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# KEEPING UP WITH TECHNOLOGY: WHY A FLEXIBLE JUVENILE SEXTING STATUTE IS NEEDED TO PREVENT OVERLY SEVERE PUNISHMENT IN WASHINGTON STATE

Reid McEllrath

*Abstract:* Sexting can be a costly activity, particularly for teenagers. As more teenagers engage in sending sexually explicit images to one another, the likelihood of serious long-term consequences increases. When sexting is used as a means to bully, the potential severity of consequences also increases. In many jurisdictions, prosecutors may charge juveniles caught sexting with possession or distribution of child pornography. At the same time, some states have recognized the severity of such a charge and found other ways of addressing the teen sexting problem. This Comment addresses the current issues surrounding juvenile sexting by examining empirical data, legal responses, and legislative reactions. It argues that Washington's current approach to juvenile sexting is inappropriate and should be amended. It suggests a two-tiered statute that separates non-malicious juvenile sexting from malicious juvenile sexting. The proposed statute, which would punish cyberbullying and malicious juvenile sexting more severely, will allow Washington to effectively deter harmful behavior while taking into account juvenile immaturity.

## INTRODUCTION

In 2008, a Pennsylvania District Attorney called a meeting with a number of teenagers and their parents in the community.<sup>1</sup> The topic of discussion was a serious and sensitive one—child pornography. The District Attorney informed the parents and teenagers that sexually suggestive images of some of the teenagers were found circulating via cell phones among the local schools. The parents, worried about their children, asked to see the pictures. The photos showed the teenage girls in training bras, towels, and bathing suits. One parent tried to account for the pictures, saying the girls were simply being “goofballs.”<sup>2</sup> The District Attorney disagreed and threatened prosecution, calling the pictures sexually suggestive.<sup>3</sup>

That same year, a teenage girl in Ohio sent nude images to her

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

2. *Id.* at 144.

3. See Tamar Lewin, *Court Says Parents Can Block “Sexting” Cases*, N.Y. TIMES, Mar. 17, 2010, at A18; Saul Relative, *Pennsylvania Teen Sues over Sexting Pictures*, YAHOO VOICES (Mar. 30, 2009), <http://voices.yahoo.com/pennsylvania-teens-sue-over-sexting-pictures-2967606.html?cat=46>.

boyfriend.<sup>4</sup> Soon after, the two broke up.<sup>5</sup> When the ex-boyfriend decided to share the images with some of the other girls at school, the group began to harass the girl.<sup>6</sup> Other students who found out about the pictures started calling her a “whore.”<sup>7</sup> She began to skip classes to avoid the harassment.<sup>8</sup> In an attempt to alert others of the effects of such bullying, she went on a television station to tell her story.<sup>9</sup> Unfortunately, the harassment continued, and two months after the interview, the girl committed suicide.<sup>10</sup>

The media attention these stories received,<sup>11</sup> along with others like them,<sup>12</sup> illustrates the complexities of addressing the growing problem of juvenile sexting. Sexting is commonly considered “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.”<sup>13</sup> As cellular phones expand their capabilities and become more ubiquitous among teenagers, prosecutors in many jurisdictions face the predicament of charging teenagers with overly severe child pornography crimes.<sup>14</sup> Unfortunately, most state legislatures have not given this problem the attention it deserves. As of publication, only twenty states have enacted laws exempting juvenile sexting from the

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4. Mike Celizic, *Her Teen Committed Suicide over “Sexting”*, TODAY (Mar. 6, 2009, 9:26 AM), [http://www.today.com/id/29546030/ns/today-parenting\\_and\\_family/t/her-teen-committed-suicide-over-sexting/#.UvwM4Hk1dg1](http://www.today.com/id/29546030/ns/today-parenting_and_family/t/her-teen-committed-suicide-over-sexting/#.UvwM4Hk1dg1).

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. See *Miller v. Mitchell*, 598 F.3d 139, 143 (3d Cir. 2010); Celizic, *supra* note 4.

12. See, e.g., Justin Jouvenal, “Sexting” Case Fuels Debate over Punishment for Teens, WASH. POST, Apr. 18, 2013, at A1; Paris Achen, *Sex Crimes Team Will Investigate Eagle Point “Sexting”*, MAIL TRIBUNE (Dec. 17, 2009), <http://www.mailtribune.com/apps/pbcs.dll/article?AID=/20091217/NEWS07/912170346>; Hector Becerra, *Teen “Sexting” Case: “There’s 6th and 7th Graders Doing This”*, L.A. TIMES (May 10, 2013), <http://articles.latimes.com/2013/may/10/local/la-me-ln-sexting-underage-20130510>; Dave Summers & Christina London, *Charges to Be Filed in Teen Sexting Ring*, NBC 7 SAN DIEGO (Oct. 29, 2013), <http://www.nbcsandiego.com/news/local/Charges-To-Be-Filed-in-Teen-Sexting-Ring-229646361.html>.

13. *Miller v. Skumanick*, 605 F. Supp. 2d 634, 637 (M.D. Pa. 2009), *aff’d sub nom. Miller*, 598 F.3d at 139.

14. See, e.g., *Miller*, 598 F.3d at 143; A.H. v. State, 949 So. 2d 234, 237 (Fla. Dist. Ct. App. 2007); Frank Graham, *Student Gets Year Probation for “Sexting”*, NORTH PLATTE BULLETIN (May 12, 2009), <http://www.northplattebulletin.com/index.asp?show=news&action=readStory&storyID=16546&pageID=3>.

harsh punishments of child pornography.<sup>15</sup> This leaves teenagers in many states, including Washington, subject to child pornography laws.

This Comment examines the legal dilemmas brought on by juvenile sexting and proposes a statutory alternative to Washington's current approach. Part I provides background information on juvenile sexting and cyberbullying before discussing empirical data on juvenile immaturity. Part II explores legislative and prosecutorial responses to juvenile sexting and cyberbullying. Part III discusses the need for a change in Washington's current statutory scheme, arguing for a two-tiered statute that separates non-malicious juvenile sexting from malicious juvenile sexting. It further argues that neither tier should be subject to sex offender registration. This approach would more effectively account for juvenile immaturity, while still providing the means for punishing malicious sexting in cases like cyberbullying.

## I. THE RISING PROBLEM OF JUVENILE SEXTING

Cell phones have become ubiquitous and studies show that juveniles are sexting.<sup>16</sup> A 2013 study found that seventy-eight percent of teens between the ages of twelve and seventeen have a cell phone.<sup>17</sup> Further, surveys have shown that up to twenty-eight percent of teenagers have sent a sexually suggestive or nude photo of themselves.<sup>18</sup>

Advances in cell phones and cell phone applications have made it easier to send and receive sexually explicit images. Camera phones and smart phones are no longer a luxury, but are now the norm. With camera phones, users have the freedom to take pictures at any time without the inconvenience of carrying a separate camera. Smart phones can access the internet, providing the additional option of posting images to a websites and social networks. Smart phone users can also download

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15. See Sameer Hinduja & Justin Patchin, *State Sexting Laws*, CYBERBULLYING RES. CENTER (Sept. 2014), [http://www.cyberbullying.us/state\\_sexting\\_laws.pdf](http://www.cyberbullying.us/state_sexting_laws.pdf).

16. See Eric Rice et al., *Sexually Explicit Cell Phone Messaging Associated With Sexual Risk Among Adolescents*, 130 PEDIATRICS 667, 670 (2012).

17. Mary Madden et al., *Teens and Technology 2013*, PEW RESEARCH CENTER 2 (2013), [http://www.pewinternet.org/files/old-media/Files/Reports/2013/PIP\\_TeensandTechnology2013.pdf](http://www.pewinternet.org/files/old-media/Files/Reports/2013/PIP_TeensandTechnology2013.pdf).

18. See, e.g., Jeff R. Temple et al., *Teen Sexting and Its Association with Sexual Behaviors*, 166 ARCHIVES OF PEDIATRIC & ADOLESCENT MED. 828, 829 (2012); Amanda Lenhart, *Teens and Sexting: How and Why Minor Teens Are Sending Sexually Suggestive Nude or Nearly Nude Images Via Text Messaging*, PEW RES. CENTER 2 (2009), [http://www.pewinternet.org/~media/Files/Reports/2009/PIP\\_Teens\\_and\\_Sexting.pdf](http://www.pewinternet.org/~media/Files/Reports/2009/PIP_Teens_and_Sexting.pdf); Nat'l Campaign to Prevent Teen & Unplanned Pregnancy & Cosmogirl.com, *Sex and Tech: Results from a Survey of Teens and Young Adults*, COSMOGIRL.COM 1, [http://www.afim.org/SexTech\\_Summary.pdf](http://www.afim.org/SexTech_Summary.pdf).

phone application software like Snapchat,<sup>19</sup> an application that facilitates the sexting phenomenon by providing users a sense of security that images will be destroyed rather than saved by the receiver and shared with others.<sup>20</sup> As a result, Snapchat users may feel more at ease sending a sexually explicit image with the expectation that it will exist only temporarily.<sup>21</sup> Unfortunately, there are several ways to save or retrieve a Snapchat photo,<sup>22</sup> making such feelings of security erroneous.

