

SEX, CELLS, AND SORNA: APPLYING SEX OFFENDER
REGISTRATION LAWS TO SEXTING CASES

TABLE OF CONTENTS

INTRODUCTION	1718
I. THE SEXTING EPIDEMIC	1720
<i>A. Sexting Consequences</i>	1722
<i>B. Legislative Responses</i>	1724
<i>C. Sexting Prosecutions</i>	1725
<i>D. Child Pornography Laws and Sexting</i>	1728
<i>E. Shifting the Focus of the Debate</i>	1728
II. THE ADAM WALSH ACT AND SORNA	1729
<i>A. Background of the Adam Walsh Act and SORNA</i>	1729
<i>B. The Three Tiers</i>	1731
III. SORNA IN SEXTING CASES	1732
<i>A. Juvenile Registration</i>	1732
<i>B. Statutory Analysis of SORNA's Registration Requirements as Applied to Sexting</i>	1733
<i>C. State Speculation Regarding Juvenile Registration</i>	1734
1. <i>Virginia</i>	1734
2. <i>Pennsylvania</i>	1737
<i>D. The National Guidelines</i>	1738
<i>E. The Decision Maker: Judge or Jury?</i>	1739
IV. PROPOSED SOLUTION	1741
CONCLUSION	1743

INTRODUCTION

Three teenage girls from Wyoming County, Pennsylvania, entered the national spotlight when former District Attorney George Skumanick, Jr., threatened to prosecute them for child pornography.¹ Their offense: posing for provocative pictures.² Skumanick threatened prosecution under Pennsylvania's "sexual abuse of children" statute.³ He claimed that the girls' roles in creating two digital photographs,⁴ one showing two girls in their bras and the other showing one girl "with a white towel wrapped tightly around her body just below the breasts,"⁵ subjected them to criminal penalties. The ACLU of Pennsylvania intervened and convinced a federal court to issue a temporary restraining order to prevent Skumanick from filing charges.⁶ Skumanick appealed, making *Miller* the first federal case concerning the phenomenon of sexting.⁷ The Third Circuit affirmed the injunction, stating that "the District Attorney has failed to present any semblance of probable cause" for prosecuting the minors for possession and distribution of child pornography.⁸ The court's ruling, however, leaves many unanswered questions regarding the application of child pornography laws to sexting cases.

1. *Miller v. Skumanick*, 605 F. Supp. 2d 634, 637 (M.D. Pa. 2009).

2. *See id.* at 638.

3. 18 PA. CONS. STAT. ANN. § 6312(d) (West Supp. 2010) ("(1) *Any person* who intentionally views or knowingly possesses or controls any ... photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.") (emphasis added).

4. Complaint at 2, *Miller*, 605 F. Supp. 2d 634 (No. 3:09cv540-JMM) [hereinafter *Miller* Complaint].

5. *Id.*

6. *Miller*, 605 F. Supp. 2d at 637, 647.

7. Nathan Gorenstein, *Federal Court in Phila. Weighs 'Teen Sexting' Case*, ALL BUSINESS, Jan. 15, 2010, <http://www.allbusiness.com/print/13736425-1-22eeq.html>.

8. *Miller v. Mitchell*, 598 F.3d 139, 153 (3d Cir. 2010).

Sexting, a combination of the words “sex” and “texting,”⁹ has sparked a national debate regarding the appropriate response to the trend. Partially fueling this debate is the concern that, presuming the pictures involved in sexting offenses meet the state’s statutory definition of child pornography, persons engaging in sexting are subject to prosecution under the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act)¹⁰ and the Sex Offender Registration and Notification Act (SORNA).¹¹ SORNA requires registration if the sexual offense is “comparable to or more severe than” specified offenses,¹² yet it provides no guidance as to whom makes this determination.

This Note will argue that the determination of whether a sexting offense passes the comparison test is a question of fact that a jury should decide. Part I will provide background information on the sexting debate. Part II will explain the statutory requirements of the Adam Walsh Act and SORNA. Part III will address the application of SORNA to sexting cases, and Part IV will argue that the comparison test involves a question of fact that a jury should determine at trial.

9. The term “sexting” has been criticized for both its sensationalism and vagueness. See Mary Graw Leary, *The Right and Wrong Responses to ‘Sexting,’* PUB. DISCOURSE: ETHICS, L. & COMMON GOOD, May 12, 2009, <http://www.thepublicdiscourse.com/2009/05/227>; see also Mary Graw Leary, *Sexting or Self-Produced Child Pornography? The Dialog Continues—Structured Prosecutorial Discretion Within a Multidisciplinary Response*, 17 VA. J. SOC. POL’Y & L. 486, 487, 491-96 (2010) [hereinafter Leary, *Structured Prosecutorial Discretion*]. For the purposes of this Note, the term sexting will refer to “the practice of sending ... sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular telephones.” *Miller*, 605 F. Supp. 2d at 637 (citation and quotation omitted). Any particular incident of sexting will be presumed to be consensual unless otherwise indicated.

10. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified in scattered sections of 18 and 42 U.S.C.).

11. Sex Offender Registration and Notification Act, Pub. L. No. 109-248, 120 Stat. 590 (2006) (codified as amended in scattered sections of 18 and 42 U.S.C.).

12. 42 U.S.C. § 16911 (2006). Whether an offense is “comparable to or more severe than” the “threshold offenses” will be referred to in this Note as the “comparison test.”

I. THE SEXTING EPIDEMIC

From Miley Cyrus and Vanessa Hudgens¹³ to *Law and Order: SVU*,¹⁴ sexting is increasingly a part of popular culture.¹⁵ Teens and young adults around the world are involved in sexting.¹⁶ The coverage of the sexting debate extends from prominent legal scholars' websites¹⁷ to popular gossip blogs.¹⁸

A December 2008 study from the National Campaign to Prevent Teen and Unplanned Pregnancy revealed that 20 percent of thirteen- to nineteen-year-olds have "sent [or] posted nude or semi-nude pictures or videos of themselves," and 39 percent have sent or posted "sexually suggestive messages" via text, e-mail, or instant message.¹⁹ A December 2009 study by the Pew Research Center, however, reported that only 4 percent of twelve- to seventeen-year-olds who own cell phones sent "a sexually suggestive nude or nearly-nude photo or video of themselves to someone else."²⁰ The study also noted the possibility of underreporting. Because sexting has "a relatively high level of social disapproval," students may be unwilling to admit their participation.²¹ The discovery of sexting's

13. Dan Herbeck, *Exposed Stars Send Wrong Message*, BUFF. NEWS, Jan. 25, 2009, at A1.

14. *Law & Order, Special Victims Unit: Crush* (NBC television broadcast May 5, 2009).

15. The popular website, Texts From Last Night, credits "a common disgust for all the negativity surrounding the 'sexting' phenomenon" as one of the reasons for the creation of the site, which publishes late night text messages. About Texts From Last Night, <http://textsfromlastnight.com/About-Texts-From-Last-Night.html> (last visited Feb. 18, 2011).

16. See, e.g., Penny Spiller, *Alarm Bells Ring over "Sexting,"* BBC, May 15, 2009, <http://news.bbc.co.uk/2/hi/americas/8043490.stm>; Elise Vincent, *Le Sexe sur SMS, Nouveau Jeu Dangereux des Adolescents*, LE MONDE (Fr.), Aug. 20, 2009.

17. See, e.g., Posting of Douglas A. Berman to Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2009/03/the-many-fascinating-legal-and-social-issues-swirling-around-sexting.html (Mar. 30, 2009, 09:47 EST); Posting of Howard Wasserman to PrawfsBlawg, <http://prawfsblawg.blogspot.com/2009/03/on-defining-sexting-and-moral-panics.html> (Mar. 30, 2009, 07:01 EST).

18. See, e.g., Sadie Stein, *Teen Girl Panel: "Sexting" Panic Is Overblown*, JEZEBEL, Feb. 24, 2009, <http://jezebel.com/5159617/>.

19. NAT'L CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS 1 (2008), http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf [hereinafter SEX AND TECH].

20. AMANDA LENHART, PEW RESEARCH CENTER, TEENS AND SEXTING 4 (2009), http://www.pewinternet.org/~media/Files/Reports/2009/PIP_Teens_and_Sexting.pdf.

