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Kids These Days: Teenage Sexting and How the Law Should Deal with It

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I. Introduction

Most parents believe that they put forth a good faith effort to remain vigilant when it comes to monitoring the actions of their teens. However, most parents have never heard of the term “sexting.” Sexting is a recently coined term that describes a new technological trend amongst teenagers. Although no formal definition of the term exists, sexting can best be described as “the practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular telephones or over the Internet.” Often, this sexually suggestive material portrays the individual who is sending the “sex message.” Finally, once this suggestive message is sent, it is usually stored on the cell-phone of the recipient, in e-mail, or on a social networking site such as Facebook or MySpace.

Shocking as it may be for parents and educational professionals to imagine teens involved in such activities, based on statistical data, a significant percentage of teens are participants. The National Teen Pregnancy, Birth and Sexual Activity Campaign recently conducted a study in an effort to analyze how teens (ages 13-19) and young adults (ages 20-26)

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1 The earliest known use of the term “sexting” is in 2005. See Yvonne Roberts, The One and Only, SUNDAY TELEGRAPH, July 31, 2005, at 22 ("Following a string of extramarital affairs and several lurid "sexting" episodes, Warne has found himself home alone, with Simone Warne taking their three children and flying the conjugal coop.").
4 Id.
5 Id.
have utilized technology to participate in sexual behavior, specifically through the use of text messages and images.\textsuperscript{7}

Of the 653 teens surveyed, an astonishing twenty percent (twenty-two percent of girls and eighteen percent of boys) claimed to “have electronically sent, or posted online, nude or semi-nude pictures or video of themselves.”\textsuperscript{8} Furthermore, of the teens surveyed, an even greater thirty-nine percent (forty percent of boys and thirty-seven percent of girls) have claimed to have sent “[s]exually suggestive messages (text, email, IM).”\textsuperscript{9} These numbers continue to increase once teenagers reach adulthood. According to the survey, thirty-three percent of young adults (ages 20-26) also claimed to have sent “nude or semi-nude pictures or videos of themselves.”\textsuperscript{10} This data suggests that sexting is not just an uncommon novelty, but an issue that must be approached delicately, especially with respect to teenagers.

Although a look at the aforementioned data suggests a need for analysis and care, states have been slow to respond, and in many situations completely non-responsive to this new trend. When it comes to sexting, states have undertaken a variety of approaches, some more drastic than others. Punishments range from threatening teens with charges of sexual abuse, including registration as a sex offender, to the complete legalization of sexting. The purpose of this article then, is to examine the legal issues surrounding sexting, and to suggest what approach states should adopt when attempting to resolve these issues.

The article will be divided into two parts, each consisting of several subsections. Part I will tackle whether teenage sexting should be a considered an activity worthy of criminal liability and punishment. In this section sexting will be compared to laws concerning underage

\textsuperscript{7} Id. at *2.
\textsuperscript{8} Id.
\textsuperscript{9} Id.
\textsuperscript{10} Id.
sex, also known as statutory rape. Part II will analyze whether, if teenage sexting can be classified as a crime, teenagers who are convicted of it should be eligible for sex offender registration. Finally, this article concludes that teens who sext should never be charged with a crime, and that if a state decides that they must make underage sexting a crime, teenagers should never be eligible for compulsory sex offender registration.

II. **Should Sexting Expose Teens to Criminal Liability?**

A. **How Have States Treated Teen Sexting?**

When it comes to new trends and fads, states are often slow to adopt legislation when necessary.\(^{11}\) When internet gambling became prevalent, for example, it was years before legislation was passed making such acts illegal.\(^{12}\) This statement is equally true in the context of sexting. Many legislatures have been slow, if not absent, in adopting legislation tailored to address the problems of sexting.\(^{13}\) And though some states have altered their existing child pornography statutes, or drafted new ones altogether, many states have simply failed to take initiative.\(^{14}\)

\(^{11}\) Instead of drafting legislation to target online gambling, the government attempted to use the Wire Act of 1961 to prosecute internet gamblers; however, this was unsuccessful. *See In re: MasterCard Int’l Inc.*, 313 F.3d 257, 262-63 (5th Cir. 2002) (holding that the Wire Act only prohibits gambling on sporting events).

\(^{12}\) *Id.*

\(^{13}\) Only three states—Utah, Ohio, and Vermont—have altered their child pornography laws to address teen sexting specifically.

