.¹⁷ However, when public safety warrants a higher degree of care, disposition geared toward education, discipline, and rehabilitation that facilitates healthy development to adulthood—with a full opportunity to thrive and become a productive member of society—should be explored. Despite the inherently controversial nature of this topic and the difficulties of regulating something as complex as adolescent sexuality, we cannot afford to bury our heads in the sand and permit unjust applications of the law to minors and young adults go unchecked. Instead, Minnesota needs to change the application of its child pornography statute so

13. See, e.g., *Johnson v. Texas*, 509 U.S. 350, 367 (1993) (“A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young.”).

14. *Id.*

15. See *Understanding the Teen Brain*, STAN. CHILD. HEALTH, <https://www.stanfordchildrens.org/en/topic/default?id=understanding-the-teen-brain-1-3051> [<https://perma.cc/F6H5-W9Q2>] (“The rational part of a teen’s brain isn’t fully developed and won’t be until he or she is 25 years old or so.”); Sandra Aamodt, *Brain Maturity Extends Well Beyond Teen Years*, NPR (Oct. 10, 2011), <https://www.npr.org/templates/story/story.php?storyId=141164708> [<https://perma.cc/PBV7-BVZW>] (“[E]merging science about brain development suggests that most people don’t reach full maturity until the age 25.”).

16. *Simmons*, 543 U.S. at 573–74.

17. See generally Robert Fishman, *An Evaluation of Criminal Recidivism in Project Providing Rehabilitation and Diversion Services in New York City*, 68 J. CRIM. L. & CRIMINOLOGY 283, 284 (1977), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6025&context=jclc> [<https://perma.cc/YN76-J4LD>] (describing attempts of diversion in New York as steering juveniles away from the traditional justice system towards other forms of rehabilitation).

that it actually protects children from predators, yet does not criminalize teenagers for engaging in behaviors that arguably are part of the natural arc of adolescent sexual behavior. This is especially true for youth sixteen and older for consensual sexting with peers.

A. *Society's Changing Standards of Sexuality*

The need to revamp the law also must include a frank discussion about changing mores on teenage sexuality. When many of the current laws were enacted, premarital sex between minors was rare and socially condemned.¹⁸ However, in modern times, teens are embracing their sexuality and acting on sexual desires in an unprecedented manner.¹⁹ While the state legislature may find it politically expedient to continue to infantilize sexually mature teenagers and generalize them as sexually inexperienced, naïve, and in need of general protection from all aspects of sex, the reality today is that many adolescents are much more sexually savvy than that archaic stereotype portrays.²⁰

A substantial subset of sexually mature teens is having sex and wanting to enjoy it without adult regulation. In 2017, the prevalence of consensual sexual intercourse among teens nationwide was forty percent.²¹ Given that many of these teens attend school with individuals who are up to four years older than themselves, one can infer that at least some of these sexual encounters are technically

18. See Joseph J. Fischel, *Per Se or Power? Age and Sexual Consent*, 22 YALE J. L. & FEMINISM 279, 286 (2010) (discussing the three waves of statutory rape law development: 1890s to 1910s, 1970s to 1980s, and the 1990s) (citations omitted); see generally High, *supra* note 9, at 791.

19. *Adolescent Sexual and Reproductive Health in the United States*, GUTTMACHER INST. (Sept. 2017), <https://www.guttmacher.org/fact-sheet/american-teens-sexual-and-reproductive-health> [<https://perma.cc/B793-YRY2>] (providing a "Fact Sheet" noting an increase from 2002 to 2006–2010 in first sexual encounters being described as "wanted" by adolescents); cf. Sheri Madigan & Jeff Temple, *1 in 7 Teens are "Sexting," Says New Research*, SCI. AM. (Feb. 26, 2018) <https://www.scientificamerican.com/article/1-in-7-teens-are-ldquo-sexting-rdquo-says-new-research/> [<https://perma.cc/3HAN-ZYXX>] (discussing increased accessibility to smartphones and the resulting rise in teen sexting).

20. See GUTTMACHER INST., *supra* note 19; cf. Madigan & Temple, *supra* note 19.

21. *Sexual Risk Behaviors: HIV, STD, & Teen Pregnancy Prevention*, CTRS. FOR DISEASE CONTROL AND PREVENTION (June 14, 2018), <https://www.cdc.gov/healthyouth/sexualbehaviors/> [<https://perma.cc/3R5W-Z9KZ>].

violations of governing statutory rape laws designed to discourage sex with minors.²² This is problematic because many of these couples, although of differing ages, are peers developmentally. In fact, the eldest teen could be developmentally delayed in comparison to the younger sexual partner. Is it then appropriate to prosecute the eldest teen for engaging in consensual sex with another teen who is their developmental equal or superior?

B. The Growing Challenge for Legal Practitioners

Most legal practitioners in the defense bar would respond to that rhetorical question with an emphatic “no,” but they would remain limited to using case-by-case attacks and strategies to address unjust applications of sex-crime statutes. For example, an attorney might make emotional pleas to negotiate the best possible outcome for their client by securing character references and other evidence of pro-social behaviors.²³ If the assigned prosecutor is not responsive, defense counsel may appeal to the presiding judge to obtain relief through trial or substantive motions to dismiss for lack of probable cause.²⁴ Alternatively, they may have their client engage voluntarily in rehabilitative services and subsequently file sentencing motions requesting continuances without a plea,²⁵ as well as stays of adjudication to keep the client’s record clean. If such tactics fail,

22. See, e.g., High, *supra* note 8, at 828; Heidi Kitrosser, *Meaningful Consent: Toward A New Generation of Statutory Rape Laws*, 4 VA. J. SOC. POL’Y & L. 287, 313–16 (1997).

23. See MINN. R. EVID. 405.

24. See MINN. R. CRIM. P. 11.04.

25. See MINN. STAT. § 609.132 (2018) (“The decision to offer or agree to a continuance of a criminal prosecution is an exercise of prosecutorial discretion resting solely with the prosecuting attorney.”); MINN. R. JUV. DEL. P. 14.08 (“The court may order the agreement terminated, dismiss the juvenile proceedings, and bar further juvenile proceedings on the offense involved if, upon motion of a party stating facts supporting the motion and opportunity to be heard, the court finds that the child has committed no later offenses as specified in the agreement and appears to be rehabilitated.”); *id.* at 14.04 subdiv. 2(B) (“The court may order the agreement terminated and the juvenile proceeding resumed if, upon motion of the prosecuting attorney stating facts supporting the motion and upon hearing, the court finds that the child has committed a material violation of the agreement, if the motion is made not later than one month after the expiration of the period of suspension specified in the agreement.”).

however, the same attorney can still try to mitigate their client's sentence through requests for dispositional and durational departures from Minnesota guideline sentences.²⁶ However, these methods are fraught with inherent risks and cannot be successful in every instance. Although many state prosecutors and judges are sympathetic to youthful sexual offenders and are, therefore, willing to work diligently to bring about the least restrictive alternatives to dispose of these cases, that will not always be the case.²⁷ Some state prosecutors and judges strictly adhere to the letter of the law and see no moral conflict in doing so. The resulting disparity in outcomes raises the following question: Should the results of each case depend on such luck-of-the-draw politics as the demeanor of the judge, prosecutor, or defense attorney that touches the case? Or, if the endgame is just outcomes for all youths that appear in court, should there not be consistent guidelines that treat similarly situated youths similarly?

Juvenile law practitioners face the stark irony of defending children against laws designed to protect them:

[T]here are serious policy and constitutional problems with using [child sex] laws against [minors] . . . First, the idea that minors can mutually victimize one another is illogical; statutory rape proceedings against minors for consensual sex with minors are in fact a punitive response to *sex per se*, not victimization. This conflates two discrete ethical breaches—fornication and exploitation—and risks both diluting the moral authority of statutory rape laws and unfairly labeling mere fornicators as sex abusers.

Even in cases involving good-faith attempts to use statutory rape laws discerningly to target sex involving victimization of a vulnerable minor by a predatory minor, selective enforcement of statutory rape laws against the “true offender” where both minors are legally violators is predicated on an undefined notion of exploitation. This gives rise to the potential for discriminatory enforcement and over-criminalization of adolescent sex, based on

26. MINN. SENTENCING GUIDELINES COMM'N, MINN. SENTENCING GUIDELINES & COMMENTARY, 38-48 (Aug. 1, 2018), <http://mn.gov/msgc-stat/documents/NewGuidelines/2018/Guidelines.pdf> [<https://perma.cc/D3PC-HJ3F>].

27. See High, *supra* note 8, at 808-10; Kitrosser, *supra* note 22, at 326-27.

prosecutorial beliefs about the normative boundaries of good, bad and wrongful sex.²⁸

The status quo today is discriminatory enforcement of child-sex laws based on a prosecutor's decision about who may invoke the title of "victim."²⁹ Although there is compelling evidence that the entire criminal sexual code as applied to minors needs to be revamped to better fit modern social mores and challenges in general, the goal of this article is to highlight the unjust application of the child pornography statute on sexting among peers so that adolescents are no longer prosecuted for consensual sexting activity.

C. *Sexting and Child Pornography*

Given the alarming trend of state prosecutors using the felony charge of possession or dissemination of child pornography to prosecute minors for the widespread practice of "sexting"—a violation of section 617.247, subdivision 4(a) of the Minnesota Statutes—something more must be done. Otherwise, an entire generation of electronics-obsessed children is at risk.

Sexting is generally defined as the practice of taking a nude or semi-nude sexually explicit picture or video of oneself and sending it to someone else via phone or other electronic device.³⁰ These images are generally sent and received consensually, as the parties involved have unilateral or shared romantic interests or are active sexual partners.³¹ Whereas adults engaging in this consensual conduct face no legal sanctions,³² youth under the age of eighteen who sext

28. High, *supra* note 8, at 790 (italics in original).

29. *See id.* at 814–15.

30. *See* Elana Pearl Ben-Joseph, *Sexting: What Parents Need to Know*, KIDSHEALTH (Apr. 2018), <https://kidshealth.org/en/parents/2011-sexting.html?ref=search> [<https://perma.cc/WXB9-RS63>].

31. *See* THE NAT'L CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS 2 https://www.drvc.org/pdf/protecting_children/sextech_summary.pdf [<https://perma.cc/J6DJ-UECG>] (finding "71% of teen girls and 67% of teen guys who have sent or posted sexually suggestive content say they have sent/posted this content to a boyfriend/girlfriend").

32. MINN. STAT. § 617.247, subdiv. 8 (2018) (creating an affirmative defense if "the pornographic work was produced using only persons who were 18 years or older").

consensually have violated the law.³³ These prosecutions are particularly problematic because they tend to have a disparate impact on vulnerable subsets of the general adolescent population. Specifically, studies show that adolescents who are African American, lesbian, bisexual, gay, or transgender are more likely to engage in sexting,³⁴ and may, therefore, face a higher risk of prosecution.

Perhaps most alarming about the prosecution of youth sexting is the possibility of state prosecutors pursuing charges against individuals who passively received a sext message and, either purposefully or inadvertently, failed to delete it.³⁵ Those inadvertently in possession of underage sexts are still subject to felony prosecutions for possession of child pornography.³⁶ This is true even if the possession of the explicit message is without malicious intent, and even if the youth who sent the sext message is a current, former, or prospective sexual partner who sent the message voluntarily.³⁷

It is difficult to discern a national consensus as to how prosecutors are handling these cases in the United States. In fact, leading research on the topic shows wide variation in how prosecutors exercise their discretion in handling these cases from state to state, depending on the range of legislative options and the policies of different prosecutorial offices.

A study published in January 2013 based on interviews of 378 state prosecutors who had worked on “technology facilitated crimes

33. MINN. STAT. § 617.247, subdiv. 4(a) (2013) (prohibiting possession of pornographic work involving minors based solely on the possessor’s knowledge of “its content and character”).

34. Melissa R. Lorang et al., *Minors and Sexting: Legal Implications*, 44 J. AM. ACAD. PSYCHIATRY L. 73, 74 (2016) (“A 2012 study of 1,839 youths age 14 to 17 indicated that 15 percent had engaged in sexting. Participants with the highest rates included older adolescents, African Americans, and lesbian, bisexual, gay or transgender (LBGT) adolescents.”).

35. *Infra* Part III(A)(1).

36. Joanna L. Barry, *The Child as Victim and Perpetrator: Laws Punishing Juvenile “Sexting,”* 13 VAND. J. ENT. & TECH. L. 129, 144 (2010) (stating that even teachers and school officials need to be careful in how they investigate and handle confiscated cell phones containing sexts as to not inadvertently subject themselves to child pornography charges) (citations omitted).

