

# RESPONDING TO SELF-PRODUCED CHILD PORNOGRAPHY: EXAMINING LEGISLATIVE SUCCESSES AND SHORTCOMINGS TO REACH AN APPROPRIATE SOLUTION

*Shawn P. Barnes\**

## I. INTRODUCTION

Inevitably, technological advancements present novel legal issues: this is not a new concept.<sup>1</sup> The past decade has seen vast growth in the use of computers and cellular telephones, and with it, a growing abyss of novel legal issues facing lawmakers, judges, and prosecutors. One of these issues is an all too common practice whereby cell phone and computer users electronically send sexually explicit images of themselves to one another. This practice is commonly known as “sexting.”<sup>2</sup>

A threshold matter, and one that is central to this discussion, is the actual definition of sexting. The Second Circuit has defined it as “the exchange of sexually explicit text messages, including photographs, via cell phone.”<sup>3</sup> The Fourth Circuit simply defined it as “[the] texting of sexually suggestive pictures.”<sup>4</sup> The Third Circuit has defined sexting as “the practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude

---

\*. Shawn P. Barnes is an Assistant Prosecutor in Union County, New Jersey. J.D., 2010, Rutgers School of Law – Newark; B.A., cum laude, 2006, Alfred University. All opinions expressed herein are solely those of the author and do not represent the Union County Prosecutor’s Office.

1. See Rich Haglund, Note, *Applying Pen Register and Trap and Trace Devices to Internet Communications: As Technology Changes, Is Congress or the Supreme Court Best-Suited to Protect Fourth Amendment Expectations of Privacy?* 5 VAND. J. ENT. L. & PRAC. 137 (2002-2003) (analyzing the impact of new surveillance technology on Fourth Amendment privacy rights); see also Jane A. Kalinski, *Jurors at the Movies: Day-in-the-Life Videos as Effective Evidentiary Tool or Unfairly Prejudicial Device?* 27 SUFFOLK U. L. REV. 789 (1993) (questioning the prejudicial effects of video evidence at trial).
2. See Kimberlianne Podlas, *The “Legal Epidemiology” of the Teen Sexting Epidemic: How the Media Influenced a Legislative Outbreak*, 12 PITT. J. TECH. L. & POL’Y 1, 3 (2011) [hereinafter Podlas] (describing how sexting has become a cultural phenomena).
3. *United States v. Broxmeyer*, 616 F.3d 120, 123 (2d Cir. 2010).
4. *United States v. Vann*, 620 F.3d 431, 451 (4th Cir. 2010).

photographs via cellular telephones or over the Internet.”<sup>5</sup> Sexting has even made its way into the dictionary, with Merriam Webster defining it as “the sending of sexually explicit messages or images by cell phone.”<sup>6</sup>

These conflicting definitions suggest many issues. Are sexually suggestive messages that are purely textual in nature to be treated the same as messages containing actual images? Does the term sexting apply to messages sent via the Internet, or only to messages sent via cellular telephones? Clearly defining the conduct sought to be addressed is critical to this discussion, and the foregoing definitions demonstrate the problematic, overbroad nature of the term sexting. However, attempting to formulate an acceptable definition begs the question of whether this particular conduct should even be called sexting.

Obviously, sexting is a hybrid word formed by combining the words “sex” and “texting.”<sup>7</sup> The word alone carries certain connotations that ultimately have the effect of downplaying the importance of the issue. This Article addresses the creation and dissemination of “self-produced child pornography,”<sup>8</sup> that is, images constituting child pornography,<sup>9</sup> taken by the minor who is the actual subject of the image, without threats, coercion, or adult involvement.<sup>10</sup> This Article avoids the sensational term “sexting” where possible.