\(^{14}\) *See, e.g.*, TEX. PENAL CODE §43.26 (allowing no mitigation or exception for age); OHIO REV. CODE. ANN. §2907.324 (making child pornography a misdemeanor when the violator is a minor, thus mitigating the punishment); Vermont Considers Legalizing Teen ‘Sexting’, ASSOCIATED PRESS, April 13, 2009, *available at* http://www.foxnews.com/story/0,2933,514875,00.html (discussing Vermont legislatures proposed legalization of teen sexting).
The general purpose underlying child pornography laws and regulations is to “eradicate the mistreatment, torture, and abuse of young children.” In order to address problems with sexting, states have attempted to do one of three things: continued to use their existing child pornography laws, added a mitigating element based on age, or decriminalized sexting for minors completely.

Arkansas is one example of a state that continues to use its existing child pornography laws. In Arkansas, child pornography, including child pornography that utilizes the computer, is a class B felony. The law states that an individual commits computer child pornography if that individual:

enters into, or transmits by means of computer, makes, prints, publishes, or reproduces by other computerized means, knowingly causes or allows to be entered into or transmitted by means of computer or buys, sells, receives, exchanges, or disseminates any notice, statement, or advertisement or any child's name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information for purposes of facilitating, encouraging, offering, or soliciting sexually explicit conduct of or with any child or another individual believed by the person to be a child, or the visual depiction of the conduct.

Based on the language of this statute, it is applicable to teens sending sexually explicit messages. Additionally, the only statutory defense provided is that the “the defendant in good

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16 *Id.*
17 Other examples are New Jersey and Florida. Dick Russ, Ohio to Address ‘Sexting’ Laws, WKYC-TV, April 5, 2009, available at http://www.wkyc.com/print.aspx?storyid=111478 (“Utah has made ‘sexting’ a misdemeanor, but other states such as New Jersey and Florida still have provisions in which the consequences of sending naked pictures by cell phone can include jail time, felony charges, and having to register as a sex offender for as long as 25 years.”).
19 *Id.*
faith reasonably believed that the person who engaged in the sexual conduct was seventeen (17) years of age or older." Under this model, a teenager convicted of sexting, a class B felony, could be sentenced to between five and twenty years in prison. The fact that the teenager is legally considered a child is irrelevant.

Unlike Arkansas, Utah and Ohio have attempted to address the problem of teenage sexual conduct by mitigating the punishment based on age. In Utah, both the statute addressing the distribution of pornographic material and the statute addressing the distribution of material harmful to a minor carve out three specific levels of punishment. One level is for persons over the age of eighteen, another level is for persons between the age of sixteen and seventeen, and the last level is for persons under sixteen.

If the violator is over the age of eighteen, he or she “is guilty of a third degree felony.” If the violator is between the ages of sixteen and seventeen then he or she is guilty of a class A misdemeanor. Finally, if the violator is under sixteen he or she is guilty of a class B misdemeanor. According to one Utah lawmaker, Senator Gregory Bell, one reason that the statute was altered was because parents were interfering with investigations when penalties for such crimes were felonies.28

Much like the approach taken by Utah, Ohio has attempted to mitigate the penalties for sexting based on age. The Ohio state legislature has proposed a separate statutory section addressing teen sexual exchanges via new technology. It states that “[n]o minor, by use of a

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20 Id. at § 5-27-404 (West 2009).
21 Id. at § 5-4-401 (West 2009).
22 See UTAH CODE ANN. §§ 76-10-1204, 76-10-1206; OHIO REV. CODE. ANN. §2907.324 (West 2009).
24 Id.
25 Id.
26 UTAH CODE ANN. §§ 76-10-1204(5), 76-10-1206(5) (West 2009).
27 UTAH CODE ANN. §§ 76-10-1204(2)(b), 76-10-1206(2)(b) (West 2009).
telecommunications device, shall recklessly create, receive, exchange, send, or possess a photograph, video, or other material that shows a minor in a state of nudity.” Thus, this creates a separate category for sexual exchanges involving violators who are minors.

In addition to placing the violation for minors involved in sexting into a new category, the punishment is also reduced. Whereas the normal statute addressing child pornography punishes the crime as a felony, this new incarnation is only punishable as a misdemeanor. In an interview, the Warren County Prosecutor relayed the reasons for this attempted change. According to the county prosecutor, “[w]hat we have hit against is the collision of juvenile lack of judgment and the power of technology.” The legislature hoped that this change would protect children from enduring permanent damage to their reputation and exposure to sex registration statutes.

Finally, one step removed from the Utah and Ohio approach, and on the opposite end of the spectrum from Arkansas, is the state of Vermont, which has taken the decriminalization approach. Early in 2009 the legislature of Vermont proposed a bill which would legalize sexting between children ages thirteen to eighteen. After three months of negotiations within the Vermont legislature, and after some compromises, the bill was finally passed on May 9, 2009.