37. *See generally id.*

against children” provides some insights.³⁸ Sixty-two percent of respondents reported having handled “a sexting case involving juveniles,” with thirty-six percent of the total indicating they had “filed charges in these cases” on at least one occasion.³⁹ Twenty-one percent of the total had charged a felony in the past, with “child pornography production felonies” accounting for eighty-four percent of those charges.⁴⁰ Seventeen percent of the prosecutors reported that charges were brought in some cases in the absence of images showing “sexually explicit conduct or exhibition of genitals” and sixteen percent had handled sexting cases that resulted in sentencing to mandatory sex offender registration.⁴¹ A summary of the resolution of these cases states:

Most prosecutors had sexting cases resolved by plea agreements (71%) or juvenile court (69%). Half of prosecutors (50%) mentioned diversion, 26% said dismissal of charges, and 4% said by a criminal trial. And 16% of prosecutors who had filed charges in these cases had never had a sexting case that resulted in the defendant being sentenced to sex offender registration.⁴²

With respect to the decision to pursue legal action, most of the prosecutors indicated the need for “some type of additional offense, such as harassment, unruly behavior, or stalking, to file charges and that the relationship would have had to move beyond the boyfriend/girlfriend situation.”⁴³ The prosecutors described “four main themes” that would precipitate charges being filed “against a minor.”⁴⁴ The first, “malicious intent/bullying/coercion or harassment,” could involve distribution of pictures by a current or former girlfriend or boyfriend who wished to exact revenge or damage “the other person’s reputation” or, alternatively, distribution

38. Lorang et al., *supra* note 36, at 74 (citing Wendy Walsh et al., *Sexting: When are State Prosecutors Deciding to Prosecute? The Third National Juvenile Online Victimization Study*, U. N.H.: CRIMES AGAINST CHILDREN RES. CTR. (Jan. 2013), http://www.unh.edu/ccrc/pdf/CV294_Walsh_Sexting%20&%20prosecution_2-6-13.pdf [<https://perma.cc/5W6J-5CJM>]).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

of a photo given voluntarily and under an expectation of privacy that is used to “bully the juvenile.”⁴⁵ The second theme involved distribution of images, either as an invasion of the original sender’s privacy because consent was not given or an instance where a youth sends “images of herself to many people” after “there had already been an intervention.” Third, a large age disparity between the individuals involved or a sexually-explicit image of a child younger than twelve years old would trigger charges. Finally, charges would be warranted if images depicted gang rape or were especially explicit, graphic, or violent.⁴⁶

Clearly, it is hard to predict with certainty how prosecutorial discretion might manifest in any particular case. This variability is problematic because similarly situated youth might face vastly different outcomes, with the most severe resulting in collateral consequences that interfere with future opportunities for growth and personal development and often amount to a public⁴⁷ and lifelong badge of shame. Considering these consequences in light of the habits of today’s teens, it becomes apparent that the potential liability for this generation of cyber-addicted youth is staggering and continues to grow.

To contextualize the magnitude of the potential problem, consider that according to recent data averaging thirty-nine separate national studies with 110,380 participants younger than eighteen years, about twenty-seven percent of teens say they have received sexually explicit photos, videos, or messages from a peer.⁴⁸ Moreover, fifteen percent of the youth surveyed in these studies admitted

45. *Id.*

46. *Id.*

47. *See, e.g.*, MINN. STAT. § 260B.163, subdiv. 1(c) (2013) (excluding the general public from and admitting only those the court decides have a direct interest in the case or the work of the court).

48. Linda Searing, *Sexting is Increasingly Common for Teens*, WASH. POST (Mar. 3, 2018), https://www.washingtonpost.com/national/health-science/sexting-is-increasingly-common-for-teens/2018/03/02/8e60a236-1d63-11e8-9de1-147dd2df3829_story.html?noredirect=on&utm_term=.f01b7dfd43ce [https://perma.cc/BHC2-PB6M] (citing Sheri Madigan et al., *Prevalence of Multiple Forms of Sexting Behavior Among Youth: A Systematic Review and Meta-analysis*, AM. MED. ASS’N E1 (Feb. 26, 2018), https://helt.digital/wp-content/uploads/2018/03/ja-mapediatics_Madigan_2018_oi_170107.pdf [https://perma.cc/7L98-62TY]).

sending sexually explicit texts.⁴⁹ The prevalence of forwarding a sext without consent and having a sext forwarded without consent were twelve percent and roughly eight percent, respectively.⁵⁰

There are several factors motivating today's teens to engage in sexting. According to a 2018 article published by *KidsHealth*, minors sext because:

Most teens have various ways to get online: Smartphones, tablets and laptops all can be used in private. It's very easy for teens to create and share personal photos and videos of themselves without their parents knowing about it.

Girls may sext as a joke, as a way of getting attention, or because of peer pressure or pressure from guys. Guys sometimes blame 'pressure from friends.' For some though, it's almost become normal behavior, a way of flirting, seeming cool, or becoming popular.

And teens get some backup for that when lewd celebrity pictures and videos go mainstream. Instead of ruined careers or humiliation, the consequences are often greater fame and reality TV shows.⁵¹

Girls may also be motivated to sext by the implicit demands of young boys who grew up with unfettered access to online porn, coupled with the young girls' desire to grab the boys' attention and spark their sexual interest.⁵² Adult pornography websites, which attract millions of visitors every hour with an endless supply of content,⁵³ do a poor job of screening visitors to verify user age. Because kids as young as nine years old have unsupervised internet access, the numbers of adolescents addicted to pornographic images

49. Madigan et al., *supra* note 48 (noting that the mean prevalence for sending and receiving sexts were 14.8% and 27.4%, respectively).

50. *Id.*

51. Ben-Joseph, *supra* note 30.

52. See generally Belinda Luscombe, *Porn and the Threat to Virility*, TIME (Mar. 31, 2016), <http://time.com/magazine/us/4277492/april-11th-2016-vol-187-no-13-u-s/> [<https://perma.cc/7CL3-PNZQ>] (“Teen girls increasingly report that guys are expecting them to behave like porn starlets, encumbered by neither body hair nor sexual needs of their own.”).

53. See *id.* (noting that “nearly half of the 487 men surveyed . . . had been exposed to porn before they’d turned 13”).

is staggering.⁵⁴ So, what's a teenage girl to do? Compete for attention of course, with her own cadre of sexual images and videos on Snapchat, Instagram, or text.⁵⁵ And what's a teenage boy to do? Respond in kind with graphic images of his sexual parts or, more commonly, brag and share the images he receives with his friends.⁵⁶

But once the image falls into the wrong hands, becomes viral, and the young girl feels the full brunt of the resulting humiliation, a parent usually contacts law enforcement authorities to regain control over the situation and put an end to the resulting cyberbullying.⁵⁷ Schools and communities where the recipients reside are shaken down, search warrants are issued, phones are seized, charges are filed, and young lives are destroyed by criminal charges that sabotage efforts for employment, housing, and advancement to higher education.⁵⁸ Hence, a legal crisis is born. Adults must protect these children from their own poor judgment.

Aside from the legal analysis of the issue, we, as a society, need to ask ourselves if labeling young people as sexual predators in these situations serves the greater good, or simply destroys young lives over acts of youthful indiscretion. Should adolescents face child pornography charges and registration as sex offenders for what amounts to "a 21st century version of 'I'll-show-you-mine if you-

54. *Id.* Since 2005, we have a generation of young people who are so addicted to porn and masturbation that by the time they are actually ready to form a sexual partnership with a live person, they may be at risk for erectile dysfunction. *See id.* (presenting the debate about whether porn addiction can cause erectile dysfunction).

55. *See* Kate Sheridan, *Sexts are Being Shared Among Teens at Alarming Rates*, NEWSWEEK (Feb. 27, 2018), <https://www.newsweek.com/sexts-are-being-shared-among-teens-alarming-rates-822780> [<https://perma.cc/QW3L-46UW>] ("About one in seven teens [surveyed] had sent a sext—referring to a text message containing explicit words, photos or even videos—and one in four had received one.").

56. *See id.*

57. *See* Justin W. Patchin, Joseph A. Schafer & Sameer Hinduja, *Cyberbullying and Sexting: Law Enforcement Perceptions*, FBI L. ENFORCEMENT BULL. (June 4, 2013), <https://leb.fbi.gov/articles/featured-articles/cyberbullying-and-sexting-law-enforcement-perceptions> [<https://perma.cc/T39M-GFJR>].

58. *See* Sherri Gordon, *What are the Consequences of Sexting?*, VERYWELLFAMILY (Mar. 27, 2018), <https://www.verywellfamily.com/what-are-the-consequences-of-sexting-460557> [<https://perma.cc/X65F-54DP>] (explaining the emotional and legal consequences of sexting).

show-me-yours?”⁵⁹ The American Civil Liberties Union (ACLU) and National District Attorneys Association have both recognized that child pornography laws are not meant to address teen sexting.⁶⁰ The ACLU of Washington recently highlighted a case out of Spokane County, Washington to illustrate this point.

In *State v. Gray*,⁶¹ a seventeen-year-old boy sent a sexually explicit photograph of himself to a twenty-two-year-old woman in a series of actions constituting sexual harassment.⁶² The woman reported the incident to the police, and the boy was convicted as both the perpetrator and victim of the crime of child pornography.⁶³ The ACLU of Washington filed an amicus brief with the Washington Court of Appeals,⁶⁴ arguing that Washington’s child pornography law was meant to prevent the sexual exploitation and abuse of minors and not to criminalize youth for sexual exploration.⁶⁵ The ACLU further asserted that a teen taking a selfie, even a nude selfie, did not violate Washington’s child pornography law.⁶⁶ Despite the ACLU’s best efforts, the Washington Court of Appeals and Washington Supreme Court affirmed the minor’s conviction for distributing child pornography.⁶⁷

59. *Teen Sexting on the Rise: What This Could Mean For Your Child*, TEENS SAFE INC. (Apr. 21, 2016), <https://www.teensafe.com/blog/teen-sexting-rise-mean-child/> [<https://perma.cc/2ECC-6SDL>].

60. See Amy Roe, *Teens Who Engage in ‘Sexting’ Should Not Be Prosecuted as Sex Offenders*, ACLU (Apr. 19, 2017), <https://www.aclu.org/blog/privacy-technology/teens-who-engage-sexting-should-not-be-prosecuted-sex-offenders> [[https://perma.cc/42PS-Z\]N6](https://perma.cc/42PS-Z]N6)] (“Criminal justice officials are beginning to recognize that child pornography laws are not meant to address teen sexting. The president of the National District Attorneys Association has publicly urged prosecutors to use their discretion to avoid criminal charges in many such cases. Courts are also finding that sexting should not be handled through child pornography prosecutions.”).

61. 402 P.3d 254 (Wash. 2017).

62. *Id.* at 256.

63. *Id.*

64. Roe, *supra* note 60.

65. *Id.*

66. *Id.*

67. *Gray*, 402 P.3d at 261; *State v. E.G.*, 377 P.3d 272, 278 (Wash. Ct. App. 2016) (noting that this was “not a case of innocent sharing of sexual images between teenagers” but a case of sexual harassment).

These same actions are relatively common among teens today.⁶⁸ Of teens who have sent nude or semi-nude messages, sixty-six percent of boys stated they were meant to be “fun or flirtatious,” and forty percent of girls said they sent sexually explicit messages as a “joke.”⁶⁹ Prevailing research suggests that none of these same children realized the risks they were taking by doing so—unwittingly making themselves vulnerable to felony-level charges. Thus, we must protect these youth from these unwarranted consequences and find another, less destructive way to address this important issue.

Unfortunately, the law changes slowly as it takes time for awareness of the detrimental effects to reach those who have the platform to bring attention to the issue or the authority to make changes.⁷⁰ For that reason, the law typically lags behind current social mores and does not always fall on the perceived “right” side of moral justice.⁷¹ This has been the case with the long-standing laws that historically oppressed women, racial minorities, and homosexuals or other gender non-conforming individuals.⁷² These archaic laws are now generally disavowed and regarded as illegal discrimination of protected classes, but, that was not always the case.⁷³ Perhaps the

68. Roe, *supra* note 60.

69. *Id.*

70. See, e.g., Emma Nelson, *St. Paul City Council Passes \$15 Minimum Wage, and Mayor Signs It*, STAR TRIB. (Nov. 14, 2018), <http://www.startribune.com/st-paul-city-council-passes-15-minimum-wage/500530412/> [<https://perma.cc/5J38-9HVD>] (“The St. Paul City Council . . . approved the citywide \$15 minimum wage, which will be completely phased in by July 2027 . . . Mayor Melvin Carter signed it into law . . . [t]he unanimous vote was the culmination of about a year of lobbying, protests, public meetings.”).

71. See generally Nancy Scola, *Courts ‘Choose’ to Lag Behind on Tech, Says Chief Justice Roberts*, WASH. POST (Jan. 2, 2015), https://www.washingtonpost.com/news/the-switch/wp/2015/01/02/courts-choose-to-lag-behind-on-tech-says-chief-justice-roberts/?noredirect=on&utm_term=.05bbe0c9a9f3 [<https://perma.cc/ZYU8-HF6X>] (“[T]he courts will often choose to be late to the harvest of American ingenuity.”).

72. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (reversing Virginia’s anti-miscegenation law on the grounds that it violates the Equal Protection Clause of the Fourteenth Amendment); *Brown v. Board of Education*, 347 U.S. 483 (1954) (holding that segregation of public education on the basis of race violates the Equal Protection Clause).

73. See *id.*

sexual rights of adolescents will be among the next civil rights issues of our time.

What can those in the legal community do to be an impetus for change? Should we be patient and chip away at injustice, one case at a time? After all, one of the most iconic change agents, Dr. Martin Luther King, Jr., famously said that the “arc of the universe is long, but bends towards justice.”⁷⁴ Stated another way, the process of reform is long and fraught with difficulties but in time, change will be widely embraced as essential to the greater good of all people. As the famous abolitionist Frederick Douglass once said, “[I]f there is no struggle there is no progress. . . . Power concedes nothing without a demand. It never did and it never will.”⁷⁵ Hence, all of us have a moral duty to demand justice by resisting injustice wherever it is found.

Strategically, in making this demand for justice, a case-by-case protest is not as effective as dismantling a systemic problem at its root.⁷⁶ This is especially true in the context of sex crimes where the consequences are often immediate, severe, and carry a devastating social stigma that the accused often bears for a lifetime.⁷⁷ Although

74. See Melissa Block & Clayborne Carson, *Theodore Parker And The 'Moral Universe'*, NPR: ALL THINGS CONSIDERED (Sept. 2, 2010), <https://www.npr.org/templates/story/story.php?storyId=129609461> [<https://perma.cc/BY69-TDYC>] (reading the 1853 sermon by Theodore Parker that “Dr. King then used and made it his own” and playing the audio of Dr. King during the march from Selma in 1965 using Parker’s quote).