21. *Id.* at 4 n.10.

pervasiveness has provoked what one commentator called a “full-scale freakout.”²² Parents, educators, commentators, and legislators have reacted strongly to the discovery of teens sending sexually explicit pictures via cell phone.²³ The combination of “teenagers’ age-old sexual curiosity, notoriously bad judgment[,] and modern love of electronic sharing”²⁴ has created a situation that has left many parents feeling powerless.²⁵ Their reaction is a mixture of anger over the prosecution of what some people perceive to be merely “kids being kids” and fear over the possible long-term consequences of prosecuting sexting as a sex crime.²⁶

A variety of factors prompt this visceral reaction to sexting. Some have reacted to what appears to be a slight gender gap in the treatment of sexting cases. Although the numbers indicate roughly the same amount of sexting behavior between the genders—36 percent of women and 31 percent of men age twenty to twenty-six have sent or posted “nude or semi-nude images of themselves”²⁷—there is still a perception that girls are more vulnerable than boys. Sixty-four percent of the teens and young adults surveyed by the National Campaign to Prevent Teen and Unplanned Pregnancy believed that “[g]irls have to worry about privacy (of sexy messages and pictures [or] video) more than guys do.”²⁸ It has been suggested that prosecutors “may be more interested in policing female sexuality than protecting the juveniles in [their] jurisdiction[s]” from real child predators.²⁹ Proponents of this theory point out that the subjects of

22. Errol Louis, Editorial, *Sexting Spawns New Witch Hunt*, N.Y. DAILY NEWS, Apr. 23, 2009, at 31.

23. Sara Jacobson, *The Ramifications of Criminalizing Teen Sexting*, UPON FURTHER REVIEW, July 7, 2009, <http://uponfurtherreview.philadelphiabar.org/page/Article?articleID=9f87fccc-dfa3-4a7e-8443-4e2c11194a0d> (“The phenomenon has created a media frenzy, parental panic, and ultimately a moral conundrum for the educational system and the courts.”).

24. Riva Richmond, *Sexting May Place Teens at Legal Risk*, N.Y. TIMES, Mar. 26, 2009, <http://gadgetwise.blogs.nytimes.com/2009/03/26/sexting-may-place-teens-at-legal-risk/>.

25. Mary McCarty, Commentary, *Grieving Parents Want Appropriate Sexting Penalty*, DAYTON DAILY NEWS (Ohio), Apr. 26, 2009, at A8.

26. *See id.*

27. SEX AND TECH, *supra* note 19, at 3.

28. *Id.* at 15.

29. Hannah Geyer, *Sexting—The Ineffectiveness of Current Law in Addressing the Phenomenon*, A.B.A. JUV. JUST. E-NEWSL., June 2009, http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjust_newsletterjune

the photos are often prosecuted whereas the people receiving and forwarding the pictures are not.³⁰ They also note that the subjects are charged with more severe offenses than the recipients.³¹ Aside from this perceived gender inequity,³² sexting carries a variety of consequences for minors engaging in the practice.

A. Sexting Consequences

Although the reactions to the sexting “epidemic” may be overblown,³³ there are real social and legal consequences to sexting that partially justify the concerns.³⁴ First, nothing is private in the technology age.³⁵ The capability of modern phones to send instantaneous messages enables what was intended to be a private message to be forwarded to anyone, including “a parent, teacher, or potential employer ..., or [it] could end up on the Internet on sites designed exclusively for sharing these types of pictures.”³⁶ Twenty-four percent of young adult women and 40 percent of young adult men admit “they have had nude or semi-nude images—originally meant

09_june09_pdfs_sexting.authcheckdam.pdf. The District Attorney in *Miller v. Skumanick*, see *supra* notes 1-8 and accompanying text, offered to forgo prosecution if the girls participated in a re-education program. *Miller* Complaint, *supra* note 4, at 11. The program’s curriculum included teaching “what it means to be a girl in today’s society, both advantages and disadvantages, and identify[ing] non-traditional societal and job roles.” *Id.* (citation and quotations omitted).

30. Jessica Blanchard, *Cheerleaders’ Parents Sue in Nude Photos Incident*, SEATTLE POST-INTELLIGENCER, Nov. 21, 2008, http://www.seattlepi.com/local/388940_bothell22.html (citing attorney Matthew King as saying “it was troubling that the [female] teens were punished, but the football players and other students ... who sent or received the texts were not”).

31. See Mike Bruner, “Sexting” Surprise: Teens Face Child Porn Charges, MSNBC, Jan. 15, 2009, <http://www.msnbc.msn.com/id/28679588/> (“The female students ... [who took the pictures], all 14- or 15-years-old, face charges of manufacturing, disseminating or possessing child pornography while the boys, who are 16 and 17, face charges of possession.”); see also Geyer, *supra* note 29.

32. Even though the gender issue warrants further discussion, it is outside the scope of this Note.

33. Stein, *supra* note 18.

34. See generally Berman, *supra* note 17.

35. See Brian Kane & Brett T. Delange, *A Tale of Two Internets: Web 2.0 Slices, Dices, and Is Privacy Resistant*, 45 IDAHO L. REV. 317, 332 (2009) (“The prevalence of social networking users ... creates a situation in which the personal privacy of youth is often willingly and eagerly sacrificed.”).

36. Geyer, *supra* note 29.

for someone else—shared with them.”³⁷ Students from Parkland High School in Allentown, Pennsylvania, learned this the hard way when pictures depicting students, either naked or engaging in a sexual act, were circulated to approximately forty students in the school.³⁸ Similarly, a teenage girl and her minor boyfriend in Florida were charged with the production of child pornography for taking pictures of themselves “naked and engaged in sexual behavior.”³⁹ Although the pictures were never shared with anyone else,⁴⁰ the court upheld the judgment of delinquency against the girl despite her argument that her actions were protected by a right to privacy.⁴¹ The court found that there was no reasonable expectation of privacy in the photographs, as minors “have no reasonable expectation that their relationship will continue and that the photographs will not be shared with others intentionally or unintentionally.”⁴² The court further justified its decision on the grounds that these kinds of photographs would have value to people trafficking in child pornography.⁴³

In addition to the privacy concerns associated with sexting,⁴⁴ teens whose pictures are spread among their peers often suffer severe emotional trauma. The Parkland High School students found themselves the subject of a Facebook group entitled: “Parkland ... where porn stars are born.”⁴⁵ Sexting has been a contributing factor in at least two teen suicides. Eighteen-year-old Jessica Logan’s boyfriend passed around naked pictures of her to several class-

37. SEX AND TECH, *supra* note 19, at 3. The authors define “young adults” as men and women between ages twenty and twenty-six. *Id.* at 1.

38. Brian Callaway, *DA to Parkland High Students: Delete Cell Phone Porn or Else*, MORNING CALL (Allentown, Pa.), Jan. 24, 2008, at A1.

39. *A.H. v. State*, 949 So. 2d 234, 235 (Fla. Cir. Ct. 2007).

40. *Id.* at 236.

41. *Id.* at 239.

42. *Id.* at 237.

43. *Id.*

44. The seizure of students’ cell phones by school officials, as state actors, additionally raises Fourth Amendment concerns. See Letter from Jeffrey M. Gasmol, Legal Director, ACLU of Ohio Foundation, Inc., to the Ohio School Board Association (Oct. 21, 2009), available at <http://www.acluohio.org/issues/juvenilejustice/osbacellPhoneletter.pdf> (citing *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)). This constitutional issue is outside the scope of this Note.

45. Associated Press, *Pornographic Photos, Video of 2 High School Girls Spread by Cell Phone*, FOX NEWS, Jan. 25, 2008, <http://www.foxnews.com/story/0,2933,325508,00.html>.

mates.⁴⁶ She committed suicide after enduring weeks of harassment from her peers.⁴⁷ Hope Witsell, thirteen, also committed suicide after being taunted by other students for the naked picture she sent to a classmate who distributed the picture to others.⁴⁸

B. Legislative Responses

Some states have addressed these issues by passing legislation that specifically targets sexting. Vermont, for example, passed a law in the summer of 2009 decriminalizing sexting:⁴⁹ “Vermont teenagers who are caught sexting will be adjudicated delinquent, and the process will move forward in family court as a juvenile delinquency proceeding.”⁵⁰ New Jersey, Ohio, and Pennsylvania currently have legislation pending to enact similarly reduced punishments.⁵¹ Some commentators have decried the move as “legalizing

46. Cindy Krantz, *Family Wants Tougher Laws: Sexting Suicide*, CINCINNATI ENQUIRER, Mar. 22, 2009, at A1.

47. *Id.* In response to this tragedy, Ohio State Representative Ronald Maag sponsored a bill to clarify the legal consequences of sexting. See Press Release, Ronald Maag, Ohio State Representatives Maag and Schuler Introduce Legislation to Address “Sexting” Issue (Apr. 13, 2009) (on file with author) (“The legislation would make the creation, exchange and possession of nude materials between minors by a telecommunications device a misdemeanor of the first degree. Additionally, any minors *that show themselves in a state of nudity* through text message may be charged with the same penalty.”) (emphasis added); see also *Hearing on H.B. 132 Before the H. Crim. Justice Comm.*, 128th Gen. Assem., Reg. Sess. (Ohio 2009) (testimony of Rep. Maag, sponsor of H.B. 132) (on file with author) [hereinafter Maag Testimony] (“House Bill 132 brings needed balance to Ohio law to hold teenagers accountable for their actions, without having to charge them as sexual offenders and will raise awareness for how serious and common ‘sexting’ has become.”).