- 
5. Miller v. Mitchell, 598 F.3d 139, 143 (3d Cir. 2010) (quoting the plaintiff’s definition of sexting).
  6. See Leanne Italie, ‘F-bomb,’ ‘Sexting’ make it into mainstream dictionary, USA TODAY, (Aug. 14, 2012, 4:10 AM), [http://www.usatoday.com/USCP/PNI/Front%20Page/2012-08-14-New-Dictionary-Words\\_ST\\_U.htm](http://www.usatoday.com/USCP/PNI/Front%20Page/2012-08-14-New-Dictionary-Words_ST_U.htm).
  7. Todd A. DeMitchell & Martha Parker-Magagna, *Student Victims or Student Criminals? The Bookends of Sexting in a Cyber World*, 10 CARDOZO PUB. L. POL’Y & ETHICS J. 1, 4 (2011-2012).
  8. Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL’Y & L. 1, 4 n.8 (2007-2008) [hereinafter Leary I] (introducing the term “self-produced child pornography” as opposed to “sexting”).
  9. The States and Federal Government do not universally define “child pornography,” and admittedly, many intricacies exist with each entity’s definition. The concept of child pornography, however, does generally encompass similar behavior across jurisdictional lines. This Article will propose alternative legal treatment for one aspect of child pornography, specifically, that which is “self-produced.” For this reason, a uniform definition of child pornography is not necessary for the purposes of this Article.
  10. Sexually explicit messages that are purely textual in nature will not be discussed in this Article. While these specific messages pose some risks similar to those posed by sending actual images, they do not meet the

The initial debate regarding self-produced child pornography focused on the necessity, if any, of a legal response.<sup>11</sup> Naturally, the discussion has shifted since its inception. The present debate generally accepts the premise that self-produced child pornography is a problem requiring a societal response; it is clear that such a response is not only appropriate, but also necessary.<sup>12</sup> Now, the discussion focuses on developing an appropriate response.<sup>13</sup> Which societal institutions should be responding to self-produced child pornography? What exactly should the response entail? This Article seeks to answer these questions, proposing a legislatively based, multi-disciplinary approach encompassing both proactive and reactive mechanisms to combat self-produced child pornography in an effective, uniform manner.

Section I describes the considerable problems involved with self-produced child pornography, which demonstrate the overwhelming importance of legislative action on this topic. Section II discusses the appropriate sources of the solution. Section III examines the legislative enactments of six states, highlighting not only their benefits, but also their flaws. Section IV explains the components that should be included in any legislation seeking to combat self-produced child pornography. Section V proposes a legislative scheme

---

legal definition of ‘child pornography,’ and thus, do not implicate the same harms addressed in this Article.

11. Cf. Susan Hanley Duncan, *A Legal Response is Necessary for Self-Produced Child Pornography: A Legislator’s Checklist for Drafting the Bill*, 89 OR. L. REV. 645, 650 (2010-2011) [hereinafter Duncan] (arguing that a legal response is necessary, but noting that “[s]ome commentators argue that self-produced child pornography is a social issue and that no legal sanctions should be imposed[.]” and citing numerous articles suggesting a response to self-produced child pornography is an overreaction), with Leary I, *supra* note 8 (advocating and proposing a societal and legal response).
12. See, e.g., Leary I, *supra* note 8 at 6 (explaining the dilemma society has faced when dealing with self-produced child pornography).
13. See generally Eric S. Latzer, Comment, *The Search for a Sensible Sexing Solution: A Call for Legislative Action*, 41 SETON HALL L. REV. 1039, 1041 (2011) [hereinafter Latzer] (urging legislators to pass anticipatory laws); see also Maryam F. Mujahid, Note, *Romeo & Juliet – A Tragedy of Love by Text: Why Targeted Penalties that Offer Front-End Severity and Back-End Leniency are Necessary to Remedy the Teenage Mass Sexing Dilemma*, 55 HOW. L.J. 173, 177 (2011) [hereinafter Mujahid] (advocating for a narrowly-tailored rule that takes into account a teenager’s level of maturity); see also David A. Bosak, Note, *The Blurring Line Between Victim and Offender: Self-Produced Child Pornography and the Need for Sentencing Reform*, 73 OHIO ST. L.J. 141 (2012) [hereinafter Bosak] (proposing changes to the sentencing laws to account for self-produced child pornography).

that could serve as a model for states seeking to address self-produced child pornography.

## II. HIGH STAKES FOR ALL: THE OVERWHELMING IMPORTANCE OF AN EFFECTIVE RESPONSE

Many of our nation's teenagers are engaging in behavior involving self-produced child pornography.<sup>14</sup> It is clear that the creation and dissemination of self-produced child pornography is occurring on some level, and the consequences for those involved are dire.<sup>15</sup> The specific facts of the juvenile's involvement present very different problems. First, the most important issue is the need to protect the very children who are the potential subjects of these images. Second, there is the need for a mechanism to correct illegal conduct in a manner that is effective, but not unnecessarily harsh. When taken together, the importance of an effective response becomes apparent.