29 OHIO REV. CODE. ANN. §2907.324 (West 2009).
30 See OHIO REV. CODE. ANN. §2907.323 (West 2009) (listing the punishment for illegal use of a minor in nudity-oriented material); OHIO REV. CODE. ANN. §2907.324 (West 2009) (listing the punishment for a minor participating in illegal use of a minor in nudity-oriented material).
32 Id.
33 Id.
35 VT. STAT. ANN. Tit. 33, §2802b (West 2009).
Although the statute signed into law states that a minor who is found disseminating indecent material to another person may be sent to family court as a delinquent, the bill also states that:

[a] minor who violates subsection (a) of this section and who has not previously been adjudicated in violation of that section shall not be prosecuted under chapter 64 of this title (sexual exploitation of children), and shall not be subject to the requirements of subchapter 3 of chapter 167 of this title (sex offender registration).

Thus, even though a minor may be sent to family court if found in violation of Vermont’s statute, the violation is not automatically considered a misdemeanor or felony. Furthermore, while Vermont was not able to pass complete legalization of sexting for teens, their statute has moved in the direction of doing so.

B. Comparison to Statutory Rape

Sexting, although a new issue, is rooted in an old problem. Teenage sexual behavior has been a major concern in society, particularly for parents, since time immemorial: fathers barraging their daughters’ dates on prom night, parents’ desire to be part of their children’s decisions to have an abortion, and the rating of movies to protect children from sexual images. Moreover, since this problem has existed for such an extensive period of time, solutions have already been developed to address many of its incarnations.

Although there are a plethora of issues within the category of teen sexual behavior, the best comparison to sexting is statutory rape. This is because sexting and statutory rape both make

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36 Id. at §2802b(a)(3)(1) (stating that “[a]n action brought under this subdivision (1) shall be filed in family court and treated as a juvenile proceeding pursuant to chapter 52 of Title 33, and may be referred to the juvenile diversion program of the district in which the action is filed”)
37 Id at §2802b (b)(2).
illegal an activity that would normally be permissible if all parties were consenting adults. Thus, the current law developed to regulate statutory rape should be examined closely.

Although most states do not refer specifically to statutory rape, they use designations such as sexual assault and sexual abuse to identify prohibited activity. According to Merriam-Webster’s Dictionary, statutory rape is defined as “sexual intercourse with a person who is below the statutory age of consent.” A survey of related state statutes reveals that the most common age of consent is sixteen. The average age of consent, however, ranges from ages fourteen to eighteen.

Statutory rape laws are not unfounded. There are multiple concerns that spurred the creation of statutory rape legislation. First, there is the concern that even if the child desires sexual intercourse with a legal adult, they may have been coerced or deceived into doing so. Second, children are often unequal economically and socially, thus causing the legal adult to maintain a position of power over them. Finally, there is the concern that, by taking the child’s virginity, the legal adult is corrupting the child.

Although governments have rational and acceptable reasons to protect children from adult sexual behavior, legislatures have realized that they are not equally valid reasons to protect

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39 WEBSTER’S NEW COLLEGE DICTIONARY (11th Ed. 2008).
40 See Norman-Eady & Reinhardt, supra note 38 (describing the statutory language of statutory rape laws in the United States).
41 Oklahoma sets the age of consent at fourteen. OKLA. STAT. ANN. §21-1114 (West 2009). California sets the age of consent at eighteen years of age. CAL. PENAL CODE § 261. 5(b)-(d) (West 2009).
44 See Sherry F. Colb, The Pros and Cons of Statutory Rape Laws, CNN, available at http://www.cnn.com/2004/LAW/02/13/findlaw.analysis.colb.statutory.rape/index.html. Although in some states it is a defense to corruption to show that the child already has had sexual intercourse. Id.
children from other children. With the exception of a small number of states, almost every state has crafted some exception to statutory rape which exempts children of similar age from prosecution. A few others offer a multi-level punishment system based on age.

The exemption from prosecution is accomplished in one of two ways. States may establish a buffer range based on the age of the child. If the person engaging in sex with the child is within that buffer age, then prosecution is barred. Another mechanism that accomplishes a similar result is to set a maximum age for exemption. If the individual engaging in sexual conduct with the minor is below the maximum age allowed by the statute, then they are also exempt from prosecution. For example, if the maximum age is eighteen, then as long as both teens engaging in sexual activity are under the age of eighteen, they are exempt from prosecution.

New Jersey is an example of a state that has created an age buffer between the age of the child and the age of the individual engaging in sexual interactions with that child. The statute reads: “Sexual assault is sexual penetration with a victim between age 13 and 16 when the actor is at least four years older.” Thus, if the actor is within the buffer zone—in this case four years—they are completely exempt from prosecution.