48. Michael Inbar, *‘Sexting’ Bullying Cited in Teen’s Suicide*, TODAY, Dec. 2, 2009, http://today.msnbc.msn.com/id/34236377/ns/today-today_people/.

49. See VT. STAT. ANN. tit. 13, § 2802b (2010).

50. Don Corbett, *Let’s Talk About Sext: The Challenge of Finding the Right Legal Response to the Teenage Practice of “Sexting,”* J. INTERNET L., Dec. 2009, at 3, 6.

51. In New Jersey, see A.B. 1561, 214th Leg., 2d Sess. (N.J. 2011); S.B. 2700, 214th Leg., 2d Sess. (N.J. 2011). In Ohio, see H.B. 132, 128th Leg., Reg. Sess. (Ohio 2009). In Pennsylvania, see H.B. 2189, 194th Leg., Reg. Sess. (Pa. 2010); S.B. 1121, 193d Leg., Reg. Sess. (Pa. 2009). See also Nat’l Conference of State Legislatures, *Sexting Legislation 2010*, <http://www.ncsl.org/default.aspx?tabid=19696> (last visited Feb. 18, 2011); Nat’l Conference of State Legislatures, *Sexting Legislation 2009*, <http://www.ncsl.org/default.aspx?tabid=17756> (last visited Feb. 18, 2011). As of the publication of this Note, the New Jersey General Assembly’s bill, authorizing the creation of an educational program for sexting minors to complete in lieu of prosecution, was awaiting the passage of the Senate bill and governor’s signature. See Megan DeMarco, *N.J. Lawmakers Approve Education Programs For Teens*

the production of child pornography.”⁵² Others have seen it as an appropriate method of lessening the aftereffects of misbehavior.⁵³ Until these states sign these bills into law to clarify the legal consequences of sexting, they must confront the dilemma posed by prosecutions of sexting offenses under child pornography laws.⁵⁴

C. Sexting Prosecutions

The most widespread concern over sexting is the prosecution of sexters under state and federal child pornography laws. Many commentators, including the mother of the girl for whom Megan’s Law is named, have argued that education is the key to addressing sexting.⁵⁵ Others respond that “sexting is just as damaging [as traditional child pornography] and could be a stepping stone to other sexual offenses.”⁵⁶ These commentators thus maintain that sexting must be prosecuted just like any other instance of child pornography.⁵⁷

In Pennsylvania, Lehigh County District Attorney James Martin threatened to prosecute any Parkland student who failed to delete the offending pictures.⁵⁸ This is not just an empty threat: prosecutions for sexting under child pornography laws have occurred

Caught ‘Sexting,’ NJ.COM, Mar. 15, 2011, http://www.nj.com/news/index.ssf/2011/03/nj-lawmakers_approve_education.html.

52. iCare, ‘Safe Sexting’—Permission over Principle (Apr. 16, 2009), <http://www.purehope.net/icareNewsDetail.asp?id=604>.

53. See, e.g., Maag Testimony, *supra* note 47 (“[A] misdemeanor charge will still be enough to let young kids know that this behavior is not appropriate.”).

54. See, e.g., *id.* (indicating that, until Ohio passes a law specifically targeting sexting between minors, a minor caught sexting can be charged with a felony of the second degree and will acquire a sex offender status).

55. See, e.g., ‘Megan’s Law’ Mom Criticizes ‘Sexting’ Charges, NPR, Mar. 26, 2009, <http://www.npr.org/templates/story/story.php?storyId=102399198>. Megan’s Law is a law requiring publication of information about registered sex offenders. Megan’s Law Search, <https://www.meganslaw.com> (last visited Feb. 18, 2011).

56. Scott A. Johnson, *Masking a Sex Offense: When a Non-Sex Crime Really Is a Sex Crime*, FORENSIC EXAMINER, Fall 2009, at 46, 48.

57. Gregory Sullivan, Editorial, *By Any Other Name, It’s Still Child Pornography*, TIMES (Trenton, N.J.), Apr. 3, 2009, at A13 (“A great deal is at stake, which is why the prosecution for child pornography is justified. The seductive combination of omnipresent technology and pornography must be checked by the force of the criminal law.”).

58. Callaway, *supra* note 38.

throughout the country.⁵⁹ Three sexting middle school students from Washington, for example, were “formally charged ... with a single count of dealing in depictions of a minor engaged in sexually explicit conduct.”⁶⁰

For minors who are convicted or adjudicated delinquent, appellate courts have been willing to uphold the verdicts. The Iowa Supreme Court, for example, upheld the conviction of Jorge Canal, Jr., for sending a fourteen-year-old female friend a picture of his erect penis “after [the girl] asked him to send a photograph of his penis three or four times.”⁶¹ For “knowingly disseminating obscene material to a minor,”⁶² Canal is currently listed on the Iowa Sex Offender Registry.⁶³

In Florida, Phillip Alpert was convicted of transmitting child pornography⁶⁴ after he forwarded naked pictures of his ex-girlfriend to his friends.⁶⁵ Alpert registered as a sex offender, “lost friends, was kicked out of school, [and] he [could not] even move in with his dad because his dad live[d] near a school.”⁶⁶ Alpert commented: “You [can] find me on the registered sex offender list next to people who have raped children [and] molested kids You think child pornography, you think 6-year-old, 3-year-old little kids who can’t think for themselves, who are taken advantage of. That really

59. See Susan L. Pollet, *Teens and Sex Offenses: Where Should the Law Draw the Line?*, 240 N.Y.L.J. 4 (2009) (listing various grounds for prosecutions for sexting).

60. Jeremy Pawloski, *Three Lacey Teens Face Felony ‘Sexting’ Charges*, NEWS TRIB. (Tacoma, Wash.), Jan. 30, 2010. These charges were subsequently reduced to misdemeanor phone harassment. Associated Press, *Felony ‘Sexting’ Charges Reduced Against Lacey Teens*, NEWS TRIB. (Tacoma, Wash.), Feb. 18, 2010.

61. *State v. Canal*, 773 N.W.2d 528, 529 (Iowa 2009).

62. *Id.*

63. See Iowa Sex Offender Registry, <http://www.iowasexoffender.com/registrator/8407> (last visited Feb. 18, 2011); see also Grant Schulte, *Iowa Court Upholds ‘Sexting’ Conviction*, USATODAY, Sept. 18, 2009, http://www.usatoday.com/news/nation/2009-09-18-iowa-sexting_N.htm; *infra* Part II.B (discussing sexual offender tiers).

64. “[A]ny person ... who knew or reasonably should have known that he or she was transmitting child pornography ... commits a felony of the third degree.” FLA. STAT. ANN. § 847.0137(2) (West 2010). This is also the statute under which A.H. was adjudicated delinquent. See *A.H. v. State*, 949 So. 2d 234 (Fla. Cir. Ct. 2007); see also *supra* notes 39-43 and accompanying text.

65. Mike Galanos, *Commentary: Is ‘Sexting’ Child Pornography?*, CNN, Apr. 8, 2009, <http://www.cnn.com/2009/CRIME/04/08/galanos.sexting/index.html>.