### A. *Statistics Associated with Self-Produced Child Pornography*

Various groups have conducted studies on the prevalence of behavior involving self-produced child pornography among teenagers. A 2009 study, conducted by the National Campaign to Prevent Teen and Unplanned Pregnancy, found that 20% of teenagers between the ages of 13 and 19 admit to having sent or posted "nude or semi-nude photographs of themselves."<sup>16</sup> Another 2009 study, conducted by the Pew Research Center, found that among 12- to 17-year-olds who own a cellular phone, 4% admit to having taken a "sexually suggestive nude or nearly nude photo or video of themselves" and sending it to another adolescent.<sup>17</sup> Among this same group, 15% admitted to receiving those images.<sup>18</sup> A 2011 study, conducted by the University of New Hampshire Crimes Against Children Research Center, found that 9.6% of minors between 10 and 17 years old "reported appearing in or creating nude images or receiving such images in the past

- 
14. See *infra* notes 16–23 and accompanying text.
  15. E.g., Bosak, *supra* note 12 at 142–143 (describing how six teenage girls faced child pornography charges after taking sexually explicit photographs of themselves).
  16. *Sex and Tech: Results from a Survey of Teens and Young Adults*, NAT'L CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY (2009), [http://www.thenationalcampaign.org/sextech/PDF/SexTech\\_Summary.pdf](http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf).
  17. Amanda Lenhart, *Teens and Sexting: How and Why Minor Teens are Sending Suggestive Nude or Nearly Nude Images via Text Messaging*, PEW INTERNET & AM.LIFE PROJECT (Dec. 15, 2009), <http://pewresearch.org/assets/pdf/teens-and-sexting.pdf>.
  18. *Id.*

year.”<sup>19</sup> Most recently, researchers at the University of Texas conducted a study examining the frequency of sexting behavior, and its relationship to sexual activity.<sup>20</sup> This study included 948 participants between the ages of 14 and 19 years old, with a median age of 15.8.<sup>21</sup> Alarming, 27.6% of the participants admitted to having “sent a naked picture of themselves through text or e-mail.”<sup>22</sup>

Admittedly, the results of these studies are not entirely comparable.<sup>23</sup> However, they ultimately demonstrate that many teenagers are engaging in some form of self-produced child pornography, and these percentages are significant enough to warrant a response.

*B. Issues Facing Minor Subjects of Self-Produced Child Pornography*

The state has a strong interest in protecting the youngest members of society.<sup>24</sup> Under the doctrine of *parens patriae*, the state has an obligation to protect children when such protection is warranted.<sup>25</sup> Oftentimes, this includes protecting children from themselves due to their lack of maturity and foresight. Minors are often unable to grasp the full consequences of their actions; this principle is especially true in the realm of the risks associated with sharing sexually explicit photographs or videos of themselves. As electronic communications are complex, it is doubtful that a given juvenile contemplates the fact that an image may become “viral”<sup>26</sup>

- 
19. Kimberly J. Mitchell, Ph.D., et al., *Prevalence and Characteristics of Youth Sexting: A National Study*, 129 PEDIATRICS 1, 4 (2012), available at <http://pediatrics.aappublications.org/content/early/2011/11/30/peds.2011-1730.full.pdf>.
  20. Jeff R. Temple, Ph.D., et al., *Teen Sexting and Its Association With Sexual Behaviors*, 166 ARCH. PEDIATRICS & ADOLESCENT MED. 828 (2012), [hereinafter Univ. of Texas Study], available at <http://archpedi.jamanetwork.com/article.aspx?articleid=1212181>.
  21. *Id.* at 828–829.
  22. *Id.*
  23. This is because the studies were conducted utilizing different variables and different study groups. For a detailed discussion about these differences, see Bill Albert, *Sexting Redux*, PREGNANT PAUSE: GETTING BLOGGY ABOUT TEEN AND UNPLANNED PREGNANCY, (Dec. 6, 2011), <http://blog.thenationalcampaign.org/cgi-bin/mt/mt-search.cgi?tag=teens>.
  24. *E.g.* Ginsburg v. New York, 390 U.S. 629, 640 (1968).
  25. BLACK’S LAW DICTIONARY 1221 (9th ed. 2009) (“[T]he state in its capacity as provider of protection to those unable to care for themselves.”).
  26. The term ‘viral’ generally refers to a file or photo spreading through the process of sharing, either by Internet or messaging.

before he or she pushes “send.” To reverse the process and delete an image after others have distributed it would be virtually impossible in light of the infinite nature of the Internet.