Differing from New Jersey’s approach, Ohio is an example of the maximum age approach for exemption. Ohio’s statutory rape provision states that “[s]exual assault for a person age 18 to engage in sexual conduct with a minor if the actor knows that the minor is between

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45 See Norman-Eady & Reinhardt, supra note 38 (describing the statutory language of statutory rape laws in the United States).
46 Idaho Code Ann. §18-6101 (West 2009) (“Rape is defined as the penetration, however slight, of the oral, anal or vaginal opening with the perpetrator's penis accomplished with a female under any one (1) of the following circumstances: (1) where the child is under the age of eighteen (18) years.”).
47 CAL. PENAL CODE § 261.5(b)-(d) (West 2009) (assigning different punishments based on the age of the “victim” relative to the age of the perpetrator).
ages 13 and 16.” Thus, as long as the actor is under eighteen, they are exempt from prosecution regardless of the age difference between themselves and the child.

C. Analysis

By closely examining the laws concerning sexting and laws on statutory rape it is clear that legislative bodies have generally set a double standard when it comes to minors and their sexual behavior. For example, if a seventeen year old teen and a sixteen year old teen have sex in Pennsylvania, they are not committing a crime. However, if instead the seventeen year old teen uses his or her cell phone and takes a photograph of a naked sixteen year old, then according to Pennsylvania law he or she is guilty of child pornography, which if convicted could carry the burden of sex offender registration.

Situations like this demonstrate the need for an overhaul of the system. The way the current law is written, it is equivalent to punishing an individual for possession of an illegal firearm, but carving out an exception if that firearm is used to commit a robbery. In this context child pornography is the firearm and sexual intercourse is the robbery. Legislatures are concerned about child pornography because it is often a vehicle for immediate or subsequent sexual abuse, just like a firearm is a vehicle for immediate or subsequent violence. It seems odd then to punish an individual for the intermediate portion of the crime, child pornography, but permitting the full harm if it is achieved, sexual intercourse with a child.

Furthermore, these extreme differences are wholly inconsistent with the purposes of these laws. As noted earlier, the purpose of child pornography laws is to “eradicate the mistreatment,

\[50\] 18 Pa. Cons. Stat. § 3121 (2009) (“Rape to engage in deviate sexual intercourse with a complainant who is less than (1) 13 years of age or (2) 16 years of age and the actor is four or more years older.”).
torture, and abuse of young children." 53 This is the same goal that statutory rape laws are designed to achieve. 54 It is very confusing then, that allowing minors to participate in sexual relations is not mistreating, torturing, or abusing young children, but taking a photograph or video without any physical contact is abuse.

The best explanation of the difference is that minors were never intended to be the target of child pornography laws. It is possible that legislatures are just disconnected from the most recent trends and have been slow to adapt to the activities of teens. As will be discussed later, however, this has not stopped prosecutors from pursuing teenagers for violating child pornography laws. 55

Even assuming the legislatures of most states, with full knowledge of sexting, intended for the punishment scheme to work the way it currently does, these laws still violate American concepts of criminal punishment. Applying child pornography laws to children who participate in sexting would violate both of the major punishment theories used in the United States: utilitarianism and retributivism.

At its most basic level, classical utilitarianism belief is that the purpose of all law is to maximize the net happiness of society. 56 “No matter how egregious the wrongdoing, utilitarians do not advocate punishment unless they believe it will provide an overall social benefit.” 57 In order to determine what achieves the maximum net happiness of society, utilitarians begin with the premise that the criminal justice system should minimize the sum of the cost of crime and

53 Sayle, supra note 15, at 274.
54 See notes 41–43 and accompanying text.
55 See Miller, infra note 106 (describing a case in which a prosecutor threatened to charge teens participating in sexting with child pornography).
57 Id. at 17.
crime prevention.\textsuperscript{58} In other words, once everything is said and done, society should be better off with the punishment than without.

In the case of sexting, the harm sought to be eliminated is the abuse of children.\textsuperscript{59} When this crime is committed by an adult, the adult is punished, and society is benefited by the future deterrence of abusive adults. Thus, the net happiness of society increases. However, when a minor participates in sexting and is punished, the minor is harmed—either by going to jail, having a criminal record, or registering as a sex offender—and the goal of protecting children from abuse is no longer furthered. Although it can be argued that a minor may still physically abuse a child, other laws such as rape statutes can protect minors from unwanted sexual encounters. Therefore, in the end, if minors are generally punished for sexting, the net happiness of society decreases. According to utilitarianism then, sexting, just like statutory rape, should not result in punishment for minors.