66. *Id.*

wasn't the case."⁶⁷ Although many would agree that Alpert's offense is closer to the kind of offenses child pornography laws were designed to combat⁶⁸—what one commentator refers to as “secondary” or “downstream” sexting⁶⁹—others would still argue that a form of punishment with fewer life-long consequences is a more appropriate penalty.⁷⁰

At the federal level, the Third Circuit's decision in *Miller v. Mitchell* did not resolve the many questions regarding the tension between criminal liability for sexting and the First Amendment, disappointing many.⁷¹ The court noted that, because “appearing in a photograph provides no evidence as to whether that person possessed or transmitted the photo,” there was no probable cause to prosecute the case as a possession or distribution case.⁷² The court, however, did not completely foreclose the possibility of prosecution, saying that “[t]he District Court may revisit this determination at a later date, and the District Attorney is free to move to vacate the injunction if he thinks he has secured probable cause.”⁷³

67. Deborah Feyerick & Shelia Steffen, ‘Sexting’ Lands Teen on Sex Offender List, CNN, Apr. 7, 2009, <http://www.cnn.com/2009/CRIME/04/07/sexting.busts/index.html>.

68. See, e.g., Geyer, *supra* note 29.

69. Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONCEPTS 1, 30 (2009) (“[S]econdary (or downstream) incidents of sexting are those in which the sender is not the same person who took and initially transmitted the image in question The potential for harm seems greater in secondary or downstream incidents of sexting, as the initial taker/sender loses all control and power over the image in question.”).

70. See, e.g., Galanos, *supra* note 65.

71. 598 F.3d 139 (3d Cir. 2010). The plaintiffs had claimed that the threat of prosecution for failure to attend the educational program, see *supra* note 29, constituted retaliation for exercising their First Amendment right to avoid compelled speech. *Miller*, 598 F.3d at 152. The court concluded that “any prosecution would not be based on probable cause that Doe committed a crime, but instead in retaliation for Doe’s exercise of her constitutional rights not to attend the education program,” and upheld the injunction. *Id.* at 155; see also Tamar Lewin, *Court Says Parents Can Block ‘Sexting’ Cases*, N.Y. TIMES, Mar. 18, 2010, at A18 (quoting ACLU attorney Witold Walczak as stating that *Miller* “does not resolve all of the constitutional issues implicated in sexting prosecutions”); Posting of Ashby Jones to Wall Street Journal Law Blog, <http://blogs.wsj.com/law/2010/03/18/third-circuit-bans-sexting-prosecution-against-minors/> (Mar. 18, 2010, 17:14 EST).

72. *Miller*, 598 F.3d at 154.

73. *Id.*

D. Child Pornography Laws and Sexting

The cases discussed above reveal the problematic inflexibility of applying current child pornography laws to sexting cases: the girls in *Miller* face the same charges that Alpert did for completely different actions.⁷⁴ “The victim’s charge would be no different than and would carry the same penalties as the charge for the person or persons who then forwarded the picture on to their friends.”⁷⁵ Moreover, people convicted of child pornography offenses for sexting crimes face the same harsh penalties as those convicted of more traditional child pornography offenses.⁷⁶

The penalties for child pornography offenses are severe in that they have both high statutory minimum sentences and rarely permit downward departures in sentencing.⁷⁷ Alpert’s attorney said in an interview that “[c]hild pornography laws are very strict, very draconian, and the punishments are some of the most severe known in the law outside of crimes like murder.”⁷⁸ Included in these penalties are registration requirements for specified sex offenses promulgated under the Adam Walsh Act.⁷⁹

E. Shifting the Focus of the Debate

The current debate surrounding sexting has focused on whether sexting is child pornography and, correspondingly, whether it should be prosecuted as such.⁸⁰ This Note will presume that sexting

74. See *supra* notes 1-8, 64-67 and accompanying text.

75. Mathias H. Heck, Jr., *Sexting and Charging Juveniles—Balancing the Law and Bad Choices*, PROSECUTOR, Jan.-Mar. 2009, at 28-29.

76. See Robert D. Richards & Clay Calvert, *When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case*, 32 HASTINGS COMM. & ENT. L.J. 1, 12 (2009).

77. U.S. SENT’G COMM’N, HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 6 (2009), available at http://www.ussc.gov/Research/Research_Projects/Sex_Offenses/20091030_History_Child_Pornography_Guidelines.pdf (“Congress has specifically expressed an intent to raise penalties associated with certain child pornography offenses several times through directives to the Commission and statutory changes aimed at increasing the guideline penalties and reducing the incidence of downward departures for such offenses.”).

78. Richards & Calvert, *supra* note 76, at 12.

79. See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified in scattered sections of 18 and 42 U.S.C.).

80. Compare Mary Gray Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL’Y & L. 1, 6 (2007)

fulfills the statutory requirements of child pornography⁸¹ and is therefore subject to the sex offender registration requirements under SORNA. Convicted sex offenders must “register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student.”⁸² In determining if the offender is required to register and in which tier he or she belongs,⁸³ a decision maker is required to implement the comparison test.⁸⁴ This Note argues that a jury should perform the comparison test when the underlying offense is sexting.

II. THE ADAM WALSH ACT AND SORNA

A. Background of the Adam Walsh Act and SORNA

Title I of the Adam Walsh Act enacted SORNA, which requires all jurisdictions to create a sex offender registry compliant with federal standards.⁸⁵ SORNA aims to “create [a] seamless web of

(arguing that criminal prosecution of juveniles is a “viable response to juvenile self-exploitation”), and Leary, *Structured Prosecutorial Discretion*, *supra* note 9, at 551 (refining her argument to state “prosecutorial responsibility would be part of a larger multidisciplinary effort with education, prevention, and diversionary programs”), with Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL’Y & L. 505, 507 (2008) (arguing that “child protective services, backed up if necessary by the threat of criminal prosecution, is a much more appropriate way of reforming minors and protecting them”).

81. Under the assumption that sexting is child pornography, it is not protected speech under the First Amendment. *New York v. Ferber*, 458 U.S. 747, 748 (1982) (holding that child pornography is outside of the protection of the First Amendment). *But see* John A. Humbach, “Sexting” and the First Amendment, 37 HASTINGS CONST. L.Q. 433, 484 (2010) (arguing that there should be “constitutional protection for teen sexting and autopornography that occur on the teens’ own initiative”).

82. 42 U.S.C. § 16913(a) (2006).

83. *See infra* Part II.A (discussing which sex offenders are required to register); *infra* Part II.B (discussing the tiers of sex offenses under SORNA).

84. *See supra* note 12 and accompanying text.

85. 42 U.S.C. § 16912. The jurisdictions subject to SORNA include all fifty states, the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, the Northern Mariana Islands, and federally recognized Native American tribes. *Id.* § 16911(10). The term “states” will be used throughout this Note for clarity, but will encompass all jurisdictions covered under SORNA. On September 23, 2009, Ohio and the Confederated Tribes of the Umatilla Indian Reservation in Oregon became the first two jurisdictions to implement a compliant sex offender registry. Press Release, Dep’t of Justice, Office of Justice

public sex offender databases,”⁸⁶ and to establish a “national baseline for sex offender registration and notification programs ... constitut[ing] a set of *minimum* national standards and sett[ing] a floor, not a ceiling, for jurisdictions’ programs.”⁸⁷ At this floor level, SORNA does not require all persons convicted of sex offenses to register.⁸⁸ Consensual sexual activity that otherwise constitutes a sex crime, such as statutory rape, does not require registration under SORNA “if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.”⁸⁹ States may implement stricter registration requirements at their discretion.⁹⁰

Juvenile offenders are also subject to SORNA regulations despite numerous complaints filed during the administrative guideline comment period.⁹¹ Under SORNA, juveniles must register if “the offender is 14 years of age or older at the time of the offense and the offense adjudicated was *comparable to or more severe than* aggravated sexual abuse ... or was an attempt or conspiracy to commit such an offense.”⁹² Juveniles tried and convicted as adults are subject to SORNA registration regardless of age.⁹³ Determining the classes of offenders required to register is important, as SORNA “also creates new offenses directed at persons required to register, including failure to register,” making offenders “subject to stiff sentences, including in some cases consecutive mandatory mini-

Programs, Justice Department Announces First Two Jurisdictions To Implement Sex Offender Registration and Notification Act (Sept. 23, 2009), *available at* <http://www.ojp.usdoj.gov/newsroom/pressreleases/2009/SMART09154.htm> [hereinafter DOJ, SORNA Implementation].

86. DOJ, SORNA Implementation, *supra* note 85.

87. National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,046 (July 2, 2008).

88. The sex offenses subject to registration under SORNA are defined in 42 U.S.C. § 16911(5)(A).

89. *Id.* § 16911(5)(C).