75. See Allison Keyes, *Frederick Douglass' 200th Birthday Invites Remembrance and Reflection*, SMITHSONIAN (Feb. 8, 2018), <https://www.smithsonianmag.com/smithsonian-institution/frederick-douglass-200th-birthday-invites-remembrance-and-reflection-180968100/> [<https://perma.cc/UHS6-EGAV>] (quoting FREDERICK DOUGLASS, TWO SPEECHES BY FREDERICK DOUGLASS 22 (1857) (generally known as the “West India Emancipation Address” delivered at Canandaigua, N.Y. (Aug. 4, 1857)), http://www.libraryweb.org/~digitized/books/Two_Speeches_by_Frederick_Douglass.pdf [<https://perma.cc/7ZUV-EJMT>]).

76. See generally John Hollway, Calvin Lee & Sean Smoot, *Root Cause Analysis: A Tool to Promote Officer Safety and Reduce Officer Involved Shootings Over Time*, 62 VILL. L. REV. 883 (2017), <https://www.law.upenn.edu/live/files/7459-hollway--villanova-rca-for-policing> [<https://perma.cc/Z2VT-72R2>] (defining root cause analysis as “a method of problem solving designed to identify core underlying factors, including environmental or systemic factors, that contributed (along with individual decision-making) to generate an undesirable outcome, organizational accident, or adverse event”).

77. See Feige, *supra* note 6.

one hopes that the safeguards of prosecutorial discretion and good old-fashioned common sense might inspire some restraint from the State in charging these cases, that approach leaves much to chance. Unfortunately, the youth that are charged are at the mercy of their attorney's fortitude, and the disposition of the assigned prosecutor or presiding judge, who may or may not see the injustice of the charge or its potentially devastating collateral consequences. However, consistent legal challenges to the constitutionality of the law might force an appeal that leads to a published legal decision that would dismantle this problem as applied to all, or at least large groups, of adolescents who are detrimentally affected. This could also force the legislature to take a closer look at a law that is inadvertently destroying young lives, rather than protecting them.

III. LEGAL ANALYSIS

It is incumbent upon defense attorneys in Minnesota to vigorously litigate the validity of the State's application of the child pornography statute to sexting youth, in order to highlight the injustice of that phenomena and hopefully end the practice for good. To launch an effective attack on the statute, one must explore both the letter of the law and its underlying legislative intent.

Section 617.247 of the Minnesota Statutes intends to "protect minors from the physical and psychological damage" that results from being depicted sexually in pornographic work by punishing those in possession of those types of pornographic works.⁷⁸

Section 617.246, subdivision 1 defines key terms such as "minor," "pornographic work," and "sexual conduct."⁷⁹ "Minor" is defined as anyone "under the age of 18."⁸⁰ "Sexual conduct" includes a range of behavior from any act of "sexual intercourse" that includes genital contact with the genitals, anus, oral cavity, or an animal.⁸¹ "Sexual conduct" also includes acts of sadomasochistic abuse, masturbation, "lewd exhibition" of genitals, or "physical contact" with bare or covered areas of another person's "buttocks" or "breasts" that

78. MINN. STAT. § 617.247, subdiv. 1 (2013).

79. MINN. STAT. § 617.246, subdiv. 1 (2013).

80. *Id.* subdiv. 1(b).

81. *Id.* subdiv. 1(e)(1).

simulates sex or that is done for sexual gratification.”⁸² “Pornographic work” is listed as a variety of visual mediums depicting “sexual performance” that involves a minor, any visual depiction that “uses a minor” for “actual or simulated” sexual content, any content that is modified or changed to make it appear as though an “identifiable minor” is engaged in “sexual conduct” or that is conveyed in a way that would lead a person to believe the “visual depiction” includes a minor engaging in sexual conduct.⁸³

Subdivision 2 of the same statute makes the conduct of using a minor in sexual performance or pornographic work a felony level offense.⁸⁴ Specifically, it states that it is illegal for someone to use or assist others in the creation of visual images that depict “any sexual performance” or “pornographic work” that includes minors, including any situation where the person “knows or has reason to know” that the “conduct” could be used for those purposes.⁸⁵ The subdivision explains that the person in violation of this law can be sentenced for “no more than ten years” or be required to pay no more than \$20,000 in fines for a first offense or \$40,000 for subsequent offenses.⁸⁶

The teen subject’s voluntary participation in and dissemination of pornographic work does not change the possibility of criminal prosecution.⁸⁷ Specifically, subdivision 5 of section 617.246 states, “Neither consent to sexual performance by a minor or the minor’s parent, guardian, or custodian nor mistake as to the minor’s age is a defense to a charge of violation of this section.”⁸⁸ This absence of consent as a defense is inherently problematic because sexting between peers logically does not invoke an image of lecherous and predatory intent toward young children. In fact, a study from Drexel University found that “[sixty-one percent] of teens had no idea that sharing their own nude photos is a felony that can result in criminal prosecution” and placement on the sex offender registry.⁸⁹ “Sixty

82. *Id.* subdiv. 1(e)(2-5).

83. *Id.* subdiv. 1(f).

84. *Id.* subdiv. 2.

85. *Id.*

86. *Id.*

87. *Id.* subdiv. 5.

88. *Id.*

89. Soraya Chemaly, *12 Reasons Why Gender Matters to Understanding Teenage Sexting*, HUFFPOST: LIFE (Dec. 6, 2017, 2:42PM), <https://www.huffpost.com/entry/12->

percent of teens said that knowing [the potential criminal liability] would probably be a deterrent.”⁹⁰

Although any party who sends or possesses the video or picture are chargeable, prosecutors typically focus on the recipient of the explicit image rather than the sender, usually a female teen, who sent the explicit image in the first place.⁹¹ Thus, in practice due to the reality of prosecutorial discretion favoring female alleged victims who are often the first or more vocal party initiating a complaint, these prohibitory laws disproportionately impact male adolescents.⁹² Arguably, this sexist application of the sexting criminal statutes has its roots in the 1960s feminist movement where notable leaders like Andrea Dworkin successfully characterized all pornography as degrading to women and a medium that perpetuates violence against and subordination of women generally in our society.⁹³ However, Minnesota law, at least in theory, holds both the sender and the recipient, regardless of their gender, liable for owning, disseminating, and receiving pornographic work.⁹⁴ The sender and recipient can each be fined up to \$10,000 and charged with a felony.⁹⁵

Digital and virtual relationships are more popular now than ever, including “adolescent romantic and sexual relationships of all kinds—happy, tragic, mutual, one-sided, healthy, [and] abusive.”⁹⁶ Sexting has become a normal component of teen sexual behavior as almost

reasons-why-gender-matters-to-understanding-teenage-sexting_b_8523142
[<https://perma.cc/RR89-QYTN>].

90. *Id.*

91. Pamela Paul, *He Sexts, She Sexts More, Report Says*, N.Y. TIMES (July 15, 2011), <https://www.nytimes.com/2011/07/17/fashion/women-are-more-likely-to-sext-than-men-study-says-studied.html> [<https://perma.cc/HE8C-ZQ8R>] (noting one survey that suggests “[w]omen are more likely to ‘sext’ than men.”).

92. Chemaly, *supra* note 89.

93. ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1979) (arguing that pornographic publications and films dehumanize and abuse women by encouraging men to eroticize their subjugation and therefore are training guides for committing sexual violence).

94. MINN. STAT. § 617.247, subdiv. 3–4 (2013).

95. *Id.*

96. Perri Klass, *Teenagers Are Sexting – Now What?*, N.Y. TIMES (Mar. 12, 2018), <https://www.nytimes.com/2018/03/12/well/family/teens-are-sexting-now-what.html> [<https://perma.cc/L6AG-T2KC>].

every teenager grows up owning a cellphone.⁹⁷ According to Professor Elizabeth Englander of Bridgewater State University and the Massachusetts Aggression Reduction Center, “[S]exting reflects adolescent curiosity about nudity and bodies and is an activity for ‘kids who are sort of interested in sexuality but might not be ready for actual sex.’”⁹⁸

A 2018 study of over 110,000 teens from around the world found that “[o]ne in seven teens report that that they are sending sexts, and one in four are receiving sexts.”⁹⁹ Perhaps even more alarming is that “one in nine teenagers report forwarding sexts without consent.”¹⁰⁰ Unfortunately, many children are unaware that sending or receiving a sexually suggestive text or image to another minor under the age of eighteen is considered possessing or disseminating child pornography and can result in felony-level criminal charges.¹⁰¹ While many states have enacted non-felony laws such as a gross misdemeanor provision outlawing the nonconsensual dissemination of private sexual images, including Minnesota,¹⁰² and even more are considering legislation,¹⁰³ Minnesota prosecutors have the discretion to determine whether to use the new, often less serious legal provisions, or to charge the child with a felony.¹⁰⁴ Thus, children

97. *Id.* (“The average age of first cellphone ownership is 10.3.”).

98. *Id.* (quoting Elizabeth Englander & Meghan McCoy, *Sexting—Prevalence, Age, Sex, and Outcomes*, JAMA PEDIATRICS (Apr. 2018), <https://jamanetwork.com/journals/jamapediatrics/article-abstract/2673715?widget=personalizedcontent&previousarticle=2673714&redirect=true> [<https://perma.cc/ET3T-UD9Y>]).

99. Madigan & Temple, *supra* note 19.

100. Klass, *supra* note 96.

101. Madigan & Temple, *supra* note 19.

102. See MINN. STAT. § 617.261, subdiv. 1, 2 (2019) (allowing the gross misdemeanor prosecution of anyone who disseminates “an image of another person who is depicted in a sexual act or whose intimate parts are exposed in whole or in part,” unless aggravating factors are present, which enhance the penalty to a felony).

103. Brandon De Hoyos, *Sexting Laws in the United States*, LIFEWIRE (Sept. 2, 2018), <https://www.lifewire.com/sexting-laws-in-united-states-1949957> [<https://perma.cc/EZH9-9M9D>].

104. Rayeed Ibtisam, *On Teenage ‘Sexting’ and the Law*, 37 HAMLIN J. OF PUB. L. & POL’Y 246, 263 (2017) (“[M]ost instances of teenage sexting are handled based on prosecutorial discretion. Also many of the sexting statutes that are in congress waiting to be enacted also give a lot of discretion to prosecutors and thus provide ample opportunity for abuse.”).

engaged in the exact same behavior may face vastly different outcomes, depending on how that discretion is exercised.

A. Using the Penumbra Doctrine to Protect Teens

Although this article posits that the law should protect all adolescents from criminal prosecution for sexting, this argument is strongest for children involved in sexting who are sixteen and older. This subset of teenagers should be set apart from other youth for two primary reasons. First, at sixteen, any felony delinquency charge they face is public information.¹⁰⁵ They are not afforded the same data

105. Historically, records on juvenile offenders maintained by the juvenile court are not available to the general public and are available to other government agencies only on a “need to know” basis, unless the juvenile court orders otherwise. This privacy policy is based on the primarily rehabilitative mission of the juvenile justice system and the expectation that the system will best achieve its objectives if the juvenile and his or her mistakes are protected from public scrutiny. However, this general rule has significantly changed in the past 20 years in Minnesota and other states. As a result, juvenile records, particularly those involving serious crimes committed by older juveniles, currently are available to a variety of specified entities and individuals. MINN. STAT. § 260B.171, subdivs. 1, 4 (2018). Often, the openness of the record depends on the juvenile court category into which the juvenile has been placed.

- For example, if a juvenile offender is at least 14 years old and commits a felony-level crime, he or she may be certified to stand trial as an adult in criminal court. If this occurs, all of the records relating to that crime are handled in the same manner as criminal records of adult offenders and are, generally speaking, public.
- Additionally, if a juvenile is 16 years old or older and is accused of a felony-level offense, all proceedings conducted by the juvenile court relating to that offense are open to the public, and all records relating to it are, likewise, available to the public.
- The victim of a juvenile’s offense has the right to be informed of the final disposition in the case, the right to attend the juvenile court hearing at which the juvenile receives the disposition, and the right to object to or otherwise comment on the disposition.
- Finally, if the juvenile justice system decides to place a felony-level juvenile offender in the hybrid “extended jurisdiction juvenile” (EJJ) category* and the offender is under 16 years old, the proceedings and records are not open to the public, but the records will become publicly available if the offender’s juvenile disposition is later revoked and his or her adult sentence is imposed.

privacy protections in juvenile court as other minor children, so the stakes are much higher for them in terms of public stigma from having a public record and collateral consequences such a public record would likely cause, impeding opportunities for higher education, employment, and housing. Second, under Minnesota law, children can legally consent to sex when they are sixteen years old.¹⁰⁶ Accordingly, it is more imperative to initiate legal challenges to protect this subset of children and, given their age, those legal challenges could be made using classic constitutional civil rights law focused on sexual privacy and equal protection jurisprudence.

Employing constitutional jurisprudence to dismantle overly intrusive areas of the law is a tradition that dates back to the founding fathers. The belief that all citizens are endowed with certain “God-given” and, therefore, inalienable “natural rights” that should not be subject to government interference is a mainstay of constitutional jurisprudence.¹⁰⁷ In fact, this “natural law” philosophy was the inspiration for both the state and Federal Bill of Rights.¹⁰⁸ For example, the United States Supreme Court has pointed out that “the Ninth Amendment provides: ‘The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.’”¹⁰⁹

Minn. Stat. §§ 260B.171, subdiv. 4; 611A.037, subdiv. 2; 611A.038.

*A juvenile in this category is adjudicated in juvenile court and, upon conviction, receives both a juvenile court disposition and an adult sentence. If the juvenile fails to abide by the terms of the juvenile disposition, it may be revoked and the adult sentence may be imposed immediately, often resulting in incarceration in adult prison.”