Unfortunately, many dismiss the importance of this issue, chalking it up to “kids being kids,” a new form of juvenile flirtation, or sexual experimentation.<sup>27</sup> Even if the practice of sending self-produced child pornography is, in fact, a new form of flirtation or sexual experimentation, society must not dismiss this behavior altogether. To do so would be to dismiss conduct that visits grossly detrimental consequences upon children. The harm these children suffer ranges from feelings of embarrassment and isolation to severe cases of depression.<sup>28</sup> On more than one occasion, the most concerning cases have ended tragically with the child taking his or her life.<sup>29</sup> These examples illustrate some of the devastating effects that self-produced child pornography has on children who are the subjects of these images.

In addition to providing shocking figures about the prevalence of self-produced child pornography, the University of Texas study also illustrates some very alarming connections between self-produced child pornography and sexual behavior, as well as risky sexual behavior among teenagers.<sup>30</sup> Of the girls who indicated that they had never engaged in sexting, only 42% had engaged in sexual activity; by contrast, of the girls who indicated that they had engaged in sexting,

- 
27. *E.g.* Peter E. Cumming, *Children’s Rights, Children’s Voices, Children’s Technology, Children’s Sexuality*, ROUNDTABLE: YOUTH, SEXUALITY, TECH. (May 26, 2009), available at <http://www.yorku.ca/cummingp/documents/TeenSextingbyPeterCummingMay262009.pdf>.
28. Christina Caron, *Teen Sexting Linked to Psychological Distress*, ABC NEWS (Nov. 10, 2011), <http://abcnews.go.com/Technology/teen-sexting-linked-psychological-distress/story?id=14914700>.
29. *See* Randi Kaye, *How a Cell Phone Picture Led to a Girl’s Suicide*, CNN (Oct. 7, 2010, 3:51 PM), <http://www.cnn.com/2010/LIVING/10/07/hope.witsells.story/index.html> (describing how 13-year-old Hope Witsell committed suicide after a picture of her breasts, which she had taken and forwarded to her boyfriend, went viral and led to her being incessantly bullied); *see also* Mike Celizic, *Her Teen Committed Suicide Over ‘Sexting’*, NBC NEWS (Mar. 6, 2009, 9:26 AM), [http://today.msnbc.msn.com/id/29546030/ns/today-parenting\\_and\\_family/t/her-teen-committed-suicide-over-sexting](http://today.msnbc.msn.com/id/29546030/ns/today-parenting_and_family/t/her-teen-committed-suicide-over-sexting) (describing how 18-year-old Jessica Logan committed suicide after her ex-boyfriend forwarded nude photographs that she had sent him to their classmates).
30. Univ. of Texas Study, *supra* note 20 at 828 (“The results suggest that teen sexting is prevalent and potentially indicative of teens’ sexual behaviors.”).

77.4% had engaged in sexual activity.<sup>31</sup> Of the boys who indicated that they had never engaged in sexting, 45.4% had engaged in sexual activity; of the boys who indicated that they had engaged in sexting, 81.8% had engaged in sexual activity.<sup>32</sup>

Additionally, the study outlines a correlation between young women creating and disseminating self-produced child pornography and young women engaging in risky sexual behavior.<sup>33</sup> According to the study, risky sexual behavior includes having “multiple partners and using drugs or alcohol before sex.”<sup>34</sup> For instance, among sexually active young women who have sent a sext, 55.8% admit to having more than one sex partner in the past year and 39.8% admit using drugs or alcohol prior to sexual activity.<sup>35</sup> Among sexually active young women who have not sent a sext, 34.6% have had more than one sexual partner over the previous year and only 26.5% have used drugs or alcohol prior to sexual activity.<sup>36</sup> A similar connection existed among sexually active young women who have “asked for a sext” or “have been asked to sext.”<sup>37</sup> Unfortunately, the study does not indicate any causal relationship, so it is unclear whether the sexual activity tends to influence the photography, vice versa, or, if there is no relationship at all. Even so, the fact that this study provides a link between self-produced child pornography behavior and sexual behavior suggests that this issue affects not only the emotional and psychological health of children, but also their physical health.