Cell phones capable of sexting create a number of potentially serious problems when in the hands of teenagers. Sexting facilitates cyberbullying, which may lead to emotional and long-term consequences for both the receiver and the sender.<sup>23</sup> Teenagers sending sexually suggestive or nude photos can be prosecuted or threatened with prosecution under child pornography statutes.<sup>24</sup> Such statutes are intended to reduce the availability of child pornography and to protect the victims of child pornography.<sup>25</sup> These laws often prohibit the possession or dissemination of such photos generally; in addition to prosecution the teenager can face felonious penalties and, depending on the applicable statute, the possibility of sex offender registration.<sup>26</sup> In addition to sex offender registration, sexting can also jeopardize teenagers' futures by permanently putting compromising images online, making such images available to potential employers, academic institutions, and family members.<sup>27</sup>

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19. An application for sending pictures to other users in which the pictures are deleted after a set amount of time. *iTunes Preview: Snapchat*, APPLE iTUNES, <https://itunes.apple.com/us/app/snapchat/id447188370?mt=8> (last visited June 21, 2014).

20. Dominique Mosbergen, *Snapchat "Hacks" Make Using "iPhone Sexting App" to Send Incriminating Photos a Bad Idea*, HUFFINGTON POST (Jan. 1, 2013, 6:32 PM), [http://www.huffingtonpost.com/2013/01/22/snapchat-hacks-iphone-sexting\\_n\\_2528803.html](http://www.huffingtonpost.com/2013/01/22/snapchat-hacks-iphone-sexting_n_2528803.html).

21. Kaja Whitehouse, *Snapchat Sexting Scandal Could Scare off Investors*, N.Y. POST (Nov. 13, 2013, 9:48 PM), <http://nypost.com/2013/11/14/snapchat-sexting-scandal-could-scare-off-investors/>.

22. *Id.* (explaining that recipients have several ways of saving or retrieving a Snapchat photo, including taking a screenshot, finding the hidden file on the phone, or recording the photo with another phone).

23. *See infra* Part I.A.

24. *See, e.g.*, *Miller v. Mitchell*, 598 F.3d 139, 144 (3d Cir. 2010).

25. *See, e.g.*, WASH. REV. CODE § 9.68A.001 (2012).

26. *See id.* § 9A.44.130 (2012).

27. Kimberly J. Mitchell et al., *Prevalence and Characteristics of Youth Sexting: A National Study*, 129 PEDIATRICS 1, 2 (2012).

### A. *Sexting and Cyberbullying*

Sexting in and of itself is not an inherently illegal activity.<sup>28</sup> The law does not concern itself with private sexual activity among consenting adults.<sup>29</sup> However, the nature of the activity changes once the messages leave the confines of a consenting relationship and spread to other viewers. Once the messages leak into a more public environment, the original participants no longer enjoy the privacy they may have initially expected. Without control of the sensitive content, the persons sexting are at the mercy of anyone with access to the image. For consenting adults caught sexting, the consequences may not be severe.<sup>30</sup> Teenagers, however, may be subject to bullying and ridicule.<sup>31</sup>

Cyberbullying can create severe consequences for juvenile sexting. Cyberbullying is bullying that takes place using cell phones and the internet.<sup>32</sup> It presents additional concerns that are unique compared to more traditional bullying because it can be harsher, farther-reaching, anonymous, and unpredictable.<sup>33</sup> This type of bullying can also lead to devastating consequences for both the victim and bully.<sup>34</sup> A juvenile posing in a sexual image can be left with emotional issues. In one study, seventy percent of respondents who had appeared in or created sexting images and sixty-three percent of respondents who had received such images reported feeling either “very” or “extremely” upset, embarrassed, or afraid.<sup>35</sup> Cyberbullying that leads to such mental and emotional stress

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28. Sam M. Krattiger, Comment, *Sex-Cells: Evaluating Punishments for Teen “Sexting” in Oklahoma and Beyond*, 63 OKLA. L. REV. 317, 317 (2011).

29. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that adults had the right to engage in consensual, private sexual conduct under the Due Process clause of the Fifth and Fourteenth Amendments).

30. See, e.g., *FAQ on ‘Sexting’ and ‘Sextortion’*, CONNECTSAFELY (Feb. 1, 2013), <http://www.connectsafely.org/faq-on-sexting-and-sextortion/>.

31. See, e.g., Celizic, *supra* note 4; Steve Almasy et al., *Sherriff: Taunting Posts Lead to Arrests in Rebecca Sedwick Bullying Death*, CNN (Oct. 16, 2013, 8:53 AM), <http://www.cnn.com/2013/10/15/justice/rebecca-sedwick-bullying-death-arrests/>; *Jessica Logan Suicide: Parents of Dead Teen Sue School, Friends over Sexting Harassment*, HUFFINGTON POST (Mar. 3, 2010, 6:12 AM), [http://www.huffingtonpost.com/2009/12/07/jessica-logan-suicide-par\\_n\\_382825.html](http://www.huffingtonpost.com/2009/12/07/jessica-logan-suicide-par_n_382825.html).

32. *What is Cyberbullying?*, NAT’L CRIME PREVENTION COUNCIL, <http://www.ncpc.org/topics/cyberbullying/what-is-cyberbullying/> (last visited Feb. 2, 2014).

33. *Id.*

34. Lori Tobias, *Teenager Gets Jail in “Sexting” Case*, THE OREGONIAN, Oct. 17, 2009, at B2 (reporting about a juvenile defendant who pled guilty to charges of sexual abuse and solicitation to encourage child sexual abuse after she recorded a dog having oral contact with her drunk, semi-nude friend at a party and sent the picture to others in the community).

35. Mitchell et al., *supra* note 27, at 5.

can have tragic results—including suicide<sup>36</sup>—creating a serious issue among juveniles that would be in society's best interest to resolve.

*B. Empirical Data Shows that Juveniles Lack Psychosocial Maturity*

One explanation as to why teenagers are more susceptible to sexting and its ill effects might be the underdevelopment of their psychosocial maturity. Various studies illustrate reasons against severely punishing juvenile sexting, showing that juveniles lack psychosocial maturity and future-oriented thinking.<sup>37</sup> Because of this, juveniles are less likely to fully understand and consider the consequences associated with sexting.<sup>38</sup> Because juveniles, unlike adults, do not consider the consequences of their actions, juveniles may be less culpable than adults.<sup>39</sup>

Juveniles' psychosocial immaturity leads them to be heavily influenced by short-term rewards.<sup>40</sup> Research shows that teenagers lack many decision-making skills they will possess as adults,<sup>41</sup> including the ability to consider the consequences of their actions.<sup>42</sup> During adolescence, the brain begins its final stages of maturation and continues to rapidly develop well into a person's early twenties, concluding around the age of twenty-five.<sup>43</sup> The prefrontal cortex, which governs the "executive functions" of reasoning—advanced thought and impulse control—is the final area of the human brain to mature.<sup>44</sup> Although teenagers' cognitive capacities approximate an adult's, their judgment and actual decision-making may differ from an adult's based on

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36. Michael Inbar, "Sexting" Bullying Cited in Teen's Suicide, TODAY (Dec. 2, 2009, 10:26 AM), <http://www.today.com/id/34236377#.UxBW-9w1dg0> (reporting that a teenage girl hung herself after a topless photo of herself spread throughout her middle school and local high school).

37. Robin D'Antona, *Sexting, Texting, Cyberbullying and Keeping Youth Safe Online*, 6 J. SOC. SCI. 523, 524 (2010).

38. See Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009, 1012 (2003).

39. See *infra* Part II.A.

40. See Steinberg & Scott, *supra* note 38, at 1012.

41. See Donald S. Strassberg et al., *Sexting by High School Students: An Exploratory and Descriptive Study*, 42 ARCHIVES SEXUAL BEHAV. 15, 19 (2013); Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 28 ISSUES SCI. & TECH. 67, 74 (2012); Steinberg & Scott, *supra* note 38, at 1012.