See Access to Government Data Maintained on Juvenile Offenders, MINN. HOUSE OF REPRESENTATIVES RES. DEP’T (2004), <https://www.house.leg.state.mn.us/hrd/pubs/juvdata.pdf> [<https://perma.cc/8DTB-8PPF>].

106. MINN. STAT. § 609.344, subdiv. 1(e–g) (allowing consensual sex with a minor at least sixteen years old, where the actor is more than 48 months older and does not hold a position of authority over the complaint, or the actor does not have some other significant relationship).

107. Charles S. Desmond, *Natural Law and the American Constitution*, 22 *FORDHAM L. REV.* 235, 235–36 (1953), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1424&context=flr> [<https://perma.cc/83FQ-LPPQ>].

108. *Id.*

109. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

The legal challenges that could be launched to protect this subset of children is not limited to federal constitutional law. In fact, arguably these children are afforded more rights under Minnesota's state constitution. Specifically, Article I, section 16 of the Minnesota Constitution explicitly states that, "[t]he enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people."¹¹⁰ In the case of *State v. Hershberger*, the Minnesota Supreme Court interpreted this provision to mean that the State could not infringe upon nor interfere "with religious freedom."¹¹¹ Thus, the State of Minnesota afforded greater protections to its citizens than did the Federal Constitution.¹¹² This liberal interpretation of the state constitution is also applied to the Minnesota Due Process Clause.

During the late nineteenth century, the due process clause of the Minnesota Constitution was drafted to protect substantive rights—such interests that were not explicitly listed in the constitution.¹¹³ If the legislature drafted a criminal statute, the statute must survive the scrutiny of the Due Process Clauses of both of the Federal and Minnesota Constitutions or risk being overturned.¹¹⁴

This "natural rights" notion expanded into a body of case law where the courts substituted their own judgment for that of the often stodgy and out-of-touch legislators who were not in the trenches of litigation, in touch with changing social mores, nor privy to the specific facts of cases that rendered the law outdated and unjust.¹¹⁵

110. MINN. CONST. art. 1, § 16.

111. 462 N.W.2d 393, 397 (Minn. 1990).

112. *Id.*

113. *State v. Moseng*, 254 Minn. 263, 268–69, 95 N.W.2d 6, 11–12 (1959) ("[A] criminal statute must be definite as to persons within the scope of the statute and acts which are penalized, and if the criminal statute is not definite, the due process clauses of [the Minnesota Constitution], and of [the United States Constitution], whichever may be applicable, are violated.").

114. *Id.*

115. Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299, 1327 (2015), <http://texaslawreview.org/wp-content/uploads/2015/08/Calabresi-93-6.pdf> [<https://perma.cc/YM3H-L3B8>] ("Five state supreme courts—the supreme courts of Vermont, Massachusetts, Indiana, Illinois, and Ohio—applied the Lockean Natural Rights Guarantee's equality language that 'all men are by nature equally free and independent' to hold that slavery was unconstitutional.").

This judicial activism was a necessary evil to escape the confines of antiquated laws that failed to keep pace with modern thinking and the changing morals of society.¹¹⁶

Out of this body of law came the notion of the penumbra doctrine. The literal meaning of penumbra is “a space of partial illumination (as in an eclipse) between the perfect shadow on all sides and the full light.”¹¹⁷ In constitutional jurisprudence, it has come to be known as the rights guaranteed by implication in the Constitution.¹¹⁸ The penumbra doctrine historically has been utilized by the United States Supreme Court to recognize fundamental or natural rights not explicitly stated in the Federal Constitution or other federal laws.¹¹⁹ It has been used most notably in matters of privacy related to sex between two or more consenting parties who are both old enough and sober enough to consent.¹²⁰ The consensus in this body of law is that sexual intercourse between two legally consenting individuals is private and should be free from invasive government interference.¹²¹ Given current sexting trends, it is time that this doctrine be applied to legally consenting teens.

If Minnesota designated sixteen as the age of legal consent to sex, then teens who are sixteen or older should be free to enjoy all the accoutrements of the sexual act—including sexting—without fear of criminal prosecution. By highlighting the holding and legal analysis of cases like *Griswold v. Connecticut*¹²² (in which the United States Supreme Court held that a criminal prohibition against the use of contraceptive devices by married couples to prevent pregnancy violated the constitutionally protected right of privacy) and *Lawrence*

116. See generally *id.*

117. *Penumbra*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1996).

118. See *Griswold v. Connecticut*, 381 U.S. 479, 479 (1965) (holding that specific guarantees in the Bill of Rights have penumbras that recognize certain fundamental rights not articulated verbatim in the Constitution's text. One of these penumbra rights is the right to marital privacy. A Connecticut law forbidding the use of contraceptives unconstitutionally infringed upon that right).

119. *Id.*

120. See Jed Rubenfeld, *The Right of Privacy*, 102 YALE L. SCH. FAC. SCHOLARSHIP SERIES 737-44 (1989), https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2568&context=fss_papers [<https://perma.cc/59FB-MRBT>].

121. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

122. 381 U.S. at 479.

*v. Texas*¹²³ (which struck down sodomy laws in fourteen states, including Texas), the defense bar and others concerned about this injustice can tackle this last bastion of sexual discrimination.

In the *Griswold* decision, Justice William O. Douglas used the penumbra doctrine to recognize the privacy rights of married couples. *Griswold* was centered on the unconstitutionality of a Connecticut law that prohibited Estelle Griswold, the executive director of Planned Parenthood League of Connecticut, and Dr. C. Lee Buxton, a medical professor at Yale Medical School and director of the League's New Haven office, from prescribing contraceptive devices and giving contraceptive advice to married persons.¹²⁴ Buxton and Griswold launched an appeal challenging the law which made it unlawful to use any drug or medicinal article for the purpose of preventing conception, asserting that the appeal was on behalf of all married persons with whom they had a professional relationship.¹²⁵ The Court ruled that the law was unconstitutional because it violated married persons' right to privacy.¹²⁶ In the opinion, Justice Douglas stated that "guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance," and the right to privacy exists within these areas.¹²⁷

Using *Griswold* and its progeny could help invalidate the child pornography law as applied to teens sixteen and older and their right to privacy in exercising their legal right to have sex. Just like a married couple or a non-marital couple engaging in a private sexual act, older teens should be afforded the same access to flirting or sexual arousal through sexting without fear of severe and life-changing criminal consequences.¹²⁸

Moreover, given that delinquency charges for many serious offenses committed by children ages sixteen and older are public

123. 539 U.S. 558 (2003).

124. *Griswold*, 381 U.S. at 480.

125. *Id.*

126. *Id.* at 485–86.

127. *Id.* at 484–85.

128. MINN. STAT. § 617.247, subdiv. 4(a) (2013) ("A person who possesses a pornographic work . . . is guilty of a felony and may be sentenced to imprisonment for not more than five years and a fine of not more than \$5,000 for a first offense and for not more than ten years and a fine of not more than \$10,000 for a second or subsequent offense.").

information, youth prosecuted under this statute face the immediate public stigma associated with any sex crime involving children.¹²⁹ The embarrassment of public condemnation for the charge might affect the individual's ability to attend college, seek employment, and find safe and affordable housing in the future.¹³⁰

In addition to the criminal sanctions and public stigma of the charge, a convicted youth also faces registration as a predatory offender.¹³¹ The registration period lasts "until ten years have elapsed since the person initially registered in connection with the offense, or until the probation, supervised release, or conditional release period expires, whichever occurs later."¹³² Failing to register, as young people are prone to do given their lack of maturity and typical address instability, exposes individuals to additional charges.¹³³ Moreover, the registration requirement undermines the rehabilitative focus and protective nature of juvenile court embodied in the *parens patriae* doctrine.

B. Older Teens Should Be Afforded Shelter Under the Equal Protection Doctrine

The Equal Protection Clauses of the United States and Minnesota Constitutions "guarantee that every person shall be free from arbitrary and intentional discrimination" brought about by a statute.¹³⁴ Under Minnesota law, a legislative classification will

129. MINN. STAT. § 260B.163(1)(c)(2) (2018).

130. See Elizabeth S. Scott & Laurence Steinberg, *Juvenile Justice: Adolescent Development and the Regulation of Youth Crime*, 18 THE FUTURE OF CHILD., PRINCETON-BROOKINGS 15, 27 (2008) https://futureofchildren.princeton.edu/sites/futureofchildren/files/media/juvenile_justice_18_02_fulljournal.pdf [<https://perma.cc/CDV3-HPN5>].

131. MINN. STAT. § 243.166 (2016).

132. *Id.* subdiv. 6(a).

133. See *id.* subdiv. 5.

134. *State v. Nordstrom*, 331 N.W.2d 901, 906 (Minn. 1983); see also U.S. CONST. amend. XIV ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); MINN. CONST. art. I, § 2 ("No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers.").

survive an equal protection challenge if: (1) “[t]he distinctions which separate those included within the classification from those excluded . . . are genuine and substantial,” (2) “the classification [is] . . . genuine or relevant to the purpose of the law,” and (3) “the purpose [is] one . . . the state can legitimately attempt to achieve.”¹³⁵

Review of an equal protection challenge under the less stringent federal rational basis test requires: (1) a legitimate purpose for the challenged legislation, and (2) that it was “reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose.”¹³⁶

Some may argue that the issue of sexting between teen peers sixteen or older is still controversial despite the legalization of sex within this age group because society does not wish to condone what might lead to unintended consequences, such as nonconsensual dissemination of sexually explicit videos to nefarious third parties.¹³⁷ Any sexual act within this age group, however, could lead to undesirable results, such as unwanted pregnancy or the transmission of sexually transmitted diseases. Moreover, harassment statutes could be used to discourage cyberbullying behaviors without labeling the offending party as a sexual predator. As it stands right now, even two consenting teens in this age group could be prosecuted for sexting each other within the confines of a non-predatory, loving, and committed relationship.¹³⁸ Thus, for no legitimate reason, teens face

135. *Guilliams v. Comm’r of Revenue*, 299 N.W.2d 138, 142 (Minn. 1980) (quoting *Miller Brewing Co. v. State*, 284 N.W.2d 353, 356 (Minn. 1979)); *see also State v. Holloway*, 916 N.W.2d 338, 348–50 (Minn. 2018) (determining that limiting age classifications in a statutory rape defense did not violate the Equal Protection Clause); *State v. Russell*, 477 N.W.2d 886, 889 (Minn. 1991) (determining that a statute that distinguished crack and powder cocaine violated the Equal Protection Clause).

136. *See, e.g., W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668 (1981).

137. *See* Raychelle Cassada Lohmann, *The Dangers of Teen Sexting*, PSYCHOL. TODAY (July 20, 2012), <https://www.psychologytoday.com/us/blog/teen-angst/201207/the-dangers-teen-sexting> [<https://perma.cc/QN7Q-DKW7>]; Steven Woda, *7 Consequences of Teen Sexting*, UKNOWKIDS DIGITAL PARENTING BLOG (June 26, 2012), <http://resources.uknowkids.com/blog/bid/177105/7-consequences-of-teen-sexting> [<https://perma.cc/XKB8-N963>].

138. *See* MINN. STAT. §§ 617.246, subdiv. 5; 617.247, subdiv. 6 (2018) (establishing that consent is not an affirmative defense to the creation or possession of nude photos of a minor).

harsh legal consequences that similarly situated adults do not—a clear violation of the Equal Protection Clauses of both the Federal and Minnesota Constitutions.

C. *Section 617.247, subdivision 4(a) is Unconstitutionally Vague When Interpreted to Include Sexually Explicit Videos Between Adolescents*

In launching a legal challenge that is generally applicable to all adolescents who engage in sexting, the Due Process Clauses of both the United States Constitution and the Minnesota Constitution are fertile ground as they generally prohibit vague statutes.¹³⁹ A statute “may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests.”¹⁴⁰ A criminal statute must “provide the kind of notice that will enable ordinary people to understand what conduct it prohibits.”¹⁴¹ “Where a statute imposes criminal penalties, a higher standard of certainty of meaning is required.”¹⁴² Due process requires that “[p]ersons of common intelligence must not be left to guess at the meaning of a statute nor differ as to its application.”¹⁴³ “The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.”¹⁴⁴

1. *Minnesota Courts Should Assess a Child's Knowledge Through the Standard of a Reasonable Juvenile.*

The Minnesota courts should apply a “reasonable juvenile” standard in assessing whether the youth knew or should have known the content and character of the sexting material at issue was in fact child pornography. In doing so, however, it is imperative to give

139. *State v. Christie*, 506 N.W.2d 293, 301 (Minn. 1993) (citing *State v. Newstrom*, 371 N.W.2d 525, 528 (Minn. 1985)).

140. *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (citing *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)).

141. *Id.* at 56 (citing *Kolender*, 461 U.S. at 357).

142. *Newstrom*, 371 N.W.2d at 528 (citation omitted).

143. *Id.* (quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1925)).

144. *United States v. Harriss*, 347 U.S. 612, 617 (1954).

historical context to the word “pornography” and examine how changing social mores have drawn a distinction between constitutionally protected sexual expression and legally condemned obscenity.

The word “pornography” comes from the Greek word “pornographos,” which distilled down to its roots is a combination of the Greek words “porne” meaning prostitute and “graphein” meaning to write.¹⁴⁵ So in its purest sense, the word pornography means “writing about prostitutes” or individuals engaged in sex or sexual gratification for hire, which arguable suggests an inherent element of both commercial profit and exploitation due to a disparity of power.¹⁴⁶ Over time, this definition has evolved to include all depictions of sexual behavior that are erotic or lewd and designed to stimulate sexual excitement in its audience, but the legal analysis always harkens back to the issue of exploitation of the subject to derive ill-gotten gains.