90. National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. at 38,032 (“[J]urisdictions may adopt requirements ... [exceeding the SORNA requirements] in relation to such matters as: The classes of persons who will be required to register.”).

91. *Id.* at 38,030-31.

92. 42 U.S.C. § 16911(8) (emphasis added).

93. National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. at 38,050.

num sentences.”⁹⁴ Adult and juvenile offenders are divided into the three tiers, based in part on whether the offense “is comparable to or more severe than” specified offenses.⁹⁵

B. The Three Tiers

SORNA divides sex offenders into three numbered tiers.⁹⁶ These tiers determine the amount of time the offender is required to register and the minimum amount of prison time served before the offender may petition to be removed from the registry.⁹⁷ Tier I is a catchall covering those offenders who do not fit the requirements of Tier II or Tier III.⁹⁸ Tier II and III require the term of imprisonment permissible under the statute to exceed one year.⁹⁹ Because child pornography offenses generally meet the imprisonment requirement, they are most frequently classified as Tier II or Tier III offenses.¹⁰⁰

In addition to the length of imprisonment requirement, Tier II and III offenses under SORNA must meet the comparison test.¹⁰¹ Tier II offenses are defined as being “comparable to or more severe than” sex trafficking, coercion and enticement, transportation with intent to engage in criminal sexual activity, or abusive sexual contact.¹⁰² Because the threshold offenses for Tier III are more

94. Memorandum from Amy Baron-Evans & Sara E. Noonan to Defenders, Adam Walsh Act—Part II (Sex Offender Registration and Notification Act), at 1 (Nov. 20, 2006), available at http://www.fd.org/pdf_lib/adam%20walsh%20part%20ii.pdf [hereinafter Baron-Evans & Noonan II]; see also 18 U.S.C. § 2250(a).

95. 42 U.S.C. § 16911(2)-(4).

96. *Id.* § 16911.

97. *Id.* § 16915.

98. *Id.* § 16911(2).

99. *Id.* § 16911(3), (4).

100. For example, possession of child pornography, a felony of the third degree for a first offense, is punishable by up to seven years of imprisonment under Pennsylvania law. 18 PA. CONS. STAT. ANN. §§ 6312(d)(2), 106(b)(4) (West Supp. 2010). The federal child pornography statute provides for a maximum ten-year term of imprisonment for possession. 18 U.S.C. § 2252(b)(2).

101. See *supra* note 12.

102. 42 U.S.C. § 16911(3)(A). Tier II registration also may be based on offenses against a minor listed in 42 U.S.C. § 16911(3)(B). This Note will concentrate on the comparison test, however, because it forms an independent basis for liability under SORNA.

severe,¹⁰³ sexting offenses are more likely to be classified under Tier II. To adjudicate these standards, someone must decide whether the possession of nude or otherwise indecent “sexts” is comparable to these offenses. The decision regarding the comparison test becomes especially important when applied to juvenile cases.

III. SORNA IN SEXTING CASES

A. Juvenile Registration

In the conventional sexting case, sexting is consensual between two minors.¹⁰⁴ This situation presents a unique fact pattern for which SORNA has no provision—what to do when the “victim” and the “offender” are the same person. The juvenile provision requires only that the juvenile be older than fourteen and found delinquent of a comparable or more severe offense than aggravated sexual abuse.¹⁰⁵ If, as in *Miller v. Skumanick*, the prosecutor decides to prosecute a girl for producing child pornography¹⁰⁶ and she is adjudged delinquent, she will be subject to SORNA registration if the offense is regarded as fulfilling this comparison. Although the question has not been resolved in state or federal court, states have speculated as to whether juveniles adjudged delinquent of sexting offenses would be required to register under SORNA, and they have reached different conclusions.¹⁰⁷

103. A Tier III offense is comparable to “(i) aggravated sexual abuse or sexual abuse ...; or (ii) abusive sexual contact ... against a minor who has not attained the age of 13 years.” *Id.* § 16911(4)(A).

104. For example, a sixteen-year-old girl may sext her seventeen-year-old boyfriend. *See, e.g., A.H. v. State*, 949 So. 2d 234, 235 (Fla. Cir. Ct. 2007).

105. 42 U.S.C. § 16911(8). Aggravated sexual abuse is defined at 18 U.S.C. § 2241.

106. *See supra* notes 1-8 and accompanying text.

107. *See infra* Part III.C.

B. Statutory Analysis of SORNA's Registration Requirements as Applied to Sexting

The first step of statutory interpretation is: “Read the statute. Read the statute. Read the statute.”¹⁰⁸ The statutory language for SORNA provides little additional guidance to the comparison test. The plain text of SORNA merely indicates that people who are convicted or adjudged delinquent of sexting offenses will have to register if their offense is “comparable to or more severe than” the threshold offenses.¹⁰⁹

The statutory language does lead to the conclusion that the likelihood that a person would be liable under SORNA for sexting depends upon whether the alleged violator is tried as an adult or juvenile. The crimes to which adult conduct is compared are relatively less serious than the threshold offenses for juveniles. Adult conduct has to be comparable to or more severe than coercion or enticement *and* involve child pornography in order for the adult to be classified as a Tier II offender.¹¹⁰ Because their conduct necessarily involves child pornography, juveniles tried as adults would therefore have their conduct compared with only coercion and enticement, a significantly lower standard.

It is also important to remember that the crimes listed by the guidelines provide a floor for states seeking to conform to SORNA.

108. LINDA D. JELLUM, *MASTERING STATUTORY INTERPRETATION* 13 (2008) (quoting John M. Kernochnan, *Statutory Interpretation: An Outline of Method*, 3 *DALHOUSIE L.J.* 333, 338 (1976)); *see also* 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 45:1 (7th ed. 2007) (“[T]he particular language of the text is always the starting point on any question concerning the application of the law.”).

109. 42 U.S.C. §§ 16911(3), (8).

110. *Id.* § 16911(3). Coercion and enticement entails “using the mail or any facility or means of interstate or foreign commerce ... [to] knowingly persuade[,], induce[,], entice[,], or coerce[] *any individual who has not attained the age of 18 years*, to engage in prostitution or *any sexual activity for which any person can be charged with a criminal offense*, or attempts to do so.” 18 U.S.C. § 2422(b) (emphases added). Asking an underage person to send naked photos via e-mail or text would qualify under this statute:

It is a felony to solicit a minor to appear in child pornography; the penalty is the same as for producing child pornography. Therefore, if a teenager asks his underage girlfriend to send him a nude photo, he would be guilty of a crime, *even if the girlfriend refused and no photo was sexted.*

Staff Presentation to Va. State Crime Comm’n, *Sexting* 12 (Sept. 16, 2009), <http://vscc.virginia.gov/Sexting.pdf> [hereinafter *VSCC Presentation*] (emphasis added) (discussing Virginia’s solicitation of a minor law).

The guidelines repeatedly emphasize that “the inclusions and exclusions in the definition of ‘conviction’ for purposes of SORNA do not constrain jurisdictions from requiring registration by additional individuals—e.g., *more broadly defined categories of juveniles adjudicated delinquent for sex offenses*—if they are so inclined.”¹¹¹ This emphasis on minimum standards practically asks for states to make stricter standards for sex offender registration.¹¹² In an effort to seem tough on crime, the rush to comply with SORNA may lead to an abuse of prosecutorial discretion and widespread jurisdictional disparity in what is and what is not a registrable offense.¹¹³ It is not beyond the realm of possibility that a decision maker, whomever that may be, could reasonably conclude that a particularly graphic picture of a minor sent to another was sufficiently comparable to the specified offenses to warrant SORNA liability. Yet no guidance is provided as to whom makes this decision.

C. State Speculation Regarding Juvenile Registration

As the concerns over sexting are relatively new, states have come to different conclusions regarding registration requirements under SORNA. This subsection will address the assumptions and conclusions of two states that have taken opposite approaches and are thus illustrative: Virginia, which conducted a study regarding registration laws, and Pennsylvania, the location of the *Miller* case.

1. Virginia

Like many other school districts across the country, Virginia schools have already dealt with sexting teens, including “an eighth-grade girl [sending] a photo of herself ‘engaged in a sexual act’ to a 16-year-old boyfriend ... [and] a middle school student who stole a

111. National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,050 (July 2, 2008) (emphasis added).

112. *Id.* at 38,046.