42. See Steinberg, *supra* note 41, at 74.

43. See *Adolescent Brain Development & Juvenile Justice Fact Sheet*, ACT 4 JUVENILE JUSTICE, [http://www.act4jj.org/sites/default/files/ckfinder/files/factsheet\\_12.pdf](http://www.act4jj.org/sites/default/files/ckfinder/files/factsheet_12.pdf) (last visited July 22, 2014).

44. *Id.*

teenagers' psychosocial immaturity.<sup>45</sup> This can make teenagers deficient in their decision-making capacity.<sup>46</sup>

Psychosocial immaturity also increases the likelihood of being influenced by peers. Research shows that juveniles lacking in psychosocial maturity generally are more responsive to peer pressure, more impulsive, less future-oriented, and place less weight on risk in risk-reward calculus.<sup>47</sup> Conversely, controlling impulses, planning ahead, and resisting peer influence increases from pre-adolescence to post-adolescence, and sometimes continues to increase into adulthood.<sup>48</sup> This data may suggest that if juveniles are driven more by immediate reward than by fear of risk, juveniles are less likely to rely on the possible consequences of their actions when making decisions and are more likely to consider only immediate rewards like peer approval.

Even when juveniles know of possible legal consequences, they often neither care<sup>49</sup> nor consider legal consequences a serious threat when sexting.<sup>50</sup> A study of high school students found that over a third of the students who reported sending a sexually explicit picture did so despite knowing that, if they were apprehended for the picture, serious legal consequences would follow.<sup>51</sup> Another survey found that fifty-four percent of respondents did not consider getting in trouble with the law a concern when sending or posting "sexy" pictures or videos of themselves.<sup>52</sup> This further illustrates that juveniles lack risk consideration when weighing the long-term risks and rewards of sexting. Without full psychosocial maturity, juveniles are less likely to competently contemplate the consequences of their actions.<sup>53</sup>

These three elements of psychosocial immaturity make teenagers less capable of avoiding the pitfalls of juvenile sexting. While adults are equipped with social tools to help them adequately consider and avoid the consequences of sexting, teenagers are not.<sup>54</sup> However, many states—including Washington—hold juvenile sexting to the same legal

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45. See Steinberg & Scott, *supra* note 38, at 1012.

46. *Id.*

47. *Id.*

48. *Id.*

49. Strassberg, *supra* note 41, at 19.

50. See, e.g., *Sex and Tech: Results from a Survey of Teens and Young Adults*, *supra* note 18, at 14.

51. Strassberg, *supra* note 41, at 19.

52. *Sex and Tech: Results from a Survey of Teens and Young Adults*, *supra* note 18, at 14.

53. See Steinberg & Scott, *supra* note 38, at 1012.

54. *Id.*



standards as child pornography,<sup>55</sup> raising questions of whether such equal treatment is fair or just.

## II. PUNISHMENT OF JUVENILE SEXTING

The legal responses to juvenile sexting vary among jurisdictions, but some similarities transcend jurisdictional lines. The United States Supreme Court has expressed some principles for the general treatment of juvenile criminals,<sup>56</sup> but has yet to comment on the specific issue of juvenile sexting. This void leaves states with the opportunity to develop their own specific approach to juvenile sexting. Some prosecutors have responded to the increased popularity of juvenile sexting by charging juveniles under child pornography statutes.<sup>57</sup> Another possible response to juvenile sexting is through legislation. Twenty state legislative bodies have responded to juvenile sexting by limiting the statutory penalties, reducing the severity of such penalties, or both.<sup>58</sup> However, Washington is not one of the twenty states that have reformed their codes to address juvenile sexting.<sup>59</sup> Washington's lack of a legislative response to the juvenile sexting phenomenon leaves its juveniles subject to the state's strict child pornography laws.<sup>60</sup>

### A. *The Supreme Court's Take on Punishing Juveniles*

Courts generally take into account the detrimental effect immaturity has on a juvenile's ability to weigh consequences.<sup>61</sup> In *Thompson v. Oklahoma*,<sup>62</sup> the United States Supreme Court overturned the death sentence of a fifteen-year-old who was convicted of first-degree

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55. See WASH. REV. CODE § 9.68A.050 (2012).

56. See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

57. See, e.g., *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010); *A.H. v. State*, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007) (the juveniles were "charged as juveniles under the [state's] child pornography laws").

58. See Hinduja & Patchin, *supra* note 15.

59. See WASH. REV. CODE § 9.68A.050.

60. See *id.*; see also, e.g., Jan Hoffman, *A Girl's Nude Photo, and Altered Lives*, N.Y. TIMES (Mar. 26, 2011), [http://www.nytimes.com/2011/03/27/us/27sexting.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/03/27/us/27sexting.html?pagewanted=all&_r=0).

61. See *Graham v. Florida*, 560 U.S. 48 (2010) (holding juveniles cannot be sentenced to life imprisonment without an opportunity for parole for a non-homicide offense); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding it unconstitutional to impose the death penalty when the crime was committed while under the age of eighteen); *Thompson*, 487 U.S. at 815 (overturning the death sentence of a minor on the grounds of cruel and unusual punishment).

62. 487 U.S. 815.

murder.<sup>63</sup> Justice Stevens, writing for the plurality, recognized the immature judgment of youth and determined that such a severe punishment would violate proportionality principles.<sup>64</sup> The plurality stressed that the reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.<sup>65</sup> Justice Stevens believed that there was a low likelihood that juvenile offenders engage in a cost-benefit analysis that gives any weight to the possibility of a severe legal consequence, like execution.<sup>66</sup> As a result, the plurality determined that the death penalty was an ineffective and inappropriate punishment for juveniles.<sup>67</sup>

*Thompson* was not the only Supreme Court case finding that traditional deterrence rationales for severe punishment are ineffective for juveniles and therefore should be less severe because juveniles are less susceptible to deterrence.<sup>68</sup> Deterrence prevents criminal behavior by fear of punishment,<sup>69</sup> yet more than once the Court has found that juveniles are less susceptible to deterrence.<sup>70</sup> Juveniles are less likely to take possible punishment into consideration because juveniles' "lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions."<sup>71</sup> The Court, like experts who have studied juvenile psychosocial immaturity,<sup>72</sup> has recognized that juveniles should not be treated the same as adults because of their immaturity.<sup>73</sup> If deterrence is not as effective when the culprit is a juvenile rather than an adult, then the punishment for juveniles should reflect this ineffectiveness and should not be as severe.<sup>74</sup>

Likewise, the retribution rationale is not as strong with a juvenile as

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63. *Id.* at 838.

64. *Id.* at 834–35 (Stevens, J., plurality opinion).

65. *Id.* at 835.

66. *Id.* at 836–38.

67. *Id.* at 838.

68. *See* *Graham v. Florida*, 560 U.S. 48, 72 (2010); *Roper v. Simmons*, 543 U.S. 551, 571–72 (2005).

69. BLACK'S LAW DICTIONARY 514 (9th ed. 2009) (defining "deterrence").

70. *See* *Graham*, 560 U.S. at 72; *Roper*, 543 U.S. at 571.

71. *Graham*, 560 U.S. at 72 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

72. *See supra* Part I.B.

73. *See, e.g., Graham*, 560 U.S. at 72; *Roper*, 543 U.S. at 571.

74. *See, e.g., Roper*, 543 U.S. at 571–72; *Thompson v. Oklahoma*, 487 U.S. 815, 836–38 (1988) (Stevens, J., plurality opinion).

with an adult.<sup>75</sup> Under the retribution rationale, criminal sentences are directly related to the personal culpability of the criminal offender.<sup>76</sup> The Court has found that retribution is not proportional for capital punishment when culpability is “diminished, to a substantial degree, by reason of youth and immaturity.”<sup>77</sup> Such proportionality analysis was extended by the Court to also apply to life imprisonment of juveniles for non-homicide crimes.<sup>78</sup>

Much like retribution, the rehabilitation rationale should also be considered less applicable to juvenile sexting. The purpose of rehabilitation is to “improve a criminal’s character and outlook so that he or she can function in society without committing other crimes.”<sup>79</sup> However, current Washington law only concerns sexting when a juvenile is in the photo.<sup>80</sup> If those involved in sexting are both adults, then their conduct is legal and the law no longer applies.<sup>81</sup> This suggests that Washington has an interest in teenage sexting only until the teenagers turn eighteen.<sup>82</sup> This is much different than other crimes like theft or murder, which will continue to be illegal when the juvenile becomes an adult. If the crime will continue to be illegal when the juvenile becomes an adult, I argue that society has a legal interest in rehabilitation both before and after the juvenile becomes an adult. Conversely, if a crime will not continue to be illegal when the juvenile becomes an adult—such as sexting—then I argue that society will have a legal interest in rehabilitation only until the juvenile becomes an adult. I believe that this distinction suggests that society has a weaker interest in rehabilitation for sexting than for other crimes like theft or murder.