It is not surprising then, that First Amendment legal analysis on this issue addresses these seminal issues of sexual mores and power. When analyzing any form of pornography in the legal context, however, one must contemplate the application of the First Amendment. The First Amendment to the United States Constitution guarantees freedom of expression, including sexual expression, in all citizenry, including children.¹⁴⁷ But the issue of pornography as a form of sexual expression protected under the First Amendment to the United States Constitution and obscenity that is not protected by the First Amendment has been the subject of constitutional debate for decades. Cases such as *Roth v. United States*, which held that obscenity is “utterly without redeeming social importance” and therefore is not protected by the First Amendment, established a test for discerning whether sexually explicit material was obscenity or constitutionally protected expression.¹⁴⁸

145. WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY (1984).

146. *Id.*

147. U.S. CONST. amend. I.

148. 354 U.S. 476 (1957). The *Roth* test for obscenity was “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to a prurient interest.” *Id.* at 489.

The *Roth* test was generally viewed as too nebulous to be helpful.¹⁴⁹ Thus in 1966, the United States Supreme Court adopted a new standard.¹⁵⁰ In *John Cleland's Memoirs of a Woman of Pleasure v. Attorney General*, the Supreme Court concluded that to meet the legal definition of obscenity, the material must, aside from appealing to the prurient interests of its audience, be "utterly without redeeming social value" and "patently offensive because it affronts contemporary community standards relating to the description of sexual matters."¹⁵¹ However, even this standard was considered too vague to give clear directives for determining whether sexually explicit material was obscene or constitutionally protected speech.¹⁵²

The Supreme Court gave more clarity to the legal analysis of obscene materials in *Miller v. California*.¹⁵³ A distinction was drawn in *Miller* between hard-core pornography which was not protected under the First Amendment and soft-core pornography which was protected speech.¹⁵⁴ Hard-core pornography was deemed patently offensive, and included, but was not limited to representations of "ultimate sex acts" and "masturbation, excretory functions, and lewd exhibition of the genitals."¹⁵⁵ In contrast, soft-core pornography involved depictions of nudity and limited or simulated sexual conduct.¹⁵⁶

However, in 1982, the Supreme Court took a zero tolerance approach to child pornography in *New York v. Ferber*.¹⁵⁷ *Ferber* held that child pornography of any kind is not a form of expression protected under the Federal Constitution—First Amendment or otherwise. It found that the state of New York had a compelling

149. See generally *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, 383 U.S. 413 (1966).

150. *Id.*

151. *Id.* at 418.

152. *Miller v. California*, 413 U.S. 15 (1973).

153. See *id.* In *Miller*, Chief Justice Warren E. Burger opined that pornographic material was legally obscene if the work, taken as a whole and viewed through the lens of contemporary community standards: (1) appeals to the prurient interest; (2) depicts sexual conduct in a patently offensive way; and (3) lacks serious literary, artistic, political, or scientific value. *Id.* at 24–26.

154. See *id.* at 27–29.

155. *Id.* at 25–26.

156. *Id.* at 25.

157. 458 U.S. 747 (1982).

interest in protecting children from sexual abuse and found a close connection between such abuse and the use of children in the production of pornographic materials.¹⁵⁸

In 1990, the Court went even further in upholding a state law prohibiting the possession and viewing of child pornography in *Osborne v. Ohio*.¹⁵⁹ Arguably, this constitutional jurisprudence was a reflection of a feminist movement, that started in the 1960s and culminated in the 1980s, that launched an unprecedented attack on the pornography industry which disproportionately victimized and exploited female youth for profit.¹⁶⁰

However, neither the *Ferber* Court, nor the *Osborne* Court contemplated the widespread use of such statutes to prosecute adolescents

engaged in the consensual dissemination and possession of sexually explicit material with peers of the same age, not for profit but for their own personal sexual expression. Moreover, neither Court contemplated the widespread use of cell phones, texting, nor social media to express sexual thoughts and imagery and pass along sexually-explicit materials received from others among a technology-obsessed generation of youth and young adults. Given these dramatic cultural changes, this area of the law is ripe for judicial review to adjust these laws to modern times.

In fact, there is persuasive legal precedent that suggests that the United States Supreme Court, if not local appellate courts, would be responsive to a First Amendment legal challenge to the practice of prosecuting sexting youth under felony child pornography statutes.¹⁶¹

158. *Id.* at 756.

159. 495 U.S. 103 (1990).

160. See Hanna Roos, *Trading the Sexual Child: Child Pornography and the Commodification of Children in Society*, 23 TEX. J. WOMEN & L. 131 (2014).

161. See, e.g., *Hudnut v. American Booksellers Association, Inc.*, 771 F.2d 323 (7th Cir. 1985) (reviewing a First Amendment challenge to an Indianapolis ordinance prohibiting pornography that was passed due to the efforts of feminist like MacKinnon and Dworkin and political conservatives who championed their cause). However, although the Seventh Circuit ostensibly agreed with prevailing feminist thought that pornography affected how people view the world and their social relations, it noted that the same logic applied to other forms of offensive, but nonetheless protected speech, like racial bigotry. See *id.* at 330.

With the advent of the Internet in the 1990s, the First Amendment debate entered a new battleground.¹⁶² Legal scholars debated how the electronic distribution of pornography should be regulated by the government.¹⁶³ The use of computer bulletin boards and the Internet to distribute pornography world-wide led to the enactment of the Federal Communications Decency Act (“CDA”). This act prohibited the distribution of obscene and indecent sexual material in cyberspace to minors.¹⁶⁴ In *Reno v. American Civil Liberties Union*, relying on well-established First Amendment precedent, the Supreme Court overturned provisions of the CDA prohibiting transmission of obscene or indecent material by means of electronic devices.¹⁶⁵ The Court held that the provisions represented a content-based restriction, in violation of the Free Speech Clause of the First Amendment.¹⁶⁶

The above analysis of the relevant case law in this field illustrates two things: that the debate on the legality of sexually explicit material, be it traditional forms of pornography or sexting, is inextricably linked to a discussion of changing social mores and what does or does not offend the general conscience of our society and cultural institutions. It is also inextricably linked to a discussion about whether the subject of that sexual material is the victim of predatory exploitation caused by a patently unfair disparity of power. This article posits that sexting between two adolescent peers in its purest sense is sexual exploration and not predatory behavior. Thus, such

162. See Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L. J. 1115 (2005).

163. See *id.*; Mark Tushnet, *Internet Exceptionalism: An Overview from General Constitutional Law*, 56 WM. & MARY L. REV. 1637 (2015).

164. See *id.*

165. 521 U.S. 844 (1997).

166. The Supreme Court reasoned as follows: “[w]e are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.

In evaluating the free speech rights of adults, we have made it perfectly clear that “[s]exual expression which is indecent but not obscene is protected by the First Amendment.” *Reno*, 521 U.S. at 874–75. (internal citations omitted).

behavior is reasonably protected speech under the First Amendment, not chargeable obscenity. Moreover, if there is a predatory aspect in any given factual scenario, the resulting prosecution should be narrowly tailored to that predatory behavior through pre-existing harassment and cyberbullying statutes, rather than automatically characterizing such behavior as sexual violence worthy of felony prosecution and registration as a sexual predator.

The factor that distinguishes children who sext from adults who disseminate and/or possess child pornography is intent. To be convicted of possession of pornographic work involving minors, the defendant must have knowledge, or reason to know, of the work's "content and character."¹⁶⁷ "Reason to know" means that "the possessor is subjectively aware of a 'substantial and unjustifiable risk' that the work involves a sexual exploitation of a minor--not sexual exploration with a peer of the same age."¹⁶⁸

Typically, when assessing mens rea, the court applies a "reasonable person" standard.¹⁶⁹ However, in some circumstances, Minnesota courts have elected to apply a reasonable juvenile standard.¹⁷⁰ For example, the Minnesota Supreme Court has applied this standard in assessing the culpable negligence of a minor in juvenile delinquency proceedings,¹⁷¹ stating:

[I]t is anomalous to premise an adjudication of a child's delinquency on failure to conform his conduct to adult standards. Accordingly, in juvenile delinquency proceedings, the question of culpable negligence must be decided with reference to the conduct and appreciation of risk reasonably to be expected from an ordinary and reasonably prudent juvenile of a similar age.¹⁷²

167. MINN. STAT. § 617.247, subdiv. 4(a) (2018).

168. *State v. Mauer*, 741 N.W.2d 107, 115 (Minn. 2007).

169. *See id.* at 116 ("It is possible that the district court determined Mauer had reason to know because . . . a reasonable person under the circumstances should have known.").

170. *See In re Welfare of S.W.T.*, 277 N.W.2d 507, 514 (Minn. 1979) ("[T]he evidence indicated that both of them acted together with conscious disregard of a risk which reasonable children of their ages would have appreciated.").

171. *See id.* (In the instant case, the referee found that the standard of culpable negligence applicable to delinquency proceedings was one "commensurate with the age, intelligence and experience of the respondents.").

172. *Id.* (emphasis added).

As of yet, the reasonable juvenile standard has not been applied to the element of knowledge; however, Minnesota courts have not foreclosed such a possibility. In the two cases where the court of appeals has addressed the issue of applying the reasonable juvenile standard to the knowledge element, the court rejected the argument because the issue was not raised in the lower court and the petitioner did not cite any case law.¹⁷³

In *In re A.A.M.*, the Minnesota Court of Appeals did not apply the reasonable juvenile standard to the issue of consent.¹⁷⁴ This does not preclude courts from applying this standard to the element of knowledge, however. Consent is defined by Minnesota law as “words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor.”¹⁷⁵ The determination on whether consent was present focuses on the actions of the victim and whether the victim agreed, through words or overt actions, to perform a sexual act.¹⁷⁶ Because the analysis focuses on the victim’s actions, it is logical the court would not apply a reasonable juvenile standard to the defendant when assessing the actions of the victim.

“Knowledge,” on the other hand, focuses on the subjective mental state of the defendant.¹⁷⁷ Under Minnesota law, to “know” a fact “requires only that the actor believes that the specified fact exists.”¹⁷⁸ It is widely accepted that Minnesota courts apply this standard in determining whether a juvenile placed in custody

173. *In re Welfare of J.E.M.*, No. A11-1614, 2012 WL 1380400, at *7 (Minn. Ct. App. Apr. 23, 2012) (“Because appellant failed to raise the “reasonable juvenile standard” argument in district court, it is waived.”); *In re Welfare of J.T.R.*, No. A08-1586, 2009 WL 1920372, at *2 (Minn. Ct. App. July 7, 2009) (“Appellant cites no support indicating that Minnesota courts have approved the use of a “reasonable juvenile” standard in cases involving mentally impaired persons or in criminal-sexual-conduct cases.”).

174. 684 N.W.2d 925, 928 (Minn. Ct. App. 2004) (“[T]here exists no caselaw or statutory authority in Minnesota to support appellant’s proposition that a reasonable juvenile standard should apply to the element of consent in a criminal-sexual-conduct case, and we reject such an assertion.”).

175. MINN. STAT. § 609.341, subdiv. 4 (2016).

176. *Id.*

177. MINN. STAT. § 609.02, subdiv. 9(1) (2018).

178. *Id.* at § 609.02, subdiv. 9(2) (2018) (emphasis added).

believed that they were free to go.¹⁷⁹ There is no legal distinction made between the “believe” in custody determinations and the “believe” when assessing a defendant’s knowledge. Therefore, the Minnesota courts should apply the reasonable juvenile standard to assess a juvenile’s belief as they have done in assessing the belief of juveniles in other situations.

2. *A Reasonable Juvenile Would Not Believe the Character of the Video in Question to be Child Pornography.*

When viewing sexting through the lens of a reasonable juvenile,” it is clear the content and character of the video would not have been recognized as child pornography.¹⁸⁰ Juveniles often see each other naked, whether it be in a locker room or when exploring their sexuality with one another. Juveniles do not see each other as being part of some protected class—the way the law and adults do—but rather as peers or equals. Under Minnesota law, it would have been legal for juveniles of the same age to see each other naked in person.¹⁸¹ Further, it would have been legal for these youths, age sixteen or older, to engage in sexual intercourse with either one of the people in the video.¹⁸² A reasonable juvenile would not, therefore, have made the abstract connection that it would be legal to perform the acts in the video with the people in the video, but the actual video itself would be considered illegal child pornography.

D. *Accepting the Realities of Adolescent Sexuality Through*

179. *In re Welfare of G.S.P.*, 610 N.W.2d 651, 657 (Minn. Ct. App. 2000) (“The test is not whether a reasonable person under the circumstances would believe they were not free to leave, but whether a reasonable person under the circumstances would believe they were in police custody of the degree associated with formal arrest.”)

180. *See In re Welfare of J.E.M.*, No. A11-1614, 2012 WL 1380400, at *8 (Minn. Ct. App. Apr. 23, 2012); *In re Welfare of J.T.R.*, No. A08-1586, 2009 WL 1920372, at *2 (Minn. Ct. App. July 7, 2009).

181. *See generally* MINN. STAT. § 617.247 (2018) (listing prohibited acts but not listing juveniles seeing each other naked).

182. *See generally* MINN. STAT. § 609.342, subdiv. 1 (2018) (listing prohibited acts for certain age disparities).