Not only does utilitarianism prohibit punishment, but retributivism also prohibits punishment. Retributivists believe that punishment is justified when it is deserved.\textsuperscript{60} To an uncompromising retributivist “the wrongdoer should be punished, whether or not it will result in a reduction in crime.”\textsuperscript{61} In fact, not only do retributivists believe that a criminal should be punished, they also believe it is morally right to punish someone in proportion to his “desert”, or “culpable wrong doing.”\textsuperscript{62} In other words, this is an eye for an eye. Although individuals should be punished in proportion to their crime, they should not be punished in excess.

\textsuperscript{59} Sayle, supra note 15, at 274.
\textsuperscript{60} See Dressler, supra note 56, at 16 (describing the basics of retributivism).
\textsuperscript{61} Id. at 17.
With child pornography, society feels that punishment is deserved because adults use their positions of authority to abuse and mistreat young children. On the other hand, when children use technology to participate in activities of a sexual type, they are doing it as part of a social norm. This norm is clearly demonstrated by the overwhelming number of teenagers who participate in such activities. And although to some this might seem deeply appalling or unappealing, these activities are certainly not the abuse or mistreatment of young children. As previously stated, thirty-nine percent of teens participate sexually in some way with technology. What is really happening is a new generation is setting its own social norms. While this may be deserving of a scowl or two from older generations, this is not deserving of punishment. Therefore, punishing teens for this would violate the basic principles of retributivism.

III. Is it Appropriate to Subject Teens to Sex Offender Registration for a Violation of a Teen Sexting Statute?

A. History of Sex Offender Registration

In the early 1990s, a thirty-six year old man by the name of Jesse Timmendequas kidnapped, raped, and murdered a seven year old girl named Megan Kanka. The Kanka family was unaware that the perpetrator of this crime was a convicted sex offender who had previously received a ten year prison sentence for two sexual assaults against girls about the same age as Megan. They were also unaware of the fact that Timmendequas lived across the street. Some

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63 See THE NATIONAL CAMPAIGN, supra note 6, at ___.
65 Id.
66 Id.
have argued that if the Kanka family had known of their neighbor’s prior sexual assault convictions, they may have exercised stronger precautions with their daughter, and this tragedy might have been avoided.⁶⁷

As a result of this terrible incident, the Kankas, in an attempt to protect future victims of similar crimes, successfully lobbied New Jersey officials for legislation “that required convicted sex offenders to register with local law enforcement agencies and allowed for public notification of potentially dangerous sex offenders living in the area.”⁶⁸ This legislation was termed “Megan’s Law,” named after the Kanka’s daughter.⁶⁹

Taking New Jersey’s lead, states across the country enacted similar legislation, and presently every state maintains a sex offender registration law.⁷⁰ These registration statutes each differ slightly, however most include community notification laws which permit, and sometimes require, public officials to disclose the names and addresses of convicted sex offenders.⁷¹ In most states this information is also available on the Internet.⁷²

Megan’s Law and other similar sex offender registration statutes serve two purposes: registration and notification.⁷³ Registration exists as a tool to assist police in tracking offenders and apprehending suspects.⁷⁴ Notification, on the other hand, exists to increase public awareness and equip communities with information which allows them to avoid contact with sex offenders

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⁶⁷ See id. (arguing that had the Kanka family known about the past history of Jesse Timmendequas, this tragedy might have been avoided)
⁶⁸ Id.
⁶⁹ Id.
⁷¹ See Melconian, supra note 64, at 356.
⁷² Id.
⁷³ Bill Hebenton & Toby Seddon, From Dangerousness to Precaution: Managing Sexual and Violent Offenders in an Insecure and Uncertain Age, 49 BRIT. J. OF CRIM. 343, 349 (2009).
⁷⁴ Id.
and thus prevent victimization.\textsuperscript{75} This second purpose specifically targets the type of situation experienced by the Kanka family.

\textbf{B. Consequences of Registration}

Despite the fact that the goals of sex offender registration are indeed noble, the consequences of being a registered sex offender are nothing short of life destroying. According to a 2005 Florida study of 183 convicted male sex offenders, the authors discovered that the most common negative consequences associated with sex offender registration are “job loss and threats or harassment.”\textsuperscript{76} As many as five percent of registered sex offenders participating in the study also reported being assaulted or injured.\textsuperscript{77} The authors further postulate that “consequences such as the loss of a job or home can have a devastating emotional and financial effect on an individual.”\textsuperscript{78}

Although the consequences of registration are obviously severe when applied to adults, the consequences of offender registration are magnified when applied to a minor. One example is a recent tragedy in Oklahoma.