### B. *Prosecutorial Response to Juvenile Sexting*

In 2010, *Miller v. Mitchell*<sup>83</sup> highlighted potential dangers of prosecutorial discretion in juvenile sexting cases.<sup>84</sup> After images of teens

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75. *See Graham*, 560 U.S. at 71.

76. *Id.*

77. *Roper*, 543 U.S. at 571.

78. *Graham*, 560 U.S. at 72.

79. BLACK’S LAW DICTIONARY 1398–99 (9th ed. 2009) (defining “rehabilitation”).

80. *See* WASH. REV. CODE § 9.68A.050 (2012).

81. *See id.* (describing a crime for possession of sexually explicit images only of juveniles, not of adults).

82. *See, e.g., id.* § 9.68A.001.

83. 598 F.3d 139 (3d Cir. 2010).

84. *Id.* at 143–44.

in bathing suits or opaque bras circulated through the community, the prosecutor threatened to charge the teens with felony child pornography crimes if they refused to attend a program on sexting.<sup>85</sup> Generally, prosecutors can decide whether or not to prosecute and what charges to file so long as they have probable cause of a statutory violation.<sup>86</sup> The parents in *Miller* protested that the pictures included no nudity, while the prosecutor claimed that because the girls posed provocatively, the images constituted child pornography.<sup>87</sup> Despite the disagreement as to the nature of the photographs, the prosecutor stood by his initial interpretation and promised to prosecute if the children did not attend the program.<sup>88</sup> This case illustrates the wide discretion child pornography statutes give prosecutors in deciding both what constitutes child pornography and what punishment should apply in juvenile sexting cases.<sup>89</sup>

Wide prosecutorial discretion can lead to unpredictable charging decisions among prosecutors. A University of New Hampshire study on the prosecution of juvenile sexting revealed certain themes in prosecutors' decisions to file charges.<sup>90</sup> Thirty-seven percent of the prosecutors indicating that they had handled a sexting case reported never filing charges in sexting cases, while twenty-one percent reported that either all or nearly all of their sexting cases ended in charges filed.<sup>91</sup> When the case was youth-only and involved malicious, non-consensual or abusive behavior, arrests were made against the juvenile only thirty-six percent of the time.<sup>92</sup> This means that the prosecutors who indicated that they had handled a sexting case dropped over half of the sexting cases involving malicious intent, bullying, coercion, or harassment.<sup>93</sup> In

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85. *Id.* at 144.

86. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

87. *Miller v. Mitchell*, 598 F.3d at 144.

88. *Id.*

89. *Id.*

90. Wendy Walsh et al., *Sexting: When Are State Prosecutors Deciding to Prosecute?*, CRIMES AGAINST CHILDREN RES. CENTER (Jan. 2013), [http://www.unh.edu/ccrc/pdf/CV294\\_Walsh\\_Sexting%20&%20prosecution\\_2-6-13.pdf](http://www.unh.edu/ccrc/pdf/CV294_Walsh_Sexting%20&%20prosecution_2-6-13.pdf). The study's participants were 236 prosecutors who indicated that they had handled a sexting case in a state court. "Sexting" in the survey taken by the prosecutors was defined as "sexual images produced by juveniles (with no adult involvement)." The study included creating or distributing such images as sexting. The study also included high school students who are above the age of 17—i.e., 18 or 19 year olds. *Id.* at 1.

91. *Id.* at 2.

92. *Id.* at 3.

93. *Id.*

light of malicious sexting having such serious consequences,<sup>94</sup> I believe charges should be filed in more than thirty-six percent of the cases to allow for further investigation. A different approach—other than relying on prosecutors to apply discretion—is needed to combat prosecutorial discretion and raise the percentage of cases charged.

### C. *Legislative Responses to Juvenile Sexting*

Legislatures across the country have slowly begun to respond to the juvenile sexting problem. As of publication, twenty states have amended their criminal codes to address juvenile sexting.<sup>95</sup> Those states that have addressed juvenile sexting by amending their criminal code have done so using a variety of approaches.<sup>96</sup> The approaches vary by—among other things—the penalty of the violation, the mens rea required, and affirmative defenses available.<sup>97</sup>

Most commonly, states addressing juvenile sexting have simply provided a lesser penalty for violation of the statute.<sup>98</sup> Of the twenty states that have amended their criminal code to address juvenile sexting, nine<sup>99</sup> include a misdemeanor as the strictest penalty for, among other elements, a first offense free of malicious intent.<sup>100</sup> On the far end of the spectrum, West Virginia will not even charge sexting juveniles with a

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94. *See supra* Part I.A.

95. *See* ARIZ. REV. STAT. ANN. § 8-309 (West 2013); ARK. CODE ANN. § 5-27-609 (West 2013); CONN. GEN. STAT. ANN. § 53a-196h (West 2014); FLA. STAT. ANN. § 847.0141 (LexisNexis 2013); GA. CODE ANN. § 16-12-100 (West 2013); HAW. REV. STAT. ANN. § 712-1215.6 (LexisNexis 2013); 705 ILL. COMP. STAT. ANN. 405/3-40 (West 2013); LA. REV. STAT. ANN. § 14:81.1.1 (West 2013); NEB. REV. STAT. ANN. § 28-1463.03 (LexisNexis 2013); NEV. REV. STAT. ANN. § 200.737 (LexisNexis 2011); N.J. STAT. ANN. § 2A:4A-71.1 (West 2013); N.Y. SOC. SERV. LAW § 458-1 (Consol. 2013); N.D. CENT. CODE ANN. § 12.1-27.1-03.3 (West 2013); 18 PA. CONS. STAT. ANN. § 6321 (West 2014); R.I. GEN. LAWS ANN. § 11-9-1.4 (West 2013); S.D. CODIFIED LAWS § 26-10-33 (West 2013); TEX. PENAL CODE ANN. § 43.261 (West 2013); UTAH CODE ANN. § 76-10-1206 (LexisNexis 2013); VT. STAT. ANN. tit. 13, § 2802b (West 2013); W. VA. CODE § 61-8C-3b (West 2013).

96. *See* Hinduja & Patchin, *supra* note 15.

97. *Id.*

98. *See, e.g., id.*

99. ARK. CODE ANN. § 5-27-609(d) (2013); CONN. GEN. STAT. ANN. § 53a-196h(c); GA. CODE ANN. § 16-12-100(3); HAW. REV. STAT. ANN. § 712-1215.6(4); N.D. CENT. CODE ANN. § 12.1-27.1-03.3(1)(2) (statute applies to sexting involving adults only, juveniles only, or both); 18 PA. CONS. STAT. ANN. § 6321(b)–(c); S.D. CODIFIED LAWS § 26-10-33; TEX. PENAL CODE ANN. § 43.261(c),(d); UTAH CODE ANN. § 76-10-1206(2)(b)–(c).

100. *See, e.g.,* Hinduja & Patchin, *supra* note 15. Only three states that have amended their criminal codes to include juvenile sexting still prosecute juvenile sexting as a felony. FLA. STAT. ANN. § 847.0141; NEB. REV. STAT. ANN. §§ 28-1463.03, 28-1463.04, 28-1463.05; UTAH CODE ANN. § 76-10-1206.

misdemeanor, instead requiring the State's prosecutors to charge a sexting juvenile with a delinquency.<sup>101</sup>

States addressing juvenile sexting also consider the juveniles' state of mind. Nearly all of the states require mens rea to some extent.<sup>102</sup> Of those states that require mens rea, the state of mind required is either knowingly, intentionally, or purposefully.<sup>103</sup> Some states include language suggesting a concern for bullying.<sup>104</sup> Some of these states' statutes include "intentionally" or "knowingly" as the required mens rea for the bullying provisions.<sup>105</sup> This suggests that these states are concerned with any desire to bully or sext and do not consider negligent bullying or sexting to be as culpable. In dealing with cyberbullying, these states specifically require actions such as commanding, inducing, or distributing with intent to cause harm or humiliation for the juvenile to fall under the bullying aspect of the statute.<sup>106</sup>

State legislatures are also split on affirmative defenses in juvenile sexting statutes. Of the eight states that do include an affirmative

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101. W. VA. CODE § 61-8C-3b (West 2013).