Prohibition of Strict Liability Child Pornography Laws

The sexual expression of children is an inherently controversial topic. Although it is generally treated as a social norm that babies and children under the age of ten should not engage in sex, once a child reaches adolescence—transitioning to adulthood through sexual development—reasonable minds disagree as to what is or is not acceptable sexual behavior between peers.¹⁸³ Many believe that sex among teens is per se wrong.¹⁸⁴ Such opponents focus on teens' immaturity, vulnerability, and the risks of pregnancy, sexually transmitted diseases, or emotional and physical injury.¹⁸⁵ "However, a competing discourse of sex positivity acknowledges the sexual dimension of development, and recognizes that mutually agreed upon adolescent sexual encounters can in certain contexts be a normal and healthy aspect of the transition to adulthood, and are not per se morally problematic, undesirable or unsafe."¹⁸⁶

Even if we were to adopt the "discourse of sex positivity," which acknowledges that some adolescent sex is developmentally appropriate, there are other gray areas to consider. For example, "there is not always a clear dividing line between sexual activity and sexual abuse, acceptable persuasion and impermissible coercion, consent and non-consent, or childhood incapacity and coming-of-age competence."¹⁸⁷ Additionally, the teenage angst that might trigger regret or emotional confusion, even if the act is wholly consensual and does not result in unwanted pregnancy or sexually transmitted disease, must also be considered.¹⁸⁸ Because of these difficulties,

183. High, *supra* note 8, at 794.

184. *Id.* at 792 (citing *General Social Survey 2006*, THE ASS'N OF RELIGION DATA ARCHIVES, <http://www.thearda.com/Archive/Files/Descriptions/GSS2006.asp> [https://perma.cc/DV9G-AQ2M] (noting 71.4 percent of survey participants responded that premarital heterosexual sex among fourteen- to sixteen-year-olds is "always wrong," compared to 25.6 percent responding to adult premarital sex as "always wrong")).

185. *Id.* at 791.

186. *Id.* at 792 (citations omitted).

187. *Id.* at 793 (citing Rigel Oliveri, Note, *Statutory Rape Law and Enforcement in the Wake of Welfare Reform*, 52 STAN. L. REV. 463, 485 (2000)).

188. *See id.* at 800–02.

there is an inevitable “analytical complexity when it comes to regulating juvenile sexual behavior.”¹⁸⁹

Historically, our state legislature has responded to this complexity with bright-line, strict liability laws on topics of sex.¹⁹⁰ For example, despite the danger of selective prosecution, certain laws regulating sexual activity remain on the books and are enforceable, even in the face of changing sexual mores.¹⁹¹ Laws such as adultery, sodomy, and fornication, for example, are still valid.¹⁹² Laws governing statutory rape, criminal sexual conduct, and child pornography, although ostensibly serving legitimate state interests, still fail to acknowledge—let alone carve out exceptions for—consenting, sexually mature adolescents engaging in sexual behavior in non-predatory contexts.¹⁹³

The age of consent laws are perhaps the only laws in which the state legislature directly addresses the reality that teens do engage in sexual intercourse and honors the general belief of a society that sees no good in criminalizing the sexual acts of this segment of the adolescent population, in particular those aged sixteen and older.¹⁹⁴ However, even the age of consent laws are problematic in that they create a legal fiction of a fixed age at which a child develops competency to consent.¹⁹⁵

The age of consent thereby functions as a bright-line proxy for the boundary between wrongful sex, involving a presumptively incompetent and exploited juvenile, and good or at least morally permissible sex. This approach involves a legal fiction, because the childhood-adulthood transition is a continuum, not a switch, and all adolescents traverse the transition, from vulnerability and immaturity to autonomy and competence, at different speeds, meaning “any one teen . . . might not fit into the model.”

A more nuanced approach is to recognize that the competence of juveniles to meaningfully and responsibly consent to sex and resist sexual manipulation and coercion

189. *Id.* at 793.

190. *See, e.g.*, MINN. STAT. §§ 609.293, 609.34, 609.342, 609.36 (2018).

191. *Id.*

192. MINN. STAT. §§ 609.293, 609.34, 609.36.

193. MINN. STAT. § 617.247 (2018).

194. MINN. STAT. §§ 609.342–345 (2018).

195. High, *supra* note 8, at 794.

is dependent not only on the juvenile's age, but also on contextual factors such as the relative ages of the sexual partners and the nature of the sexual activity in question.¹⁹⁶

Applying this logic to child pornography statutes could eliminate the bright-line age of consent rule altogether, eliminate strict liability for possession and dissemination of sexual images of minors, and examine whether the facts suggest force, coercion, or lack of legal consent. This approach leaves room for the “I’ll-show-you-mine-if-you-show-me-yours” playful scenarios that are not predatory and are part of normal adolescent sexual development, while also safeguarding against age-disparity-based power imbalances that may impact young people negatively as they navigate their burgeoning sexual curiosity.¹⁹⁷ The advantage of this approach is that it avoids socially undesirable prosecutions under strict liability prohibitions and narrowly tailors the prohibitions to exploitative sexual relations where age disparity, coercion, or other predatory tactics are used by one adolescent to take advantage of another.

This more narrowly tailored and fact-specific approach would not reflect societal approval of sexting among adolescents but, rather, would prioritize the prosecution of coercive sexual relations as the primary punitive target of child pornography laws. Such reform is also “congruent with evidence more generally of growing societal acceptance of the reality of adolescent sexuality. For example, most states have decriminalized or ceased prosecuting fornication, and there is increasingly strong support for school-based sex education that goes beyond the ‘abstinence only’ message.”¹⁹⁸ However, as it stands now, local prosecuting authorities have taken a machete to do the job of a scalpel with its broad child pornography prosecutions of minors—inadvertently destroying one child in an effort to protect another.

196. *Id.*

197. *Cf. Roe*, *supra* note 55; Cynthia Godsoe, *Recasting Vagueness: The Case of Teen Sex Statutes*, 74 WASH. & LEE L. REV. 173, 230–31 (2017); Chemaly, *supra* note 84; Trisha Tulloch & Miriam Kaufman, *Adolescent Sexuality*, 34 PEDIATRICS IN REVIEW (Jan. 2013), <http://pedsinreview.aappublications.org/content/34/1/29> [<https://perma.cc/VU9K-XD9L>] (discussing normal teenage sexual development, curiosity, and expression).

198. High, *supra* note 8, at 796.

E. Statutory Interpretation Canons Should Narrow the Child Pornography Statute's Application to Clearly Predatory Cases

1. The Court Must Interpret an Intent to Possess Element Into Section 617.247 of the Minnesota Statutes.

In *State v. McCauley*, the court declined to read an “intent to possess” element into the possession of child pornography statute.¹⁹⁹ This decision was premised on the rejection of the defendant’s claim that the statute dictated strict liability because the statute requires knowledge of the content and character of the pornography.²⁰⁰ In the court’s decision, they never addressed the intent of the statute, as related to possession, or the absurd outcome that arises from not requiring an element of intent to possess.

The governing principle of statutory interpretation is to apply the plain meaning of the statute’s language.²⁰¹ “Plain meaning presupposes the ordinary usage of words that are not technically used or statutorily defined”²⁰² Plain meaning includes interpreting the language of the statute in context of the whole act.²⁰³ “Courts should construe a statute to avoid absurd or unjust consequences.”²⁰⁴ In the present case, the court must interpret section 617.247 as having an element of “intent to possess child pornography” in order to avoid an absurd result, fulfill the intent of the legislature, avoid a potential constitutional issue, and advance the policy of protecting our society against over-criminalization.²⁰⁵

2. Prosecutions Under Section 617.247 Will Lead to an Absurd Result Without an Intent to Possess Element

Failing to read an intent element into the child pornography statute will lead to an absurd result. The statute at issue was originally written in 1982—before commercially available cell phones, texting,

199. 820 N.W.2d 577, 585 (Minn. Ct. App. 2012).

200. *Id.* at 586.

201. *Occhino v. Grover*, 640 N.W.2d 357, 360 (Minn. Ct. App. 2002).

202. *Id.* at 359.

203. *Id.*

204. *Hince v. O’Keefe*, 632 N.W.2d 577, 582 (Minn. 2001).

205. See MINN. STAT. 617.247 (2018); *Occhino*, 640 N.W.2d at 360.

or the widespread use of personal computers and the internet.²⁰⁶ At that time, a person had to actively seek child pornography in order to obtain it.²⁰⁷ This is no longer the case. With the widespread use of cell phones, sext messaging has become increasingly popular among high-school-aged “teens and young adults.”²⁰⁸ A national study showed that twenty-two percent of teenage girls and eighteen percent of teenage boys had posted or sent nude or semi-nude pictures of themselves.²⁰⁹ Anyone who receives a “sext” message from a minor is in violation of section 617.247 the moment they look at the message. If a teen accidentally sends a “sext” message to a wrong number, the unfortunate owner of that wrong number, therefore, will be in violation of the law once they read, open, or view the message.²¹⁰ Without any knowledge, consent, or involvement, people may inadvertently become felons and registered sex offenders by way of another person’s actions—a clearly unjust and absurd result.

4. *Section 617.247’s Classification as a Predatory Offense Shows that the Legislature Intended an “Intent to Possess” Element*

Applying the plain meaning principle to both the individual words of the statute and their meaning within the context of the criminal code, it is clear the legislature intended the statute to require an intent to possess the child pornography. The Minnesota legislature has categorized possession of child pornography as a “predatory offense” under section 243.166.²¹¹ Therefore, anyone convicted of

206. MINN. STAT. § 617.247 (1982); see also Peter Ha, *All-TIME 100 Gadgets: Motorola DynaTAC 8000x*, TIME (Oct. 25, 2010), http://content.time.com/time/specials/packages/article/0,28804,2023689_2023708_2023656,00.html [<https://perma.cc/G4NX-WNWP>]; *World Wide Web Timeline*, PEW RES. CTR. (Mar. 11, 2014), <http://www.pewinternet.org/2014/03/11/world-wide-web-timeline/> [<https://perma.cc/AES4-GXYA>].

207. See Rebecca Cafe, *Police Detections of Child Porn Images Increases by 48%*, BBC NEWS (Feb. 23, 2013), <https://www.bbc.com/news/uk-21507006> [<https://perma.cc/APP2-K3P6>] (referring to child pornography before 1990 as existing in “just 7000 hard copy images”).

208 See *Sex and Tech*, *supra* note 31.

209. *Id.*

210. MINN. STAT. § 617.247 (2018) (to be guilty of possession, a person must merely possess a prohibited image “knowing or with reason to know its content and character.”).

211. MINN. STAT. § 243.166 (2018).

possession of child pornography is a considered a predatory offender.²¹² Webster’s Dictionary defines “predatory” as “inclined or *intended* to injure or exploit others for personal gain or profit.”²¹³ There is a clear element of intent within the plain meaning of predatory. Further, to “offend” is to transgress or violate the law.²¹⁴ The words “transgress” and “violate” both suggest an action by the person.²¹⁵ Therefore, the plain meaning of “predatory offender” is someone that intends to exploit or injure another through violating the law.

The other statutes categorized as predatory offenses show that the legislature intended to include an intent to commit the crime in the statute.²¹⁶ Other crimes categorized as predatory offense crimes involve perpetrators that exploited, took advantage of, or injured another sexually through an affirmative act.²¹⁷ These statutes were clearly not meant to cover a situation where the defendant performed no affirmative act and made no attempt no attempt to exploit, take advantage of, or injure another.

4. *The Statute is Overly Broad Without an “Intent to Possess”*

212. *Id.*

213. *Predatory*, MERRIAM-WEBSTER DICTIONARY ONLINE, <https://www.merriam-webster.com/dictionary/predatory> [<https://perma.cc/V8GK-LY49>] (emphasis added).

214. *Offend*, MERRIAM-WEBSTER DICTIONARY ONLINE, <https://www.merriam-webster.com/dictionary/offend> [<https://perma.cc/UV6U-8RHL>].

215. *See Transgress*, MERRIAM-WEBSTER DICTIONARY ONLINE, <https://www.merriam-webster.com/dictionary/transgress> [<https://perma.cc/2KUE-EPVP>]; *Violate*, MERRIAM WEBSTER DICTIONARY ONLINE, <https://www.merriam-webster.com/dictionary/violate> [<https://perma.cc/6CVG-JDHY>].

216. MINN. STAT. § 243.166, subdiv. 1b. (referencing MINN. STAT. §§ 609.185(a)(2), 609.25, 609.342, 609.343, 609.344, 609.345, 609.3451, subdiv. 3, 609.3453, 617.23, subdiv. 3, 609.2325, subdiv. 1(b), 609.255, subdiv. 2, 609.322, 609.324, subdiv. 1(a), 609.352, subdiv. 2(a)(1), 617.246, 617.247, 609.3455, subdiv. 3a (2018)).

217. *See, e.g.*, MINN. STAT. §§ 609.185(a)(2), 609.25, 609.342, 609.343, 609.344, 609.345, 609.3451, subdiv. 3, 609.3453, 617.23, subdiv. 3, 609.2325, subdiv. 1(b), 609.255, subdiv. 2, 609.322, 609.324, subdiv. 1(a), 609.352, subdiv. 2(a)(1), 617.246, 617.247, 609.3455, subdiv. 3(a) (2018).

Element and Potentially Violates the First Amendment

Minnesota courts should interpret statutes so as to avoid constitutional problems.²¹⁸ The First Amendment protects a person's right to free speech.²¹⁹ A fundamental element in the right to free speech is the right to receive information.²²⁰ A statute risks violating the First Amendment if it has a chilling effect on protected free speech.²²¹

To avoid a potential chilling effect on the freedom of speech, Minnesota courts must interpret the current child pornography statute as containing an element of intent to possess the child pornography.²²² Without an element of intent to possess the prohibited pornography, the statute would run the risk of being overly broad.²²³ Anytime a person receives a text message, there is a possibility it could contain a sexually explicit image of a minor. A person does not know what the message contains until they read it. If the message contains child pornography, the person is in violation of the law the moment they open the message. This broad application could create a chilling effect on the message receiver's First Amendment right to receive information. To prevent this chilling effect, the court must interpret the statute more narrowly to require that the defendant have an intent to possess the pornography.