In Oklahoma, the law treats public exposure as a crime that warrants ten years of sex offender registration.\textsuperscript{79} In 1999, an Oklahoma high school senior was arrested for what his mother called a “high school thing.”\textsuperscript{80} On his way to the restroom, the teen had exposed himself to a group of freshman gym students.\textsuperscript{81} Following the incident in the gym, the school

\textsuperscript{75} Id.
\textsuperscript{76} Jill S. Levin & Leo P. Cotter, \textit{The Effect of Megan’s Law on Sex Offender Reintegration}, 21 J. CONTEMP. CRIM. JUST. 49, 61 (2005).
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Killman, Sex Offenders Struggle to Find Jobs, TULSA WORLD, July 10, 2005.
\textsuperscript{81} Id.
administration notified the police, who promptly removed the teen in handcuffs.\textsuperscript{82} He then pled guilty to indecent exposure and received a five-year suspended sentence. Additionally, he was forced to register as a sex offender.\textsuperscript{83}

What followed next was extremely troubling. According to his mother, the teen was stigmatized by his sex offender label.\textsuperscript{84} His life was flung into a downward spiral. It drove him out of his community and away from his family—eventually causing him to drop out of high school and moved to Tulsa.\textsuperscript{85} In addition to this, he was unable to find employment.\textsuperscript{86} According to a local newspapers interview with his mother, “[i]t seemed like after that happened, he didn’t care.”\textsuperscript{87}

The consequences of such a severe punishment were made apparent when, on November 2000, the youth was found shot to death in what officials ruled a suicide.\textsuperscript{88} He was still young, only one month away from his 20th birthday.\textsuperscript{89} This tragedy has caused his mother to believe that some consideration should be given to sex offender registration requirements when the charge stems from a nonviolent act.\textsuperscript{90} “He was a pretty normal kid,” she said, the sex offender registration requirements “changed his life.”\textsuperscript{91}

The story of Chris F. is another example of how sex offender registration can have dire consequences for teens, and in this case, a pre-teen. When he was twelve years old, Chris

\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Killman, Sex Offenders Struggle to Find Jobs, TULSA WORLD, July 10, 2005.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Killman, Sex Offenders Struggle to Find Jobs, TULSA WORLD, July 10, 2005.
discovered pornographic videos in his parents’ bedroom.\textsuperscript{92} While his parents were away, Chris invited some friends—ages twelve, ten, and eight—over to watch the video.\textsuperscript{93} What at first “started off a little more as ‘you show me yours, I’ll show you mine’ turned into quite a bit more. However, there was no force.”\textsuperscript{94} 

After being adjudicated and placed under the California Youth Authority, Chris was released.\textsuperscript{95} Just like the teen in Oklahoma whose life fell apart following sex offender registration, Chris faced similar tragedies.\textsuperscript{96} Initially, Chris intended to study criminal justice; however he dropped out when he discovered that “the registration laws changed to apply toward college campus police departments.”\textsuperscript{97} According to Chris, he was fearful of registering with classmates when doing work study with the campus police.\textsuperscript{98} Chris also discussed many other instances of sex offender registration affecting his work, including instances which caused his dismissal.\textsuperscript{99}

\textbf{C. How Have Courts Dealt With the Issue of Registration?}

Despite that the aforementioned section makes clear that sex offender registration carries with it a severe burden for the convicted individual, the Supreme Court of the United States has held that sex offender registration involves no liberty interest.\textsuperscript{100} Thus, states maintain a wide range of discretion when designing the mechanisms which trigger sex offender registration, and deciding what that registration entails.

\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Id.
\textsuperscript{98} See No Easy Answers, supra note 92, at *46.
\textsuperscript{99} Id. at *47.
\textsuperscript{100} See Connecticut Department of Public Safety v. Doe, 538 U.S. 1, 4 (2003).
In *Connecticut Department of Public Safety*, the Supreme Court reviewed a decision of the Second Circuit in which the Second Circuit “enjoined the public disclosure of Connecticut's sex offender registry.”¹⁰¹ The circuit court determined that, “that such disclosure both deprived registered sex offenders of a “liberty interest,” and violated the Due Process Clause because officials did not afford registrants a predeprivation hearing to determine whether they were “currently dangerous.”¹⁰²

In making its determination the Supreme Court analyzed the purpose of sex offender statutes. Chief Justice Rehnquist, writing for the majority, held that:

‘Sex offenders are a serious threat in this Nation.’ ‘[T]he victims of sex assault are most often juveniles,’ and ‘[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sexual assault.’ Connecticut, like every other State, has responded to these facts by enacting a statute designed to protect its communities from sex offenders and to help apprehend repeat sex offenders.¹⁰³

In reversing the Second Circuit, the majority found that, “due process does not require the opportunity to prove a fact that is not material to the State's statutory scheme.”¹⁰⁴ Additionally, the court also found that “mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest.”¹⁰⁵ Thus, regardless of the damage caused by mandating the registration of a convicted sex offender, the Supreme Court has authorized states to require registration even if no due process is given. As a result, no post conviction hearing is necessary to require registration.