102. See ARIZ. REV. STAT. ANN. § 8-309 (LexisNexis 2013); ARK. CODE ANN. § 5-27-609; CONN. GEN. STAT. ANN. § 53a-196h; FLA. STAT. ANN. § 847.0141; HAW. REV. STAT. ANN. § 712-1215.6; LA. REV. STAT. ANN. § 14:81.1.1 (2013); NEB. REV. STAT. ANN. § 28-1463.03; NEV. REV. STAT. ANN. § 200.737 (LexisNexis 2011); N.J. STAT. ANN. § 2C:24-4 (West 2013); N.Y. SOC. SERV. LAW § 235.22 (Consol. 2013); N.D. CENT. CODE ANN. § 12.1-27.1-03.3; 18 PA. CONS. STAT. ANN. § 6321; R.I. GEN. LAWS ANN. § 11-9-1.4 (West 2013); S.D. CODIFIED LAWS § 26-10-33; TEX. PENAL CODE ANN. § 43.261; UTAH CODE ANN. § 76-10-1206; VT. STAT. ANN. tit. 13, § 2802b (2013).

103. See ARIZ. REV. STAT. ANN. § 8-309; ARK. CODE ANN. § 5-27-609; CONN. GEN. STAT. ANN. § 53a-196h; FLA. STAT. ANN. § 847.0141; HAW. REV. STAT. ANN. § 712-1215.6; LA. REV. STAT. ANN. § 14:81.1.1; NEB. REV. STAT. ANN. § 28-1463.03; NEV. REV. STAT. ANN. § 200.737; N.J. STAT. ANN. § 2C:24-4; N.Y. SOC. SERV. LAW § 235.22; N.D. CENT. CODE ANN. § 12.1-27.1-03.3; 18 PA. CONS. STAT. ANN. § 6321; R.I. GEN. LAWS ANN. § 11-9-1.4; S.D. CODIFIED LAWS § 26-10-33; TEX. PENAL CODE ANN. § 43.261; UTAH CODE ANN. § 76-10-1206; VT. STAT. ANN. tit. 13, § 2802b.

104. See, e.g., HAW. REV. STAT. ANN. § 712-1215.6 ("A minor commits the offense . . . if the minor: . . . (B) Intentionally or knowingly commands, requests, or encourages another minor . . . to transmit to any person a nude photograph . . . of a minor or the minor's self."); N.D. CENT. CODE ANN. § 12.1-27.1-03.3 ("A person is guilty . . . if . . . that person: . . . b. Distributes . . . a sexually expressive image with the intent to cause emotional harm or humiliation to any individual depicted in the sexually expressive image . . ."); 18 PA. CONS. STAT. ANN. § 6321 ("[A] minor commits a misdemeanor . . . when, with the intent to coerce, intimidate, torment, harass or otherwise cause emotional distress to another minor, the minor: . . . (2) transmits, distributes, publishes, or disseminates a visual depiction of any minor in a state of nudity . . .").

105. See HAW. REV. STAT. ANN. § 712-1215.6; N.D. CENT. CODE ANN. § 12.1-27.1-03.3; 18 PA. CONS. STAT. ANN. § 6321.

106. See HAW. REV. STAT. ANN. § 712-1215.6; N.D. CENT. CODE ANN. § 12.1-27.1-03.3; 18 PA. CONS. STAT. ANN. § 6321.

defense, six states<sup>107</sup> include an affirmative possession defense only for a juvenile *receiving* the sexually explicit image.<sup>108</sup> The affirmative defenses for these states mostly require that the receiver of the image destroyed the image, took reasonable steps to either destroy or report the image, did not solicit the image, or a combination of the preceding elements.<sup>109</sup> These six states do not provide an affirmative defense for a juvenile *sending* a sexually explicit image.<sup>110</sup> In fact, the two states that do provide an affirmative defense for the juvenile sender have strict limitations focusing on the relationship between the sender and receiver of the sexually explicit image.<sup>111</sup> One requires a dating or spousal relationship between the sender and the recipient,<sup>112</sup> while the other requires a reasonable belief that the receiver is a willing recipient.<sup>113</sup> The affirmative defenses available by states that have addressed juvenile sexting may suggest that states find juveniles less culpable when they do not have the intent to further distribute the image or when the sexting is consensual.

#### D. *Juvenile Sexting in Washington*

Although twenty state legislatures have taken steps to address the problematic trend, juvenile sexting in Washington is still subject to child pornography laws.<sup>114</sup> Currently, the Washington statute that applies to sexting is one that addresses sexual exploitation of children.<sup>115</sup> Chapter 9.68A of the Revised Code of Washington states the provisions of

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107. Arizona, Arkansas, Florida, Hawaii, Nevada, and Vermont.

108. See ARIZ. REV. STAT. ANN. § 8-309(c); ARK. CODE ANN. § 5-27-609(c); FLA. STAT. ANN. § 847.0141(1)(b); HAW. REV. STAT. ANN. § 712-1215.6(2); NEV. REV. STAT. ANN. § 200.737(3); VT. STAT. ANN. tit. 13, § 2802b(a)(2).

109. See ARIZ. REV. STAT. ANN. § 8-309(c); ARK. CODE ANN. § 5-27-609(c); FLA. STAT. ANN. § 847.0141(1)(b); HAW. REV. STAT. ANN. § 712-1215.6(2); NEV. REV. STAT. ANN. § 200.737(3); VT. STAT. ANN. tit. 13, § 2802b(a)(2).

110. See ARIZ. REV. STAT. ANN. § 8-309; ARK. CODE ANN. § 5-27-609; FLA. STAT. ANN. § 847.0141; HAW. REV. STAT. ANN. § 712-1215.6; NEV. REV. STAT. ANN. § 200.737; VT. STAT. ANN. tit. 13, § 2802b.

111. See NEB. REV. STAT. ANN. §§ 28-1463.03, 28-1463.04 (LexisNexis 2013); TEX. PENAL CODE ANN. § 43.261 (West 2013).

112. TEX. PENAL CODE ANN. § 43.261.

113. NEB. REV. STAT. ANN. § 28-1463.03.

114. See WASH. REV. CODE § 9.68A.050 (2012); see also, e.g., Jan Hoffman, *A Girl's Nude Photo, and Altered Lives*, N.Y. TIMES (Mar. 26, 2011), <http://www.nytimes.com/2011/03/27/us/27sexting.html?pagewanted=all&r=0>.

115. See WASH. REV. CODE ch. 9.68A.

Washington's sexual exploitation of children law.<sup>116</sup> In relevant part, this law provides that:

A person commits the crime of dealing in depictions of a minor engaged in sexually explicit conduct in the first degree when he or she:

(i) Knowingly develops, duplicates, publishes, prints, disseminates, exchanges, finances, attempts to finance, or sells a visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (e); or

(ii) Possesses with intent to develop, duplicate, publish, print, disseminate, exchange, or sell any visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (e).<sup>117</sup>

The statute's use of "person" encompasses both adults and juveniles. The plain language of Section 9.68A.050 does not distinguish between the two.<sup>118</sup> Under the statute, "[a] person commits the crime" when the necessary elements are met.<sup>119</sup> Courts in Washington and other states have found that the interpretation of "person" in child pornography statutes includes juveniles.<sup>120</sup>

Federal courts, interpreting the federal child pornography statute<sup>121</sup>—which includes the term "person"<sup>122</sup> and a similar intent as the Washington statute<sup>123</sup>—have also determined that "person" includes juveniles.<sup>124</sup> In finding no record that a child would be less traumatized if the child pornography was created or transmitted by a child rather than an adult, a federal court in *Clark v. Roccanova*<sup>125</sup> held that it did not matter that the defendants were not adults.<sup>126</sup> The Court further found unconvincing the defense that the statute's words "use of a minor"

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116. *Id.*

117. *Id.* § 9.68A.050(1)(a).

118. *Id.*

119. *Id.*

120. *See, e.g., Clark v. Roccanova*, 772 F. Supp. 2d 844, 847 (E.D. Ky. 2011); *State v. T.J.M.*, 139 Wash. App. 845, 850–51, 162 P.3d 1175, 1178–79 (2007) (holding that a juvenile two years older than the victim met the statutory standard of a "person" two years older than the victim).

121. 18 U.S.C. § 2251 (2008).

122. *Id.*

123. *See* WASH. REV. CODE § 9.68A.001.

124. *E.g., Clark*, 772 F. Supp. 2d at 847.

125. 772 F. Supp. 2d 844 (E.D. Ky. 2011).