113. See Jacobson, *supra* note 23 (“Part of the problem is that prosecutors in different counties treat the cases differently.... Having different consequences for kids, not because their conduct was any better or worse, but instead because of where they live, raises the question of whether justice by geography is fair.”); see also *infra* Part III.C (discussing Virginia and Pennsylvania cases).

high school student's phone and sent the naked images he found on it to the owner's mother."¹¹⁴ Fairfax County Commonwealth Attorney Raymond F. Morrogh said he was "not keen on lumping school kids in with child pornographers.... [W]e're sort of pounding a square peg into a round hole with these cases."¹¹⁵

In fall of 2010, the ACLU of Virginia succeeded in getting the charges dropped against a boy charged with the possession of child pornography after receiving nude pictures of a female classmate.¹¹⁶ Because the student was fourteen at the time he received the pictures,¹¹⁷ he would have been eligible for SORNA liability if he was convicted and the crime met the comparison test.¹¹⁸

Although the Virginia General Assembly has yet to address the sexting issue officially, the Virginia State Crime Commission (VSCC) recently studied the application of the state's child pornography laws to sexting cases.¹¹⁹ The VSCC determined that a minor taking a sexually explicit picture of himself or herself would violate Virginia's child pornography statute.¹²⁰ Virginia criminalizes images displaying "lewd exhibition of nudity, as nudity is defined in § 18.2-390."¹²¹ Because the definition of nudity includes the "state

114. Donna St. George, *Sending of Explicit Photos Can Land Teens in Legal Fix*, WASH. POST, May 7, 2009, at A1.

115. *Id.*

116. Press Release, ACLU of Virginia, Felony "Sexting" Charges Dropped Against Virginia Teen Who Received Photo (Oct. 7, 2010), available at <http://acluva.org/5763/felony-%E2%80%9Csexting%E2%80%9D-charges-dropped-against-virginia-teen-who-received-photo/>.

117. *Id.*

118. See *supra* notes 91-92 and accompanying text.

119. Olympia Meola, *Officials Consider Minors' Sexting: They Fear Changing Virginia's Laws Might Protect Pedophiles*, RICHMOND TIMES-DISPATCH, May 20, 2009, at A1. See generally VSCC Presentation, *supra* note 110. Virginia Attorney General Kenneth Cuccinelli also issued an official advisory opinion stating school officials may seize and search students' cell phones "when there is a reasonable suspicion that the student is violating the law or the rules of the school and ... the material should be brought to the attention of the appropriate law enforcement agents." 2010 Op. Va. Att'y Gen. No. 105 (Nov. 24, 2010), available at <http://www.vaag.com/OPINIONS/2010opns/10-105-Bell.pdf>.

120. VSCC Presentation, *supra* note 110, at 7 (citing VA. CODE ANN. § 18.2-374.1(B)(2) (2009)). The study also noted that "[i]f the minor is 15 or older, it is an unclassified felony carrying from 1 to 20 years," which meets the imprisonment requirement of Tier II SORNA offenses. *Id.*; see also *supra* notes 99-100 and accompanying text.

121. VA. CODE ANN. § 18.2-374.1(A). The Court of Appeals of Virginia recently held that a trial court's determination that a minor was posing in a "sultry" manner was sufficient evidence to determine that photographs of her bare breasts were lewd within the statute's meaning. *Kellison v. Commonwealth*, No. 0269-10-2, 2010 Va. App. LEXIS 455, at *5-6 (Ct.

of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a *full opaque covering*,¹²² the child would not necessarily need to be naked to violate Virginia's child pornography laws. A minor "wearing revealing lingerie" could qualify under this definition.¹²³ The VSCC further observed that "[u]nder Virginia's registration laws, [adult] producers of child pornography [and juvenile producers convicted as adults] must register for life as having committed a *sexually violent offense*,"¹²⁴ which satisfies SORNA's registration requirements.¹²⁵

Despite these observations, the VSCC concluded that juveniles merely found delinquent of these offenses would not be required to register as sex offenders under SORNA.¹²⁶ It noted that SORNA required juveniles over fourteen whom have been adjudged delinquent to register only if "[t]he offense was comparable to or more severe than 'aggravated sexual abuse,' which is defined in relevant part as engaging in a sexual act that involves actual touching."¹²⁷ The traditional sexting case does not involve physical contact between the sender and receiver at the time of the transmission. This difference between traditional sexting cases and the threshold offense of aggravated sexual abuse, the "touch factor," appears to have been the distinguishing factor to the VSCC. The VSCC presentation therefore concluded that the Adam Walsh Act did not require juveniles who engaged in sexting to be placed on a sex offender registry.¹²⁸

App. Nov. 23, 2010).

122. VA. CODE ANN. § 18.2-390(2) (emphasis added).

123. VA. STATE CRIME COMM'N, *SEXTING*, in VIRGINIA STATE CRIME COMMISSION 2009 INTERIM EXECUTIVE SUMMARY OF ACTIVITIES 11 (2010), available at [http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD192010/\\$file/RD19.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD192010/$file/RD19.pdf) [hereinafter VSCC *SEXTING*].

124. VSCC Presentation, *supra* note 110, at 12 (emphasis added).

125. 42 U.S.C. § 16915(a)(2) (2006) (mandating that Tier II sex offenders register for a minimum of twenty-five years).

126. VSCC Presentation, *supra* note 110, at 14.

127. *Id.*

128. *Id.*; see also VSCC *SEXTING*, *supra* note 123, at 13-14.

2. Pennsylvania

As in Virginia, the Pennsylvania General Assembly has not passed any legislation to address sexting.¹²⁹ Current Pennsylvania law does not require juveniles adjudged delinquent of sexual offenses to register; however, the state must start registering certain juveniles in order to comply with the Adam Walsh Act.¹³⁰ The plaintiffs in *Miller v. Skumanick* considered Pennsylvania's pending requirement to conform with the Adam Walsh Act and warned that "[t]he change [in Pennsylvania's law to comply with SORNA] would operate retroactively and apply to all juveniles over age fourteen convicted of predicate offenses, ... which means that all three plaintiff minors would on a conviction be subject to [SORNA] registration for at least ten years."¹³¹ The Juvenile Law Center (JLC) agreed with the ACLU in presuming that conviction under Pennsylvania's child pornography statute would require SORNA registration.¹³² Supporting their conclusion, the JLC cited pending legislation within the Pennsylvania Senate.¹³³ The legislation would require persons convicted of sexually abusing children to register as sex offenders for twenty-five years,¹³⁴ which as a result "would likely [place those persons] into a Tier II or Tier III categorization of sexual offenses requiring registration."¹³⁵ The JLC's assertions indicate its belief that the basis of the comparison test is the length

129. There are two sexting-related bills pending in the Pennsylvania Senate and House of Representatives as of the time of publication of this Note. See *supra* note 51.

130. 42 PA. CONS. STAT. ANN. § 6354 (West Supp. 2010); see also Neal F. Wilson, Note, *No Child Left Behind: The Adam Walsh Act and Pennsylvania Juvenile Sex Offenders*, 70 U. PITT. L. REV. 327, 333 (2008) (noting the Adam Walsh Act "would bring Pennsylvania in conformity with states that already require juvenile sex offenders to register through Megan's Law").

131. *Miller* Complaint, *supra* note 4, at 7-8. For a discussion of SORNA's retroactivity, see *infra* note 142 and accompanying text.

132. Brief of Juvenile Law Center as Amici Curiae in Support of Appellees at 27-30, *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010) (No. 09-2144) [hereinafter JLC Amici Curiae Brief]. The JLC also noted that, even supposing Pennsylvania's law did not end up requiring registration, if the plaintiffs moved to a different state, such as Ohio or Delaware, SORNA could require registration "pursuant to each state's SORNA-implementing legislation." *Id.* at 30.

133. *Id.* at 28.

134. S.B. 428, 193d Leg., Reg. Sess. (Pa. 2009).

135. JLC Amici Curiae Brief, *supra* note 132, at 28; see also *supra* Part II.B.

of imprisonment, unlike Virginia's reliance on the touch factor as the basis for comparing sexting and the threshold offenses. The differences between states' approaches and the high likelihood that juveniles will travel in interstate commerce necessitate additional guidance on the nature of the comparison test.

D. The National Guidelines

In an effort to clarify the application of SORNA, the U.S. Attorney General's Office issued national guidelines.¹³⁶ The guidelines were designed to "provide valuable implementation strategies to enhance [jurisdictions'] abilities to respond to crimes against children and adults and prevent sex offenders who have been released back into the community from victimizing others."¹³⁷ When applied to sexting cases, the guidelines still do not sufficiently specify which offenders are required to register under SORNA.