In recent years, over-criminalization has been acknowledged as a serious problem within our criminal justice system—so much so that the House Federal Judiciary Committee authorized a bi-partisan taskforce to investigate the over-criminalization of federal laws.²²⁴ It

218. *Hince v. O'Keefe*, 632 N.W.2d 577, 582 (Minn. 2001).

219. *See* U.S. CONST. amend. I.

220. *Dekart v. Milczark*, No. C4-98-733, 1998 WL 644255, at *2 (Minn. Ct. App. Sept. 22, 1998) (citing *Stanley v. Georgia*, 394 U.S. 557, 564–65 (1969)).

221. *See Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) (explaining that laws having a deterrent effect on free speech, although not actually prohibiting it, are equally unconstitutional as they place an undue burden on speakers who wish to speak but refrain from doing so out of fear of prosecution).

222. *See* MINN. STAT. § 617.247 (2013).

223. *See id.*

224. *See* Press Release, H.R. Judiciary Comm., House Judiciary Comm. Reauthorizes Bipartisan Over-Criminalization Taskforce (Feb. 22, 2016), <http://judiciary.house.gov/index.cfm/2014/2/house-judiciary-committee->

is hard to imagine a better example of over-criminalization than a statute allowing a person whose only act was to open a message they never requested or wanted to see to be convicted of a crime. In the interest of reducing over-criminalization in our society, courts should interpret this statute narrowly to prevent teens from being convicted of a felony. Therefore, Minnesota courts must interpret an “intent to possess” element into the statute to advance the policy issue of preventing over-criminalization.

4. *Section 617.247’s Prohibitions Should Not Include Sexually Explicit Material Exchanged Between Adolescent Peers.*

Subdivision 1, section 617.247, of the Minnesota Statutes highlights the policy and purpose of this child pornography statute stating:

It is the policy of the legislature in enacting this section to protect minors from the physical and psychological damage caused by their being used in pornographic work depicting sexual conduct which involves minors. It is therefore the intent of the legislature to penalize possession of pornographic work depicting sexual conduct which involve minors or appears to involve minors in order to protect the identity of minors who are victimized by involvement in the pornographic work, and to protect minors from future involvement in pornographic work depicting sexual conduct.²²⁵

Minnesota courts should ascribe these words their “most natural and obvious usage unless it would be inconsistent with the manifest intent of the legislature.”²²⁶ Moreover, in 2013 the Minnesota Supreme Court made it clear that “[u]nder the associated-words canon, when context suggests that a group of words have something

reauthorizes-bipartisan-over-criminalization-task-force [https://perma.cc/E59E-C437].

225. MINN. STAT. § 617.247, subdiv. 1 (2018).

226. *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999) (citing MINN. STAT. § 645.08(1) (1998); *Homart Dev. Co. v. Cty. of Hennepin*, 538 N.W.2d 907, 911 (Minn. 1995)).

in common, each word should be ascribed a meaning that is consistent with its accompanying words.”²²⁷

The State’s attempt to expand the understanding of the statute to include an unprecedented theory of prosecution ignores that an ordinary person must understand what conduct would be prohibited.²²⁸ No ordinary person would have noticed that sexually explicit videos shared between adolescent peers is illegal. Thus, the statute is vague and Minnesota courts must interpret it narrowly.²²⁹

A related doctrine and canon of interpretation, the rule of lenity, also requires the narrow reading of the statute. The rule of lenity “ensures fair warning [to citizens] by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.”²³⁰ “The rule of lenity ‘vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed.’”²³¹

Furthermore, Minnesota courts must interpret the statute narrowly to avoid the constitutional problems the State’s theory creates.²³² As defense counsel argued in the original brief, under the

227. *State v. Rick*, 835 N.W.2d 478, 485 (Minn. 2013) (citing *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)); *see also Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) (“The traditional canon of construction, *noscitur a sociis*, dictates that ‘words grouped in a list should be given related meanings.’”) (citations omitted); *State v. Taylor*, 594 N.W.2d 533, 536 (Minn. Ct. App. 1999) (“Pursuant to the doctrine of *noscitur a sociis*, a word should be construed with reference to the words around it.”) (citation omitted).

228. *See United States v. Lanier*, 520 U.S. 259, 266 (1997) (“[A]lthough clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute . . . due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope . . .”) (internal citations omitted).

229. *Id.*

230. *Id.*

231. *Rick*, 835 N.W.2d at 486 (citing *United States v. Santos*, 553 U.S. 507, 514 (2008)); *see also State v. Colvin*, 645 N.W.2d 449, 452 (Minn. 2002) (“If construction of a statute is uncertain, a statute may not be interpreted to create criminal offenses that the legislature did not contemplate.”) (citation omitted).

232. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the

State's interpretation of the statute, there is no logical distinction between one who passively receives an uninvited sexually explicit video of a minor engaged in a sexual act on their phone and another who actively seeks it out on the black market, well aware of its contents, in order to satisfy a prurient or sexually deviant interest in children.²³³

Further, a sexually explicit video created by minors and distributed to minors is not child pornography per se. The State's failure to make this distinction when interpreting the statute also violates a person's fundamental right to privacy regarding intimate and consensual sexual relationships. Therefore, the statute should be subject to strict scrutiny under the Constitution.

In *Carey v. Population Services Int'l*, the United States Supreme Court recognized procreation as a basic liberty under the Fourteenth Amendment.²³⁴ The Court further noted that its history of decisions under the Fourteenth Amendment recognize a fundamental right to privacy surrounding a person's most intimate activities and relationships.²³⁵ In *Lawrence v. Texas*, the Court held a statute criminalizing sodomy violates constitutional due process by interfering with a person's autonomous choice of sexual partner.²³⁶ As such, the Minnesota courts must not only interpret the statute narrowly because the State's prosecutorial theory renders it vague, but also because a broad reading violates fundamental constitutional rights. Moreover, the statute is not intended to be used to prosecute minors who inherently would not know or have reason to know that the pornographic work involves other minors, such as classmates, peers, or former girlfriends.

5. *Subdivision 1(a) of Section 624.713 is not a Strict Liability*

statute to avoid such problems unless such construction is plainly contrary to the intent of [the legislature].”).

233. Brief for Appellant at 22, *State v. McCauley*, 820 N.W.2d 577 (2012) (No. A11-0606), 2012 WL 4838693, at *22.

234. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684–85 (1977); *see also* *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541–42 (1942).

235. *Carey*, 431 U.S. at 684–85.

236. *Lawrence v. Texas*, 539 U.S. 558, 565, 574 (2003).

Offense.

State prosecutors have historically asserted that section 624.713, subdivision 1(a) of the Minnesota Statutes is a strict liability offense.²³⁷ Specifically, the State has asserted that the only defenses applicable to charges under this statute are those expressly enumerated in the statutory language and the defense of necessity.²³⁸ However, such an argument is inherently illogical, deleted text and finds no support in governing case and statutory law.

In *Staples v. United States*, the Supreme Court held that a statute similar to section 624.713 did not create a strict liability offense.²³⁹ In *Staples*, the petitioner was charged with possessing an unregistered machine gun in violation of the National Firearms Act.²⁴⁰ Under that act a machine gun is defined as a weapon that automatically fires more than one shot with a single pull of the trigger.²⁴¹ During his testimony at trial, Staples testified that the machine gun had never discharged automatically while he owned it, nor did he have knowledge of its capacity to do so.²⁴² Staples was later convicted, in part, because the district court refused to instruct the jury that the government must prove beyond a reasonable doubt that Staples knew the gun could fire fully automatically in order to establish a violation of section 5861(d).²⁴³ The Court of Appeals affirmed, concluding that the government need not prove a defendant's knowledge of a weapon's physical properties to obtain a conviction.²⁴⁴ The Supreme Court granted certiorari to address the mens rea requirement of section 5861(d).²⁴⁵

In its argument to the Court, the government asserted that section 5861(b) was a strict liability offense because mens rea was not a required element of the offense.²⁴⁶ The government further argued that Congress intended the National Firearms Act to regulate and

237. MINN. STAT. § 624.713, subdiv. (1)(a) (2000).

238. *State v. Rein*, 477 N.W.2d 716, 718 (Minn. Ct. App. 1991).

239. *Staples v. United States*, 511 U.S. 600, 618-19 (1994).

240. *Id.* at 600; 26 U.S.C. § 5861(d).

241. 26 U.S.C. § 5845(b).

242. *Staples*, 511 U.S. at 600.

243. *Id.* at 603; *see also* *United States v. Staples*, 971 F.2d 608, 616-17 (1992).

244. *Staples*, 971 F.2d at 612.

245. *Staples*, 511 U.S. at 604.

246. *Id.* at 605-06.

restrict the circulation of dangerous weapons.²⁴⁷ Because of this, the government asserted that the *Staples* case fit into a line of precedent concerning what courts deem to be “public welfare” or “regulatory” offenses.²⁴⁸ In this line of cases, courts have inferred congressional intent to impose strict criminal liability in statutes meant to regulate potentially harmful or dangerous items.²⁴⁹ Here, the government explained that section 5861(d) defines precisely the sort of regulatory offense described in these “public welfare” cases.²⁵⁰ The Supreme Court disagreed.²⁵¹

The Court reasoned that under the government’s argument, all guns would be considered dangerous devices, even if they were not statutory “firearms” that give gun owners notice to determine, at their own risk, whether their weapons come within the range of the Act.²⁵² On this understanding, “a conviction can rest simply on proof that a defendant knew he possessed a ‘firearm’ in the ordinary sense of the term.”²⁵³ The Court failed to see the logic in this interpretation.²⁵⁴ It noted that “the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.”²⁵⁵ Further, the Court recognized “that the common-law rule requiring mens rea has been ‘followed in regard to statutory crimes even where the statutory definition did not in terms include it.’”²⁵⁶ Relying on this traditional rule, the Court found that “offenses that require no mens rea generally are disfavored” and suggested that “some indication of congressional intent, express or implied, is required to dispense with mens rea as an element of a crime.”²⁵⁷ With respect to section 5861(d), the Court concluded that the

247. *Id.* at 606.

248. *Id.* at 600–01.

249. *See, e.g.,* *United States v. Dotterweich*, 320 U.S. 277, 281 (1943) (stating, in dicta, that a statute criminalizing the shipment of adulterated or misbranded drugs did not require knowledge that the items were misbranded or adulterated).

250. *Staples*, 511 U.S. at 600.

251. *Id.*

252. *Id.* at 608.

253. *Id.*

254. *Id.* at 609.

255. *Id.* at 605 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 436–37 (1978)).

256. *Id.* at 605–06 (quoting *United States v. Balint*, 258 U.S. 250, 251–52 (1922)).

257. *Id.* at 606.

Government's interpretation of the statute would penalize ostensibly innocuous conduct, which is an absurd result that the legislature did not intend.²⁵⁸

The level of punishment attached to violations of section 5861(d) also was relevant to the Court's determination. The Court noted that "[h]istorically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with mens rea."²⁵⁹

Six years after the *Staples* decision, the Minnesota Supreme Court applied its logic to a state statute in *In re Welfare of C.R.M.*²⁶⁰ In *C.R.M.*, a juvenile faced a charge of felony possession of a dangerous weapon on school property, and the court faced the issue of whether the State must prove beyond a reasonable doubt that the accused knew he possessed a knife on school property.²⁶¹ In that case, a teacher found a folding knife with a four-inch-long blade in C.R.M.'s coat pocket during a standard contraband check of students' coats.²⁶² At trial the

258. *Id.* at 614–16. Specifically, the Court reasoned: Here, there can be little doubt that . . . the Government's construction of the statute potentially would impose criminal sanctions on a class of persons whose mental state—ignorance of the characteristics of weapons in their possession—makes their actions entirely innocent. The Government does not dispute the contention that virtually any semiautomatic weapon may be converted, either by internal modification or, in some cases, simply by wear and tear, into a machinegun within the meaning of the Act. . . . But in the Government's view, any person who has purchased what he believes to be a semiautomatic rifle or handgun, or who simply has inherited a gun from a relative and left it untouched in an attic or basement, can be subject to imprisonment, despite absolute ignorance of the gun's firing capabilities, if the gun turns out to be an automatic. *Id.* at 614–15. (internal citations omitted). The Supreme Court concurred with the Fifth Circuit's conclusion that: It is unthinkable to us that Congress intended to subject such law-abiding, well-intentioned citizens to a possible ten-year term of imprisonment if . . . what they genuinely and reasonably believed was a conventional semi-automatic weapon turns out to have worn down into or been secretly modified to be a fully automatic weapon. *Id.* at 615 (quoting *United States v. Anderson*, 885 F.2d 1248, 1254 (5th Cir. 1989)).

259. *Id.* at 618–19 (“[W]here, as here, dispensing with mens rea would require the defendant to have knowledge only of traditionally lawful conduct, a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate the mens rea requirement. In such a case, the usual presumption that a defendant must know the facts that make his conduct illegal should apply.”).

260. 611 N.W.2d 802 (Minn. 2000).