126. *Id.*



demonstrated Congress's intent to target only adults.<sup>127</sup>

Furthermore, the Washington statute states that Washington's interest to protect children from exploitation "extends to stamping out the vice of child pornography at all levels of the distribution chain."<sup>128</sup> With an interest in protecting juveniles at all levels of a potential distribution chain,<sup>129</sup> the statute could potentially include initial sexting between consenting juveniles. Although it is not guaranteed to occur, it is possible for the sexually explicit image to fall into the hands of a third party and become available to others.<sup>130</sup> By addressing juvenile sexting at the earliest part of the distribution chain—the source—the image from sexting would not reach the rest of the distribution chain. In this way, the State could possibly ensure that this form of child pornography will not reach other levels of the distribution chain. Washington has therefore expressed its interest in preventing the creation of child pornography—<sup>131</sup>under which the sexually explicit images of juvenile sexting's falls.<sup>132</sup>

The legislative intent to prosecute juveniles under the statute is also supported by the available affirmative defenses under Chapter 9.68A.<sup>133</sup> The chapter lists a number of affirmative defenses: working as law enforcement, providing individual case treatment as a recognized medical facility, conducting research in partnership or cooperation with a higher education institution.<sup>134</sup> Being a juvenile is not included as an affirmative defense.<sup>135</sup> However, other statutes intended to protect juveniles—like statutory rape—do include protection from prosecution when those involved are close in age.<sup>136</sup> This could mean that the Washington State Legislature did not consider age proximity to be a valid defense to child pornography, no matter how close in age the juveniles might be.<sup>137</sup> Furthermore, the Legislature did not include youth as part of the exclusive list of affirmative defenses for child pornography

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127. *Id.*

128. WASH. REV. CODE § 9.68A.001(2).

129. *See id.*

130. *See, e.g.,* A.H. v. State, 949 So. 2d 234, 239 (Fla. Dist. Ct. App. 2007).

131. *See* WASH. REV. CODE § 9.68A.001.

132. *See id.* § 9.68A.011.

133. *Id.* ch. 9.68A.

134. *Id.* §§ 9.68A.110(4), (6).

135. *See id.*

136. *See, e.g.,* WASH. REV. CODE §§ 9A.44.073, .076, .079 (2012).

137. *See* WASH. REV. CODE § 9.68A.050 (lacking language that would provide an age proximity defense).

in its 2010 amendment bill,<sup>138</sup> and did not seek to add any defenses to the list in its 2012 amendment bill.<sup>139</sup> When these decisions were made, juvenile sexting was in the news and case law on the subject was available.<sup>140</sup> The fact that the Washington State Legislature did not include a defense for a juvenile offender suggests the Legislature intended for the statute to allow the prosecution of juveniles. Washington courts, in interpreting statutes, have determined that the exclusion of a defense from a statute that has a limited number of defenses suggests that the Legislature intended to exclude the availability of the defense.<sup>141</sup>

In sum, the plain language and the lack of an age-related affirmative defense of the statute suggests that Washington intends to include juveniles under the prosecution of the child pornography statute. The plain language uses “persons” and does not differentiate between adults and juveniles.<sup>142</sup> Further, the legislative intent supplements the plain language. The statute explicitly states that its purpose is to protect juveniles from exploitation and that this intent allows prosecution at all levels of distribution.<sup>143</sup> This extension of prosecution to all levels of distribution would logically include sexting among juveniles, which, if distributed, would be the first step toward dissemination. Lastly, the failure to include an affirmative defense,<sup>144</sup> despite extensive media coverage and public awareness on the issue,<sup>145</sup> supports prosecuting juvenile sexting under the statute.

### III. PROPOSAL FOR WASHINGTON TO ADOPT A TWO-TIERED SYSTEM

The possibility of severe prosecution under Washington’s child pornography statute illustrates the need for legislative reform. Juveniles are often treated differently than adults in the courts due to their

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138. H.R. 2424, 61st Leg., Reg. Sess. (Wash. 2010) (codified at WASH. REV. CODE ch. 9.68A, 9.94A).

139. H.R. 2177, 62d Leg., Reg. Sess. (Wash. 2012) (codified at WASH. REV. CODE ch. 9.68A).

140. See, e.g., Jeremy Pawloski, *Two Lacey Teens Arrested in Sexting Case*, THE SEATTLE TIMES (Jan. 29, 2010, 8:51 AM), [http://seattletimes.com/html/localnews/2010926927\\_websexting29m.html](http://seattletimes.com/html/localnews/2010926927_websexting29m.html).

141. See, e.g., *Go2Net, Inc. v. Freeyellow.com, Inc.*, 158 Wash. 2d 247, 254, 143 P.3d 590, 593 (2006).

142. WASH. REV. CODE § 9.68A.050.

143. *Id.* § 9.68A.001(2).

144. See *id.* § 9.68A.110.

145. See, e.g., Pawloski, *supra* note 140.

immaturity and a perceived lesser culpability.<sup>146</sup> As such, they should also be treated differently in the context of juvenile sexting. Juveniles are more capable of character reform than adults<sup>147</sup> and, because of this capacity to change, punishments should distinguish between adults and juveniles. Further, a legislative response is needed because prosecutors have wide discretion to determine whether to charge juvenile sexting.<sup>148</sup> While this is not necessarily an issue, problems can arise if prosecutors abuse their discretion.<sup>149</sup> Therefore, legislative action should be taken to separate juveniles from adults, preventing prosecutors from abusing their discretion and imposing overly severe punishments.

Washington's current child pornography statute punishes juvenile sexting too severely.<sup>150</sup> Given the complex motives and consequences of juvenile sexting, the Washington State Legislature should follow other states<sup>151</sup> and adopt a new approach to this growing problem. This Comment suggests a two-tiered structure that better reflects the differing natures of non-malicious and malicious juvenile sexting.

Because psychosocial immaturity often prevents teenagers from considering the consequences of their conduct, the first tier should assign mild punishments for those engaged in non-malicious sexting. However, because cyberbullying involves malicious intent,<sup>152</sup> the second tier should assign elevated punishments for those engaged in this conduct. In these situations, diversion classes<sup>153</sup> or misdemeanors may not be severe enough to punish the malicious conduct. Differentiating between malicious action and non-malicious action by using two tiers would be preferable. The first tier should include diversion or a misdemeanor charge as a general punishment for juvenile sexting. The second tier, to address cyberbullying, should include any sexting that involved malicious intent. This tier should have a stricter punishment, charging cyberbullying juveniles with a felony. Neither tier should

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146. *See supra* Part II.A.

147. *See Roper v. Simmons*, 543 U.S. 551, 570 (2005).

148. *See supra* Part II.B.

149. *See James Vorenberg, Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981).

150. *See supra* Part II.D.

151. *See supra* notes 98–113 and accompanying text.

152. *See Kelly A. Albin, Bullies in a Wired World: The Impact of Cyberspace Victimization on Adolescent Mental Health and the Need for Cyberbullying Legislation in Ohio*, 25 J. L. & HEALTH 155, 162 (2012).

153. Diversion programs are community programs such as “job training, education, and the like, which . . . may lead to the dismissal of the charges” if the program is completed. BLACK’S LAW DICTIONARY 546 (9th ed. 2009) (defining “diversion program”).

include sex offender registration because juveniles are less mature than adults and more likely to be reformed,<sup>154</sup> making a severe and long-term punishment like sex offender registration—with its lifelong consequences—<sup>155</sup> inappropriate for either tier.

Washington law needs to change to treat juvenile sexting differently than traditional child pornography. Juveniles inadequately consider negative consequences of their actions,<sup>156</sup> frustrating any deterrence a severe penalty may have.<sup>157</sup> Moreover, other states have begun to remove juvenile sexting from their child pornography statutes.<sup>158</sup> Lastly, the new law should apply only to juveniles and should not extend to adults.<sup>159</sup>

#### A. *Tier 1: Juvenile Sexting Without Malicious Intent*

Washington should reduce the current maximum charge for non-malicious juvenile sexting from a felony with required sex offender registration<sup>160</sup> to a misdemeanor. Although juveniles are more likely to focus on short-term rewards and less likely to consider legal or long-term consequences,<sup>161</sup> juvenile sexting should be a punishable crime to deter any juveniles who actually will consider the long-term consequences. Because the statute is less likely to deter juveniles from sexting, the penalty should be less severe, but not removed entirely.

The adolescent-adult distinction, exemplified in the *Thompson* plurality's decision and in the United States Supreme Court's other decisions,<sup>162</sup> should be extended to juvenile sexting. Punishing a juvenile who uses a cell phone to send a sexually explicit photo by the same standard as an adult possessing child pornography—with punishments like long-term incarceration<sup>163</sup> and registration as a sex

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154. See *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

155. Jill Levenson & Leo Cotter, *The Effect of Megan's Law on Sex Offender Reintegration*, 21 J. CONTEMP. CRIM. JUST. 49, 61–62 (2005).