In terms of juvenile adjudications, the guidelines require registration for "only ... a defined class of older juveniles who are adjudicated delinquent for committing particularly serious sexually assaultive crimes (or attempts or conspiracies to commit such crimes)."¹³⁸ The guidelines further note that, in order for a state to have "substantial[ly] implement[ed]" SORNA, it must at a minimum register "juveniles ... who are adjudicated delinquent for committing ... offenses under laws that cover: [e]ngaging in a sexual act with another by force or the threat of serious violence; or [e]ngaging in a sexual act with another by rendering unconscious or involuntarily drugging the victim."¹³⁹

The guidelines thus indicate that juveniles convicted for sexting-related offenses would not necessarily have to register, because in the typical sexting case there is no actual or threatened violence,

136. The authority to promulgate the guidelines derives from 42 U.S.C. § 16912(b) (2006).

137. Press Release, Dep't of Justice, Office of Justice Programs, Department of Justice Announces Final National Guidelines for Sex Offender Registration and Notification (July 1, 2008) (quoting Acting Assistant Attorney General Jeffrey Sedgwick), *available at* <http://www.ojp.gov/newsroom/pressreleases/2008/smart08019.htm>.

138. National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,050 (July 2, 2008).

139. *Id.*

nor any forced coercion.¹⁴⁰ However, the plain language of SORNA says the offense has to be only *comparable* to, or colloquially, just as bad as, these offenses in order to require registration.¹⁴¹ Someone will have to determine if sexting is as bad as the threshold offenses, a fact that the guidelines fail to address.

As should now be readily apparent, the question as to whom is required to register under SORNA is the subject of much debate. Not only do states have to consider future convictions, but they must address past ones as well. Due to SORNA's retroactivity, even convictions predating a state's compliance with SORNA will require registration.¹⁴²

E. The Decision Maker: Judge or Jury?

SORNA does not explicitly say whether the comparison test is to be done by a judge or a jury; however, the statute indicates that the decision is made after conviction by an "appropriate official."¹⁴³ The

140. *See id.*; *see also supra* Part III.C.1 (discussing a similar determination by the VSCC).

141. 42 U.S.C. § 16911(8).

142. The Attorney General's Office has affirmed that "SORNA's requirements took effect when SORNA was enacted on July 27, 2006, and they have applied since that time to all sex offenders, including those whose convictions predate SORNA's enactment." National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. at 38,046. Furthermore, the guidelines state that

[t]he application of the SORNA standards to sex offenders whose convictions predate SORNA creates no ex post facto problem "because the SORNA sex offender registration and notification requirements are intended to be non-punitive, regulatory measures adopted for public safety purposes, and hence may validly be applied (and enforced by criminal sanctions) against sex offenders whose predicate convictions occurred prior to the creation of these requirements."

Id. (quoting Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8896 (Feb. 28, 2007) (codified at 28 C.F.R. 72.3 (2007))); *see also* Smith v. Doe, 538 U.S. 84 (2003), *reh'g denied*, 538 U.S. 1009 (2003) (holding SORNA does not violate the Ex Post Facto Clause of the U.S. Constitution); United States v. Shenandoah, 595 F.3d 151 (3d Cir. 2010) (same). *But see* United States v. Juvenile Male, 581 F.3d 977 (9th Cir. 2009), *modified*, 590 F.3d 924 (9th Cir. 2010) (holding the retroactive application of SORNA's juvenile registration requirement violates the Ex Post Facto Clause), *petition for cert. filed*, 2010 WL 531758 (U.S. Feb. 9, 2010) (No. 09-940). The U.S. Supreme Court certified a question regarding Montana's registration laws to the Montana Supreme Court in order to determine if the question was moot and not ripe for Supreme Court review. United States v. Juvenile Male, 130 S. Ct. 2518, 2519 (2010).

143. 42 U.S.C. § 16917(a) ("An appropriate official shall [inform the offender of the duty to register], shortly before release of the sex offender from custody, or, if the sex offender is

use of the phrase “appropriate official” indicates that a judge likely decides if the offense requires registration. If this is the case, then what criteria does the judge use to make the comparison?

The guidelines say only that “jurisdictions generally may premise the determination *on the elements of the offense*, and *are not required to look to underlying conduct* that is not reflected in the offense of conviction.”¹⁴⁴ If a judge followed this guideline, the twenty-one-year-old with pictures of his sixteen-year-old girlfriend will be punished *exactly* the same as a pedophile with traditional child pornography. Likewise, the sixteen-year-old taking pictures of herself and sending them to her boyfriend would be punished exactly the same as a person taking pornographic pictures of minors and distributing them to others. Only the elements of the crimes—possession or production and distribution of child pornography—would factor into the judge’s decision; the individual nature of the offense would be excluded.¹⁴⁵ If a state statute defines child pornography offenses as per se sexually violent,¹⁴⁶ applying the elements of the guidelines will result in more sexting offenders registering under SORNA. This seems undesirable, as providing “individualized justice is ‘firmly entrenched in American law,’”¹⁴⁷ and cannot be accomplished by a judge looking solely at the elements of an offense.

The present system of merely requiring an “appropriate official,”¹⁴⁸ most likely a judge, to make the determination will also lead to “justice by geography.”¹⁴⁹ As the elements of eligible offenses vary from state to state, what may not be a sex offense in

not in custody, immediately after the sentencing of the sex offender, for the offense giving rise to the duty to register.”)

144. National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. at 38,053 (emphasis added).

145. Vermont criticized the Adam Walsh Act on this basis, saying the Act’s mandate that “risk determination be based solely on an offender’s crime of conviction, not on an actuarial risk assessment score” was flawed because, “[a]ccording to the most recent research, using crime of conviction as the primary method of determining offender risk is a far less reliable predictor of reoffense than is the use of actuarial tools.” 2009 Vt. Acts & Resolves 58 § 1(d).

146. See VSCC Presentation, *supra* note 110, at 12; see also *supra* text accompanying note 124.

147. *McCleskey v. Kemp*, 481 U.S. 279, 312 (1986) (quoting 2 WAYNE LAFAVE & JEROLD ISRAEL, CRIMINAL PROCEDURE § 13.2(a) (1984)).

148. 42 U.S.C. § 16917(a).

149. *Jacobson*, *supra* note 23.

Pennsylvania nevertheless may be one in Delaware. If a juvenile moves from Pennsylvania to Delaware after being convicted of such an offense, he or she will have to register under Delaware law.¹⁵⁰ This inconsistency created by failing to consider the individual circumstances conflicts with SORNA's stated purpose of creating a "national baseline of sex offender registration and notification programs."¹⁵¹ There is a strict SORNA noncompliance penalty, and jurisdictional ambiguity increases the risk of noncompliance, so Congress needs to address how the determination of the comparison factor is to be made. In the interests of justice, a jury should make that determination.

IV. PROPOSED SOLUTION

In order to protect teenagers and young adults engaging in consensual sexting from undeserved SORNA liability, Congress should amend SORNA to require a jury determination as to whether conviction would require SORNA registration. A jury is in a better position to determine at trial whether the sexting offense is comparable to the threshold offenses.

A jury determination does pose problems, however. A jury may be composed of people disgusted with the practice of sexting who may vote for conviction regardless of the circumstances. Moreover, teenagers accused of sexting would be required to describe their conduct to several people instead of just one judge. Empanelling a jury may also be expensive for states, and the juries—both among states and among communities within a single state—may permit varying degrees of acceptable behavior.

Even though the "justice by geography" problem would still be present,¹⁵² jurors are closer to the community and can engage with the facts for case-by-case determination rather than merely looking at the elements of the offense postconviction. Moreover, the prosecution would bear the burden of convincing an entire jury as opposed to a single judge, which may influence the prosecutor's

150. *See supra* note 132 and accompanying text.