261. *Id.*

262. *Id.* at 803.

juvenile testified that although a knife was in his coat, he did not know it was there, and, therefore, he should not be held liable for possession.²⁶³ At the close of the State's case, C.R.M. moved for a directed verdict, arguing that any reasonable interpretation of the possession element of the statute would require him to know that the knife was in his coat pocket and that general intent required knowledge of possession.²⁶⁴ The prosecutor argued "that the statute does not require either knowledge or intent because it creates a strict liability crime," and the State must only demonstrate that the appellant possessed a dangerous weapon on school grounds.²⁶⁵ The district court adopted the prosecutor's strict liability interpretation of the statute and found C.R.M. guilty.²⁶⁶ The Court of Appeals affirmed.²⁶⁷

On review, the Minnesota Supreme Court reversed C.R.M.'s conviction and used policy reasoning to highlight the importance of the protection of public welfare.²⁶⁸ Certain items, by their very nature, suggest that possession is not innocent because possession itself is demonstrative of intent. An example of such an item would be unlicensed hand grenades.²⁶⁹ On the other hand, courts are reluctant to interpret statutes to eliminate mens rea where doing so would criminalize a broad range of what would otherwise be innocent conduct.²⁷⁰ The *Staples* court recognized that lawful gun ownership fell into the latter category and pointed "to the tradition of gun ownership and the fact that guns have not historically been considered of such a dangerous nature that their owners should be on notice that mere possession is a crime."²⁷¹ In applying similar reasoning to the case at hand, the Minnesota Supreme Court observed that "knives as common household utensils are clearly not inherently dangerous, as they can be used for a myriad of completely benign

263. *Id.* at 804.

264. *Id.*

265. *Id.*

266. *Id.*

267. *In re* C.R.M., No. C6-98-2385, 1999 WL 595371, at *2 (Minn. Ct. App. Aug. 10, 1999).

268. *In re* C.R.M., 611 N.W.2d at 809.

269. *Id.*

270. *Id.*

271. *Id.* at 809-10.

purposes,” and are not as “inherently anti-social as illegal drugs and hand grenades.”²⁷² The Court concluded this public welfare analysis by reaffirming that “mere possession of something that may fit the statutory definition of ‘dangerous weapon’ would not create a level of panic that a “reasonable person should know [possession] is subject to stringent public regulation.”²⁷³ The Minnesota Supreme Court ultimately held that proof of a felony offense for violating a prohibition on the possession of a dangerous weapon on school property requires that the State must prove beyond a reasonable doubt that the accused knew he possessed a knife while on school property. The case was reversed and remanded to the trial court to determine whether the appellant had knowledge of possession of the knife while on school property.²⁷⁴

Applying *Staples* to the present case, it follows that the statute on child pornography is not considered a strict liability offense. Under section 609.035, subdivision 1 of the Minnesota Statutes, if a person’s conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses and a conviction or acquittal of any such offense is a bar to prosecution for any other of them.²⁷⁵ The purpose of section 609.035 is twofold: to protect criminal defendants from serialized prosecution and to afford them protection against multiple punishment.²⁷⁶ Under section 609.04, subdivision 2, a conviction or acquittal of a crime is a bar to further prosecution of any included offense or other degree of the same crime.²⁷⁷ Section 609.04, subdivision 1 defines an included offense as any of the following:

- (1) A lesser degree of the same crime; or
 - (2) an attempt to commit the crime charged; or
 - (3) an attempt to commit a lesser degree of the same crime;
- or
- (4) a crime necessarily proved if the crime charged were proved; or

272. *Id.* at 810.

273. *Id.* (quoting *Liparota v. United States*, 417 U.S. 419, 433 (1985)).

274. *Id.*

275. MINN. STAT. § 609.035, subdiv. 1 (2000).

276. *State v. Johnson*, 141 N.W.2d 517, 520 (Minn. 1966).

277. MINN. STAT. § 609.04, subdiv. 2 (2000).

(5) a petty misdemeanor necessarily proved if the misdemeanor charge were proved.²⁷⁸

The prohibitions listed in sections 609.035 and 609.04 apply only if the potential offenses arise out of a single behavioral incident.²⁷⁹ In *State v. Bookwalter*, the Minnesota Supreme Court expressed that the facts and circumstances are determinative of whether multiple offenses arose out of a single behavioral incident and articulated the standard for making this legal determination.²⁸⁰ Two factors to be considered are, the “singleness of purpose of the defendant and the unity of time and place of the behavior.”²⁸¹ *State v. Frank* relied on the same legal standard by holding that the defendant’s desire to “obtain a single criminal objective” constituted a single offense.²⁸² The State then has the burden of proving that the “offenses were not part of a single behavioral incident” for multiple sentences.²⁸³

When the standard articulated in *Frank* and *Bookwalter* is read in conjunction with the prohibitions of sections 609.035 and 609.04, it becomes clear that if a defendant is acquitted of one offense and convicted of a lesser included offense, 609.035 would bar prosecution for the lesser included offense.²⁸⁴ In other words, 609.035 and 609.04 bar legally inconsistent verdicts arising out of the same behavioral incident. Verdicts are legally inconsistent if a single necessary element of a greater and included offense are subject to conflicting findings by the jury.²⁸⁵

When determining whether a reasonable jury or fact finder could adjudicate a youth for illegally possessing a sexting image, intent must be examined closely and assessed on a case-by-case basis.²⁸⁶ Applying

278. *Id.* at subdiv. 1.

279. 541 N.W.2d 290, 294 (Minn. 1995).

280. *Id.*

281. *Id.*

282. N.W.2d 744, 750 (Minn. Ct. App. 1987).

283. *Id.* (quoting *State v. Gilbertson*, 323 N.W.2d 810, 812 (Minn.1982)).

284. See MINN. STAT. § 609.035(1) (2018).

285. *State v. Netland*, 535 N.W.2d 328, 331 (Minn. 1995); see, e.g., *State v. Moore*, 458 N.W.2d 90, 93–95 (Minn. 1990) (holding that the guilty verdict of premeditated, intentional murder was legally inconsistent with the guilty verdict of culpably negligent manslaughter).

286. See *id.*

sections 609.035, 609.04, and governing case law to the child pornography statute as applied to juveniles, it is a legal contradiction for a jury to say that a sexually mature youth should be held criminally liable for possession of an image he inadvertently received without solicitation. Any other result would lead to a legal absurdity. Under section 645.17(1) of the Minnesota Statutes, courts must presume that “the legislature does not intend a result that is absurd, impossible of execution, or unreasonable.” Accordingly, courts should dismiss charges where criminal intent is absent.

IV. CONCLUSION

Experimentation with sexting and sexual intercourse is a normal part of adolescent sexual development. As society adjusts to the notion of adolescent sexual autonomy and privacy interests, the legal community must keep pace by balancing the interest in safeguarding youth from predatory offenders and acknowledging that not all sexting or adolescent sexual expression warrants criminal prosecution.

The best solution is to change governing laws to reflect this shift in adolescent behavior and to draft statutes that are narrowly tailored to the problems these scenarios present without irreparably harming the adolescent offender with felony brands that will hinder their pro-social advancement. One obvious fix would be a misdemeanor statute and diversion programming for first time offenders.

Many [state] statutes specify sexting as a misdemeanor, create educational or diversion programs, or institute civil fines as punishment. Some statutes involved eliminating mandatory minimum sentencing for persons less than 18 years of age and authorize orders relieving a person of the obligation to report as a sex offender. Legislation proposed in Indiana sought to treat those under age 22 more leniently if the images are maintained only on a cellular telephone or social media website as opposed to postings on other locations on the internet. . . .

Georgia made it a misdemeanor for someone at least 14 year old to send a sexually explicit photograph to someone 18 years old or younger, if the purpose of distributing it was not for harassing, intimidating, or embarrassing the minor depicted, or for any commercial purpose. With this statute, Georgia reduced the charges and punishment for minors

involved in sexting. Before this change, minors could be convicted of felony sexual exploitation of children. This conviction would come with a sentence of 5 to 20 years' imprisonment and fines up to \$100,000.²⁸⁷

But while we wait for these broad policy solutions from our legislators, the legal community must still do its part. It is incumbent upon prosecutors to think through the collateral consequences of their charging decisions, so as not to inadvertently do more harm than good in addressing situations more suited to less-damaging, rehabilitative charging alternatives. Though some defense attorneys feel it casts too wide a net, Minnesota's relatively new "revenge porn" law is a good start.²⁸⁸ Specifically, Entitled Nonconsensual Dissemination of Private Sexual Images, section 617.261 of the Minnesota Statutes, makes it illegal to "intentionally disseminate an image of another person who is depicted in a sexual act or whose intimate parts are exposed" when: (1) the person is identifiable; (2) the person charged knows or reasonably should know that the person depicted does not consent to the dissemination; and (3) the image was obtained or created under circumstances in which the person charged knew or reasonably should have known the person depicted had a reasonable expectation of privacy.²⁸⁹

The revenge law can result in felony or gross misdemeanor charges, depending upon the circumstances of the case.²⁹⁰ It is a felony charge if one of the following factors is present: (1) the person depicted suffers financial loss due to the dissemination; (2) the person charged disseminates the image with intent to derive a profit; (3) the person charged maintains a web site, online service, online application, or mobile application for the purpose of disseminating

287. Lorang et al., *supra* note 33, at 75.

288. *Nonconsensual Dissemination of Private Sexual Images – Revenge Porn Law*, N. STAR CRIMINAL DEF. BLOG (June 15, 2018), <https://www.northstarcriminaldefense.com/nonconsensual-dissemination-private-sexual-images-revenge-porn-law> [<https://perma.cc/2FK3-K2V6>] (noting the "revenge porn" law "is written in an overbroad manner to capture much more conduct that perhaps was intended.").

289. *Id.*; see also, MINN. STAT. § 617.261 (2018) (explaining that a "person is identifiable: (i) from the image itself, by the person depicted in the image or by another person; or (ii) from personal information displayed in connection with the image.").

290. *Nonconsensual Dissemination of Private Sexual Images – Revenge Porn Law*, *supra* note 288.

the image; (4) the person charged posts the image on a web site; (5) the person charged disseminates the image with intent to harass the person depicted; (6) the person charged obtains the image by violating laws of theft, computer theft, unauthorized computer access, or interference of privacy; or (7) the person charged has a prior conviction under this chapter.²⁹¹ Where the accused is a young adult or teenager, prosecutors should exercise their discretion cautiously by pursuing the lesser charge whenever possible, agreeing to continuances without a plea or stays of adjudication, or tagging the case for diversion from the court system altogether.

Aside from prosecutorial discretion, judges should exercise their discretion to protect minors and young adults where prosecutors and defense attorneys fall short. Giving such offenders the opportunity to keep their records clean after rehabilitative programming is complete, or dismissing such cases altogether when the facts suggest the alleged offender lacked predatory intent, are both well within acceptable limits of judicial discretion.

Strict liability prohibitions against sexting to and from minors fails to acknowledge the complexity of the issue.²⁹² At a minimum, states should not prosecute adolescents for sexting when they are old enough to legally engage in sexual intercourse and there are no other elements of harassment, bullying, violence, or coercion. It is also important not to condemn minors for sending sexually explicit selfies as it is illogical to prosecute an individual as simultaneously the victim and perpetrator of the offense.²⁹³ For the remainder of adolescents who are below the age of consent, a case-by-case approach makes more sense. A prerequisite to prosecution should be facts that reflect egregious sexual predatory behavior, rather than age-appropriate sexual exploration and adolescent mischief.²⁹⁴ For less egregious cases, harassment and cyberbullying statutes should be used to avoid the collateral consequences that accompany felony convictions. In

291. MINN. STAT. § 617.261, subdiv. 2(b) (2018).

292. Ibtesam, *supra* note 99, at 255–56 (discussing how most current sexting statutes do not address sexting between teenagers, and thus, teenagers who participate in sexting are at risk of being prosecuted under child pornography laws).

293. *Id.* at 246.

294. *Id.* (“Fundamentally, teenage sexting is a product of sexual curiosity, poor judgment, and a modern trend in which teenagers utilize electronic file sharing as their primary method of communication.”).

short, the prosecution and response of the courts should be commensurate with the unique facts of the case and allow youths to commit acts of indiscretion without being inappropriately labelled as sexual abusers of other children.

Because sexting is such a common teenage behavior and within the range of normal adolescent sexual development,²⁹⁵ these findings are a call to action to all adults who interact with children. Not only should we do our best to educate adolescents about the potential dangers of sexting, we should also advocate politically for “softer legal punishments so stretched resources can be used to fund educational programs for teens on reducing [high-]risk sexual behavior.”²⁹⁶ Launching nation-wide campaigns²⁹⁷ targeting adolescents aged twelve to seventeen to highlight the dangers of sexting—including public humiliation, online exploitation, cyberbullying, and criminal sanctions—is also necessary to address this issue. We, as a society, must reject the notion that current practices are acceptable and do everything possible to stem the tide of future prosecutions and victimizations of our youth for what arguably is age-appropriate, even if misguided behavior.

295. Elizabeth Englander, *Stop Demonizing Teen Sexting. In Most Cases, It's Completely Harmless*, WASH. POST (Nov. 7, 2014), https://www.washingtonpost.com/posteverything/wp/2014/11/07/stop-demonizing-teen-sexting-in-most-cases-its-completely-harmless/?utm_term=.8e02be2c9867 [<https://perma.cc/GQ6D-ZJK6>].

296. Patricia Reaney, *Sexting Common Behavior Among U.S. Teens*, REUTERS (July 2, 2012), <https://www.reuters.com/article/sexting-teens-study/sexting-common-behavior-among-u-s-teens-study-idUSL2E8I26PF20120702> [<https://perma.cc/77A8-2KXB>].

297. Madigan & Temple, *supra* note 19 (discussing a campaign launched called “sexts are porn” which was “targeted at students aged 12 to 17” and warned of dangers of sexting).

Mitchell Hamline Law Review

The Mitchell Hamline Law Review is a student-edited journal. Founded in 1974, the Law Review publishes timely articles of regional, national and international interest for legal practitioners, scholars, and lawmakers. Judges throughout the United States regularly cite the Law Review in their opinions. Academic journals, textbooks, and treatises frequently cite the Law Review as well. It can be found in nearly all U.S. law school libraries and online.

mitchellhamline.edu/lawreview

MH

MITCHELL | HAMLINE

School *of* Law

© Mitchell Hamline School of Law
875 Summit Avenue, Saint Paul, MN 55105
mitchellhamline.edu