156. See *supra* Part II.A.

157. See *supra* Part I.B.

158. See *supra* Part II.C.

159. See *infra* Part III.D.

160. See WASH. REV. CODE § 9.68A.050 (2012); WASH. REV. CODE § 9A.44.130 (2012).

161. See *supra* Part I.B.

162. See, e.g., Martin R. Gardner, *The Categorical Distinction Between Adolescents and Adults: The Supreme Court's Juvenile Punishment Cases—Constitutional Implications for Regulating Teenage Sexual Activity*, 28 BYU J. PUB. L. 1, 28–32 (2013).

163. See WASH. REV. CODE § 9.68A.050; WASH. REV. CODE § 9A.20.021.

offender—<sup>164</sup>contradicts proportionality principles.<sup>165</sup> “From a moral standpoint, it would be misguided to equate the failings of a minor with those of an adult [because] a greater possibility exists that a minor’s character deficiencies will be reformed.”<sup>166</sup> Juveniles are more capable of change than adults<sup>167</sup> and juvenile actions are “less likely to be evidence of ‘irretrievably depraved character’” than comparable adult action.<sup>168</sup> Because juveniles are more capable of change and their actions are less likely derived from an “irretrievably depraved character,”<sup>169</sup> juvenile punishment, including sexting punishment, should not include the severe and long-term consequences that Washington’s child pornography statute provides.<sup>170</sup>

As a fundamental goal of the juvenile justice system,<sup>171</sup> rehabilitation supports a lenient punishment for juvenile sexting. Rehabilitation is as equally important a goal of the juvenile justice system as the goal of punishing wrongdoers.<sup>172</sup> Both the Washington State Legislature and the Washington Supreme Court recognizes the importance of rehabilitation in the juvenile justice system. The Juvenile Justice Act of 1977<sup>173</sup> made Washington’s juvenile courts more punitive, but courts recognized that the Act still preserved the rehabilitative aspect of juvenile courts that is not present in the wholly punitive adult courts.<sup>174</sup> The Washington Supreme Court has recognized that, despite the Juvenile Justice Act

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164. See WASH. REV. CODE § 9.68A.050; WASH. REV. CODE § 9A.44.130.

165. See Elizabeth M. Ryan, Note, *Sexting: How the State Can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults*, 96 IOWA L. REV. 357, 375 (2010).

166. *Roper v. Simmons*, 543 U.S. 551, 570 (2005). In making its decision, the Court took into account the difficulty psychologists have in differentiating between crimes based on immaturity and crimes of irreparable corruption. *Id.* at 573.

167. *Id.* at 570.

168. See *Graham v. Florida*, 560 U.S. 48, 68 (2010) (quoting *Roper*, 543 U.S. at 570).

169. *Id.*

170. See WASH. REV. CODE §§ 9.68A.050; WASH. REV. CODE §§ 9A.20.021, 9A.44.130.

171. See *State v. Posey*, 174 Wash. 2d 131, 143, 272 P.3d 840, 846 (2012) (Madsen, C.J., dissenting).

172. *Id.*

173. WASH. REV. CODE ch. 13.40 (2012).

174. See WASH. REV. CODE § 13.40.010(2) (“It is the intent of the legislature that a system capable of having primary responsibility for, being accountable for, and *responding to the needs of youthful offenders* . . . be established.” (emphasis added)); *State v. Saenz*, 175 Wash. 2d 167, 172–73, 283 P.3d 1094, 1097 (2012) (identifying that despite the Act’s shift toward administering justice, the legislature intended for the statute to still “[preserve] the fundamental difference between juvenile courts and adult courts—unlike wholly punitive adult courts, juvenile courts remained rehabilitative.”).

being amended several times, the Act has kept its focus on the needs of juveniles and the goals of rehabilitation and accountability.<sup>175</sup> Those amendments have reiterated that the goal of the juvenile justice system is to rehabilitate juveniles and promote their reintegration into society.<sup>176</sup> Currently in Washington, juveniles sending a sexually explicit image of themselves are subject to a possible felony conviction and sex offender registration.<sup>177</sup> Such severe punishment for an act that lacks malicious intent seems to be inconsistent with the rehabilitation goal of the juvenile justice system.<sup>178</sup> Likewise, the stigma of a felony or sex offender registration would complicate the juvenile's reintegration into society,<sup>179</sup> further making the punishment inconsistent with rehabilitation.

Empirical data also suggests that a less severe punishment, such as diversion, may be the best approach.<sup>180</sup> Diversion programs can be more effective in reducing recidivism than the traditional justice system.<sup>181</sup> Although studies have shown that juveniles are less likely to consider long-term consequences of their actions,<sup>182</sup> studies on diversion programs in Florida<sup>183</sup> and Michigan<sup>184</sup> suggest that diversion programs reduce the recidivism rates of juvenile offenders. Thus, some diversion programs may lead juveniles to actually consider long-term consequences.<sup>185</sup> Diversion programs could, through education, bring the dangers of sexting to the juveniles' attention.<sup>186</sup> This could mitigate the

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175. See *State v. Weber*, 159 Wash. 2d 252, 283, 149 P.3d 646, 662 (2006).

176. See Substitute H.B. 1793, 62d Leg., Reg. Sess. (Wash. 2011) ("One of the goals of the juvenile justice system is to rehabilitate juvenile offenders . . .").

177. See WASH. REV. CODE § 9.68A.050 (2012).

178. See, e.g., Mirko Bagaric, *Consistency and Fairness in Sentencing—The Splendor of Fixed Penalties*, 2 CAL. CRIM. L. REV. 1, 16–17 (2009) (discussing the possible inconsistencies between rehabilitation and punishment).

179. Jill Levenson & Leo Cotter, *The Effect of Megan's Law on Sex Offender Reintegration*, 21 J. CONTEMP. CRIM. JUST. 49, 61–62 (2005).

180. See *supra* Part I.B.

181. Holly Wilson & Robert Hoge, *The Effect of Youth Diversion Programs on Recidivism*, 40 CRIM. JUST. & BEHAV. 497, 509–10 (2012).

182. See *supra* Part I.B.

183. Richard Dembo et al., *Evaluation of an Innovative Post-Arrest Diversion Program: 12-Month Recidivism Analysis*, 47 J. OFFENDER REHAB. 356 (2008).

184. Kay Hodges et al., *Recidivism, Costs, and Psychosocial Outcomes for a Post-Arrest Juvenile Diversion Program*, 50 J. OFFENDER REHAB. 447 (2011).

185. *Id.*; Dembo et al., *supra* note 183.

186. See, e.g., W. VA. CODE ANN. § 49-5-13g(b) (West 2013) (listing a number of topics that should be covered in any sexting educational diversion program, including both legal and nonlegal consequences).

issue of juveniles failing to consider the long-term consequences of sexting and allow for a possibly more severe punishment following any subsequent violation. Several other states have followed similar approaches to addressing juvenile sexting.<sup>187</sup>

Despite the rehabilitative purpose of the juvenile justice system, the legislative intent of Washington's child pornography statute—as illustrated by its plain language<sup>188</sup> and legislative history<sup>189</sup>—suggests Washington intended to prosecute both juveniles and adults to prevent the sexual exploitation of children. Washington's current statute allowing for severely punishing juvenile sexting under child pornography law<sup>190</sup> should be considered in any future amendment the Legislature makes to the statute. These two conflicting interests—rehabilitation and severe punishment—can be addressed by finding a balance between the two. The mental immaturity of juveniles suggests that a felony charge and sex offender registration is inappropriate,<sup>191</sup> but the Washington State Legislature's intent suggests the State is interested in a more severe punishment than diversion.<sup>192</sup> The State's interest in punishment should be balanced with the immaturity of juveniles and the justice system's recognition that juveniles should be treated less severely than adults. Under the current child pornography statute, adults can face felony charges and sex offender registration.<sup>193</sup> Therefore, the most severe approach that avoids felony charges and sex offender registration—a misdemeanor penalty—would be the appropriate response for voluntary, non-malicious, juvenile sexting.

### *B. Tier 2: Juvenile Sexting with Malicious Intent—Cyberbullying*

A separate statutory section should cover malicious sexting to address cyberbullying. The separate section should also address concerns the Washington State Legislature expressed through its child pornography statute.

Washington should punish malicious sexting as a felony. Although

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187. *See, e.g.*, N.J. STAT. ANN. § 2C:24-4 (West 2013); N.Y. SOC. SERV. LAW § 235.22 (Consol. 2013).