¹⁰¹ *Id.*
¹⁰² *Id.*
¹⁰³ *Id.*
¹⁰⁴ *Id.*
¹⁰⁵ *Id.* at 6-7
D. How Have States Dealt With Registration for Teen Sexting

There may be little in terms of case law addressing how states have applied sex offender registration to sexting cases, but this is likely the result of the novelty of this social phenomenon and not a lack of prosecutorial effort. And while there is not much evidence, some cases regarding just this issue have begun to trickle through court.

The conflict discussed in \textit{Miller v. Skumanick} is an example of how some prosecutors have attempted to apply child pornography laws to minors who participate in sexting.\textsuperscript{106} The \textit{Miller} case is one in which accused “sexters” filed for a temporary restraining order against the district attorney seeking an injunction barring prosecution. The controversy in \textit{Miller} began in October of 2008, when a Pennsylvania School District official confiscated several students’ cell phones, “examined them and discovered photographs of ‘scantily clad, semi-nude and nude teenage girls.’”\textsuperscript{107} The official had been investigating due to reports that male students had been trading these pictures on their cell-phones.\textsuperscript{108} These photographs were then turned over to the district attorney—George Skumanick.

Initially, the district attorney held a conference at the high school in question, and informed the student body “that students who possess inappropriate images of minors could be prosecuted under Pennsylvania law for possessing or distributing child pornography.”\textsuperscript{109} If found guilty of these crimes students would likely be subject to sex offender registration under Pennsylvania's Registration of Sexual Offenders Act.\textsuperscript{110} Registration is for the duration of ten

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\textsuperscript{107} \textit{Id.} at *2.
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} 42 PA CONS. STAT. § 9791 (2009).
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years and those who are registered have their names and pictures displayed on the state's sex-offender website.\textsuperscript{111}

Following this assembly, the district attorney contacted the families of the teens involved in the confiscated sexual images. The district attorney informed them that the “charges would be dropped if the child successfully completed a six- to nine-month program focused on education and counseling.”\textsuperscript{112} In the end, all but three parents and their minor children agreed to the requirements of the district attorney.\textsuperscript{113}

As a result of the threat of prosecution, the parents of the three minor children filed a motion for a temporary restraining order against the prosecutor.\textsuperscript{114} The prosecutor, fully intending to pursue criminal charges against the teens, gave his word as an officer of the court that he would not bring charges against the minor plaintiffs before the court in \textit{Miller} rendered a decision on the restraining order.\textsuperscript{115}

\textit{E. Analysis}

Just like a close examination of child pornography laws reveals their inapplicability to sexting, by closely examining the laws mandating sex offender registration, it is also clear that these laws are inapplicable to “sexters”. Similarly, the application of sex offender registration to teens involved in sexting violates modern theories of criminal punishment, the logic behind sex offender registration, and intuitive ideas of fairness.

First, since Utilitarianism looks at the net good generated by maintaining a specific law or punishment,\textsuperscript{116} the benefits and harm generated by forcing convicted “sexters” to register as a

\textsuperscript{111} Id.
\textsuperscript{112} Miller, 2009 WL 838233 at *2.
\textsuperscript{113} Id. at *4
\textsuperscript{114} Id. at *1.
\textsuperscript{115} Id. at *4.
\textsuperscript{116} DRESSLER, supra note 56.
sex offender must be examined. If a minor involved in sexting is forced to register, the community will be openly informed of their actions, and precautions can be taken to protect children from these individual. But how much benefit does this really generate? In the *Miller v. Skumanick*, for example, the teens being prosecuted were both the distributors and the individuals who were photographed.\(^{117}\) Thus, while registration might inform the community, in many instances it serves no purpose because there was never a victim to protect.

Furthermore, there is an overwhelming harm generated to the individual teen as a result of sex registration. Job loss, physical assault, suicide, and social exclusion are all consequences of sex offender registration.\(^{118}\) When weighing the benefits and harm then, it is clear that according to utilitarianism, minors who participate in sexting should not only be exempt from punishment, but also from sex offender registration.