151. The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,046 (July 2, 2008).

152. Jacobson, *supra* note 23.

decision whether to prosecute in the first place. Juries may act as a check on prosecutorial discretion, as juries “can correct overinclusive general criminal laws in a way that judges cannot.”¹⁵³ Some have argued that judges’ frequent exposure to the criminal justice system may cause them to “become desensitized to the enormity of what is at stake in a criminal proceeding because it so familiar.”¹⁵⁴ The jury thus provides “a fresh set of eyes and brings no institutional bias to its vision of the facts.”¹⁵⁵ Although theoretically the standards by which judges make their decisions could be changed by the elements under the guidelines or the underlying facts, “[t]he jury’s enshrinement in the Constitution and the powers it has retained in criminal cases for 200 years reflects the judgment that any risk of disparity from jury involvement in the criminal justice process is outweighed by the benefits the jury brings.”¹⁵⁶

Moreover, the right to a jury of one’s peers is fundamental in American law, providing defendants “an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.”¹⁵⁷ Juries may offer a “common-sense judgment,” as opposed to “the more tutored but perhaps less sympathetic reaction of the single judge.”¹⁵⁸ And note that a jury determination would not exclude all SORNA liability. Through a thorough examination of the facts and underlying conduct, a jury could conceivably determine the pictures to be just as bad as the threshold offenses, depending on the community and the contents of the sexts.

A strong argument also exists that a jury determination is legally required for convicting transient offenders for failures to register. The new failure to register law under SORNA targets persons required to register under SORNA who fail to re-register after moving in interstate commerce,¹⁵⁹ such as juveniles crossing state lines to attend college. Because an element of this new offense is whether

153. Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 77 (2003).

154. *Id.* at 72.

155. *Id.*

156. *Id.* at 77.

157. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

158. *Id.*

159. 18 U.S.C. § 2250(a) (2006).

a person must register under SORNA, it is a question of fact whether the registrable offense—sexting—is equal to or more severe than the threshold offenses.¹⁶⁰ The Supreme Court has previously held that “[t]he defendant has the ‘right ... to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts.’”¹⁶¹ Judges may “instruct the jury as to what the law is, *i.e.*, what SORNA says is a ‘sex offense,’ ... but cannot instruct the jury that the offense *is* covered by SORNA or that the defendant *is* required to register.”¹⁶² States must then prove beyond a reasonable doubt that the offense was “comparable to or more severe than” the listed offenses.

A jury decision based on the law and facts of the case, rather than just the elements, would enable the distinction between sexting and real child pornography to shine through.

CONCLUSION

With the advent of the Internet, Congress rushed to address the growing problem of new technology being used to exploit children in the production and dissemination of child pornography.¹⁶³ The growth of cell phone use among teens and young adults opened up a new method for them to explore their sexuality, and once again technology has outpaced the law.¹⁶⁴ In spite of—or perhaps because of—its popularity, sexting is a serious issue that legislatures cannot ignore. Many of the calls for sexting prosecutions stem from fear that “[i]f the offender engaged in a sex or sex-related crime and is not convicted of a sex offense, then the offender slips through the legal system and may continue to sexually offend.”¹⁶⁵ Sexting, however, “generally involve[s] only normal adolescent self expres-

160. Baron-Evans & Noonan II, *supra* note 94, at 18.

161. *Id.* (quoting *United States v. Gaudin*, 515 U.S. 506, 513 (1995)).

162. *Id.*

163. 144 CONG. REC. 10,891 (June 3, 1998) (statement of Rep. Lampson) (“[The Internet’s] vast reach is unfortunately also being used to hurt our children. Child pornography has resurfaced with a vengeance with the advent of computer technology.”).

164. 152 CONG. REC. 15,326 (July 20, 2006) (statement of Sen. Hatch) (“Every day we hear new stories about how pornographers and predators take advantage of new technology to exploit children in new ways. It is very difficult for legislatures even to keep up.”).

165. Johnson, *supra* note 56, at 47.

sion without the exploitative circumstances that are implicit in the production of conventional child pornography.”¹⁶⁶ Punishing consensual sexting in the same way as traditional child pornography offenses conflicts with the interest of justice in avoiding punishing dissimilar crimes the same.¹⁶⁷ Traditional sexting offenders “lack[] virtually all of the characteristics of a child predator (at which Adam Walsh is purportedly aimed), ... [and] the Act imposes a ‘grossly unfair’ sentence as applied to [their] particular case.”¹⁶⁸ Legislation crafted on the state level to prevent SORNA registration may be an insufficient remedy.

Vermont’s new sexting law is specially constructed to protect minors and adults who engage in consensual sexting.¹⁶⁹ The statute provides that juveniles prosecuted under the law “shall not be subject to the requirements of subchapter 3 of chapter 167 of this title (sex offender registration)” for their first sexting offense.¹⁷⁰ The adult punishment provision for possession of sext messages from a minor provides an additional layer of protection from SORNA. The term of imprisonment for possessing the images is a maximum of six months.¹⁷¹ This term is less than the minimum of a year required by Tier II SORNA offenses,¹⁷² so the threshold requirement for registration is not met.

By creating a new law specifically targeting sexting offenses that sets the statutory punishment less than the imprisonment threshold, states hope to avoid registering juveniles as sex offenders.¹⁷³

166. JLC Amici Curiae Brief, *supra* note 132, at 14.

167. See Smith, *supra* note 80, at 529 (“[Minors] are insufficiently blameworthy to deserve the severe penalties authorized by child pornography laws that were passed with adult sexual predators in mind.”).

168. Memorandum from Amy Baron-Evans & Sara Noonan to Defenders, Adam Walsh Act—Part I, at 7 (Oct. 19, 2006), available at http://www.fd.org/pdf_lib/Adam%20Walsh%20MemoPt%201.pdf.

169. VT. STAT. ANN. tit. 13, § 2802b(a)(1) (2009) (prohibiting minors from “knowingly and voluntarily ... [using] a computer or electronic communication device to transmit an indecent visual depiction of *himself or herself* to another person”) (emphasis added). The law does not provide protection to anyone distributing photographs of others. *Id.*

170. *Id.* § 2802b(b)(2).

171. *Id.* § 2802b(c).

172. 42 U.S.C. § 16911(2) (2006).

173. Cf. Lawrence G. Walters, *How To Fix the Sexting Problem: An Analysis of the Legal and Policy Considerations for Sexting Legislation*, 9 FIRST AMENDMENT L. REV. 98, 116-25 (2010) (summarizing state laws regarding sexting).

Despite these efforts, merely reducing sexting to a misdemeanor may not avoid SORNA registration. Even though the offense would no longer qualify as a Tier II offense, Tier I acts as a “residual class [including] all sex offenders who do not satisfy the criteria for tier II or tier III.”¹⁷⁴ Regardless of what state law says, a juvenile adjudged delinquent under Vermont’s sexting law who moves to another state may be required to register under SORNA if the offense is technically a sex offense in that new state.¹⁷⁵ As the pending legislation focuses on the minors producing the pictures, the comparison between sexting and the threshold offenses will still have to be made if the juvenile moves to a jurisdiction in which sexting has not been decriminalized. Without initially determining whether SORNA registration is required, juveniles adjudged delinquent run the risk of inviting prosecution under failure to register laws. Creating new laws to protest against SORNA’s application to juveniles creates a “trash bin” problem as well.¹⁷⁶

An easier solution would be to have Congress require a jury determination of the comparison test at the trial level. By requiring states to determine at trial whether the sexting offense is “comparable to or more severe than” SORNA’s threshold offenses, Congress

174. The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,053 (July 2, 2008). This tier would include “a sex offender whose registration offense is not punishable by imprisonment for more than one year, [or] a sex offender whose registration offense is the receipt or possession of child pornography.” *Id.*

175. The guidelines responded to suggestions giving states more flexibility in determining what was an offense for SORNA purposes:

If that were the case, a jurisdiction could make the SORNA registration and notification requirements inapplicable to its sex offenders merely by varying its terminology—referring to certain classes of criminal convictions for sex offenses by some term other than “conviction”—and there would then be no national baseline of covered sex offenders and registration/notification requirements applicable thereto.

Such an approach would be inconsistent with SORNA’s purpose to establish “a comprehensive national system for the registration of [sex] offenders”....

SORNA does not afford such latitude to waive its requirements in this manner.

Id. at 38,040; *see also* Walters, *supra* note 173, at 140-48 (explaining the importance of a federal remedy due to the Adam Walsh Act).

176. PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 107 (1967) (“The criminal code of any jurisdiction tends to make a crime of everything that people are against, without regard to enforceability, changing social concepts, etc. The result is that the criminal code becomes society’s trash bin.”).

will enable communities to censure adolescent misbehavior without opening offenders to SORNA liability. A jury determination of the comparison factor will most effectively serve the interests of justice without sacrificing the true purpose of the Adam Walsh Act: protecting children from real child predators.

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