188. *See* WASH. REV. CODE §§ 9.68A.001, .050 (2012).

189. *See* H.B. 2424, 61st Leg., Reg. Sess. (Wash. 2010); H.B. 2177, 62d Leg., Reg. Sess. (Wash. 2012); WASH. REV. CODE § 9.68A.001.

190. *See* WASH. REV. CODE § 9.68A.050; WASH. REV. CODE § 9A.44.130 (2012).

191. *See supra* Part I.B.

192. *See* WASH. REV. CODE § 9.68A.001.

193. WASH. REV. CODE § 9.68A.050; WASH. REV. CODE § 9A.44.130.

cyberbullying through sexting may not be as common as consensual sexting among juveniles, the harm of cyberbullying can be extreme.<sup>194</sup> Much like the long-term harm that can occur from child pornography,<sup>195</sup> cyberbullying can have a lasting effect.<sup>196</sup> Once sexually explicit images enter the public realm of the digital world, they are difficult to remove, adding permanency to the images and harm.<sup>197</sup> Although some empirical data suggests a severe penalty is less likely to deter juvenile behavior,<sup>198</sup> the data does not state that a severe penalty will fail to deter *all* juvenile behavior. This means that a severe penalty could possibly deter some juvenile behavior. When extreme consequences like suicide are involved, the chance to deter some malicious sexting is arguably worth the severe punishment. Therefore, malicious sexting should be charged with a felony because of the potential severe harm to the victim.

The Washington State Legislature's intent to severely punish child pornography should still apply to cyberbullying. When a juvenile's image is sent as a means of cyberbullying, malicious intent is present.<sup>199</sup> The malicious intent is consistent with the type of activity from which the Washington State Legislature intended to protect children under the child pornography statute—intentional or knowing exploitation of a minor.<sup>200</sup> This is distinguishable from sexting under the first tier of the proposed statute<sup>201</sup> because an intent to harm is present. The child pornography statute is intended to protect the victim.<sup>202</sup> When an intent to harm is present, the statute should offer the potential victim full protection from harm pursuant to the Legislature's intent in the child pornography statute. However, even with malicious intent, sex offender registration is not appropriate<sup>203</sup> and should not be included in either tier of the statute.

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194. See Celizic, *supra* note 4 (explaining the suicide of a teen after her sexually explicit photograph was spread among her peers via sexting).

195. See Carissa Byrne Hessick, *The Limits of Child Pornography*, 89 IND. L.J. 1437, 1461–64 (2014).

196. *Id.*

197. See *Cyberbullying*, SAFETEENS.ORG, <http://www.safeteens.org/relationships/cyberbullying/> (last visited Feb. 4, 2014).

198. See *supra* Part I.B.

199. The definition of cyberbullying includes malice: “the abuse, coercion, harassment, or threatening of another person through electronic media such as . . . text messages.” BLACK’S LAW DICTIONARY 469 (10th ed. 2014) (defining “cyberbullying”).

200. See WASH. REV. CODE §§ 9.68A.001, .050 (2012).

201. See *supra* Part III.A.

202. See WASH. REV. CODE § 9.68A.001.

203. See *infra* Part III.C.



C. *Sex Offender Registration Is Not Appropriate for Either Juvenile Sexting or Juvenile Cyberbullying*

Because juveniles lack the mental capacity to appreciate the serious consequences of sexting, the long-term stigma of a sex offender registration is a disproportionate penalty for any juvenile sexting. Society in general may have difficulty accepting a sex offender.<sup>204</sup> The potential risk of being ostracized by society may not create a sufficient deterrence to juvenile sexting to justify its use because juveniles do not tend to consider the consequences of their actions.<sup>205</sup> If juveniles have a tendency to disregard future consequences of their actions, even the possibility of becoming a sex offender and being an outcast of society seems unlikely to have the deterring impact that the statute intends.

Further, juvenile sexting is not as culpable as other child pornography that justifies sex offender registration. Sex offender registration focuses on public safety by informing the public of potentially dangerous sexual predators in the community.<sup>206</sup> However, many juvenile sex offenders may not be motivated by deviant preferences or deviant sexual arousal towards a minor,<sup>207</sup> making them unlikely candidates for repeating offenses.<sup>208</sup> If juveniles do not have a deviant sexual arousal toward juveniles that would threaten public safety, then it follows that sex offender registration for juvenile sexting—and non-malicious sexting in particular—does not serve the informative purpose engrained in sex offender statutes because these juveniles are not dangerous sexual predators. If a juvenile's sexting habits are motivated by deviant preferences, it may be argued that these juveniles should be given the same punishment as adults—sex offender registration. However, juvenile character deficiencies have a greater likelihood of being reformed than adults.<sup>209</sup> If juvenile character deficiencies are more likely to be reformed, then they should be given the opportunity to reform

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204. See Levenson & Cotter, *supra* note 179, at 58.

205. See *supra* Part I.B.

206. Smith v. Doe, 538 U.S. 84, 102–03 (2003).

207. See FRANK C. DICATALDO, THE PERVERSION OF YOUTH: CONTROVERSIES IN THE ASSESSMENT AND TREATMENT OF JUVENILE SEX OFFENDERS 47 (2009) (referencing a study where “juvenile sex offenders did not demonstrate elevated levels of deviant fantasy but had fewer fantasies with nondeviant content, leading the researchers to conclude that [adolescent] sexual offending . . . may not be related to elevations in deviant fantasies but to deficits in nondeviant fantasies.”).

208. *Id.* at 18.

209. Roper v. Simmons, 543 U.S. 551, 570 (2005).

instead of given a permanent and severe punishment.<sup>210</sup> Therefore, juveniles should not be required to register as sex offenders.

*D. Washington's Approach to Juvenile Sexting Should Not Provide a Defense for Adult Defendants*

The proposed statute should address only juveniles who send, receive, or possess a sexually explicit image of a juvenile. Because of the importance of punishing child pornography in Washington State—as exhibited by its statute and amendments—adults sexting with a juvenile should still be subject to Washington's current child pornography statute, whether the sexting is consensual or not. Opponents of this approach may argue that the laws should allow for an acceptable age differential when an adult is sexting with a juvenile<sup>211</sup>—similar to statutory rape laws in the state of Washington.<sup>212</sup> However, as the California Court of Appeals in *People v. Gonzalez*<sup>213</sup> discussed, one danger of child pornography that is not found in cases of statutory rape is the possibility of the image being duplicated or copied.<sup>214</sup> Further, because adults' mental maturity allows for a better understanding of long-term consequences, adults are better able to control impulses and recognize the long-term danger of the sexually explicit image being duplicated and disseminated.<sup>215</sup> Therefore, because of the unique dangers of child pornography and the maturity difference between juveniles and adults, any special treatment in juvenile sexting cases should apply only to juvenile offenders.

## CONCLUSION

Washington should amend its criminal code to include a separate statute addressing juvenile sexting. Considering case law, legislative history, and empirical studies, Washington State should not continue to charge juvenile sexting under the current child pornography statute.

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210. *See, e.g., id.* (noting that juveniles are more likely than adults to be reformed as a basis for the Court's holding that the death penalty is prohibited by the Eighth and Fourteenth Amendments for individuals who were under the age of eighteen at the time of their crime).

211. *See, e.g.,* TEX. PENAL CODE ANN. § 43.26 (West 2013) (providing an affirmative defense for a defendant when the defendant and other individual involved are dating and within two years in age).

212. *See* WASH. REV. CODE §§ 9A.44.073, .076, .079 (2012).

213. 211 Cal. App. 4th 132 (Cal. Ct. App. 2012).

214. *Id.* at 136–37.

215. Steinberg & Scott, *supra* note 38, at 74.

Doing so is inappropriate because the current statute requires juveniles to register as sex offenders and deal with the subsequent stigma and long-term consequences of sex offender status. A new statute should separate juvenile sexting into two categories: one tier for consensual, non-malicious juvenile sexting that carries the lesser charge of a misdemeanor, and a separate tier punishing malicious sexting like cyberbullying with a felony charge. A two-tier system will apply proportionate punishments for both juvenile sexting and cyberbullying. At the same time, the proposed system will take into consideration the psychosocial immaturity of juvenile decision making, which renders deterrence less effective and diminishes the need for retribution. This new approach will protect those juveniles acting without malicious intent while still being strict on acts of malicious intent that should be considered more culpable. Washington needs to provide growing teenagers with an opportunity to learn from their actions rather than give them lifelong punishments for being young and immature.