Additionally, according to a retributivist, punishment should be given in proportion to desert.\(^{119}\) Sex offender registration then, must be a punishment equal to the harm caused by teen sexting. For the same reasons registration offends the concept of utilitarianism, it also offends retributivist theory. The harm generated by sexting is *de minimus* in comparison to the consequences realized by mandating sex offender registration. And since the punishment must be proportional to harm, retributivism rejects such punishment.

Forcing teens to register as sex offenders is also inconsistent with the purpose of registration itself. As demonstrated by the story of the Kankas, sex offender registration generally exists to notify the community and to allow the police to track these criminals.\(^{120}\) With

\(^{117}\) See *Miller*, 2009 WL 838233 at *2 (“When asked by a parent at the meeting why his daughter—who had been depicted in a photograph wearing a bathing suit—could be charged with child pornography, Skumanick replied that the girl was posed “provocatively,” which made her subject to the child pornography charge.”).

\(^{118}\) See Killman, *Sex Offenders Struggle to Find Jobs*, TULSA WORLD, July 10, 2005; Levin & Cotter, *supra* note 76, at 61.

\(^{119}\) See DRESSLER, *supra* note 56, at 16 (describing the basics of retributivism).

\(^{120}\) See Hebenton & Seddon, *supra* note 73, at 349 (describing the purposes of sex offender registration).
that in mind, it is confusing then, as to why it should apply to sexting at all. First, looking at the story of the Kankas, it is argued that registration would have alerted them to a danger which they could have provided extra protection against.121 In the situation of sexting, alerting the community of the convicted individual serves to protect no one. Just like statutory rape, the victims in sexting are only victims in name. When sexting takes place between two consenting teens, it is just a case of bad decision making, and alerting the community to this protects no one. This inconsistency is recognized for statutory rape, why not for sexting?

Furthermore, the purpose of allowing police to have this information is to track and apprehend registered offenders.122 Even considering all crimes that trigger sex offender registration, statistical data has demonstrated that “only 4 percent of youth arrested for a sex crime recidivated.”123 This research also indicates “that most adult offenders were not formerly youth offenders: less than 10 percent of adults who commit sex offenses had been juvenile sex offenders.”124 Applying registration to juvenile offenders “does nothing to prevent crimes by the 90 percent of adults who were not convicted of sex offenses as juveniles.”125 Thus, allowing the police to track teens who participate in sexting then, not only serves no practical purpose, but wastes resources that could be used to track actual sexual predators.

Finally, some courts have recognized that punishing minors for sexting may violate the constitution.126 In *Miller v. Skumanick*, the parents of three teens threatened with prosecution for

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121 See Melconian, *supra* note 64 (discussing the opinion that, had the Kankas known about their neighbor’s past history, their daughter might still be alive).
122 See Hebenton & Seddon, *supra* note 73, at 349 (stating the reasoning why the police might benefit from registration).
123 See No Easy Answers, *supra* note 92 at *12.
124 Id.
125 Id.
126 *Miller*, 2009 WL 838233, at *11 (“The court agrees with the plaintiffs that the public interest would be served by issuing a TRO in this matter as the public interest is on the side of protecting constitutional rights.”).
sexting asked the court for a temporary restraining order (TRO) on three causes of action. These three grounds were: the First Amendment right to free expression, the First Amendment right to be free from compelled expression, and the Fourteenth Amendment right of due process. The court held that the plaintiffs would have a likelihood of success and that the plaintiffs would suffer irreparable injury, and therefore granted the TRO. The court stated that “The defendant, Wyoming County District Attorney George Skumanick, and his officials, employees, agents and assigns, are hereby ENJOINED from initiating criminal charges against plaintiffs Marissa Miller, Grace Kelly and Nancy Doe for the two photographs at issue”.

IV. Conclusion

The speed with which legislatures react to new technology has been a constant problem, especially for minors. And because minors are among the first to participate in these innovations, they are also among the first to be harmed by legislatures’ slow response times. In the case of sexting, this harm has come by way of child pornography laws and sex offender registration. As demonstrated, the application of child pornography laws to sexting has not only been inconsistent with its purpose, but also with criminal theory. Additionally, the same is true of sex offender registration statutes. And while these laws consistently harm minors when applied to sexting—with the exception of a few states—little action has been taken to refine current law.

What legislatures must do is look to statutory rape as a model for redesigning and creating applicable laws for sexting. The similarities between sexting and statutory rape, and the analysis of this note, suggest that the result of this examination should be a complete exemption for teen sexting. Even if legislatures decide that some sort of punishment must be given, under

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127 Id. at *4.
128 Id.
129 Id. at *11 (emphasis in original).
no circumstances should this punishment include sex offender registration. The destructive
nature of sex offender registration, especially in children, paired with its lack of benefit for
society as a whole, renders this type of punishment absolutely useless.