The tragic reality is that the subjects of these images are frequently victimized.<sup>38</sup> The ways in which this victimization takes place are numerous, but suffice it to say that the level of harm inflicted by the existence of these images warrants appropriate action.

*C. Legal Issues Facing Minors Involved with Self-Produced Child Pornography*

The state has an interest in correcting a juvenile’s illegal conduct. Understandably, one of the ultimate goals of any juvenile justice

---

31. *Id.* at 830.

32. *Id.*

33. *Id.* at 831.

34. *Id.*

35. *Id.* (reporting these statistics in Table 2).

36. *Id.*

37. *Id.*

38. The harms discussed herein certainly do not constitute an exhaustive list of all of those associated with self-produced child pornography. *See* Duncan, *supra* note 11, at 654–63, for a comprehensive discussion of these harms.

system is rehabilitation.<sup>39</sup> Generally, rehabilitative goals should be commensurate with the charged offense. Unfortunately, many states have yet to address the legal aspects of self-produced child pornography.<sup>40</sup> The consequences for juveniles charged with a self-produced child pornography offense in these states are often unnecessarily harsh.<sup>41</sup>

The simple reality is that self-produced child pornography is, nonetheless, child pornography. The traditional child pornography laws were enacted decades before this phenomenon began, at a time when the concept of minors creating and distributing a pornographic image of themselves was unfathomable.<sup>42</sup> Thus, many of the current child pornography statutes do not contemplate circumstances in which the subjects of images voluntarily created and distributed the picture themselves. So long as such distinctions are not made, the creation and distribution of self-produced child pornography will continue to be dealt with under traditional child pornography laws.

Undoubtedly, the consequences for a minor convicted under the traditional child pornography laws are significant.<sup>43</sup> These minors are often required to register as sex offenders.<sup>44</sup> While minors who

- 
39. *E.g.* N.J. STAT. ANN. § 2A:4A-21(b) (West 2012) (noting the purposes of New Jersey's juvenile justice system).
40. *See, e.g., 2012 Sexting Legislation*, NAT'L CONFERENCE OF STATE LEGS, (last updated Oct. 26, 2012), <http://www.ncsl.org/issues-research/telecom/sexting-legislation-2012.aspx> (listing summaries of "sexting" bills that have been proposed in States that have taken or attempted to take action on the topic).
41. *See, e.g., Ken Edelstein, Teens Face More Consequences from Sexting than Congressmen Do*, JUVENILE JUSTICE INFO. EXCH. (Jun. 13, 2011), <http://jjie.org/teens-face-more-consequences-from-sexting-than-congressmen-do/16537> [hereinafter Edelstein] (describing how an 18-year-old has to register as a sex offender until the age of 43 due to his involvement with sexting).
42. The Federal Government enacted the first law regarding child pornography in 1978. *See* 18 U.S.C. § 2251 (2008).
43. *See, e.g.,* N.J. STAT. ANN. § 2C:7-2 (West 2012) (requiring juveniles who are adjudicated delinquent for sex crimes to register as sex offenders).
44. Critics cite the case of Phillip Alpert most frequently for the proposition that the penalties imposed in "sexting" cases are disproportionate with the offense. *See* Edelstein, *supra* note 41 (describing the consequences that 18-year-old Alpert faced when he intentionally distributed nude images of his 16-year-old girlfriend to over numerous people, including the girl's parents). However, the case is not directly applicable in light of Alpert's malicious intent and the fact that he had reached the age of majority. Reported cases involving minors' placement upon the sex offender registries following a self-produced child pornography convictions are sparse, but this is certainly to be expected in light of the confidential nature of the juvenile justice system. Even so, the Alpert

participate in the creation or distribution of self-produced child pornography must be held accountable, blanket treatment as sex offenders is certainly not the answer. The overarching goal of adopting sex offender registration systems was to protect society from recidivating sex offenders.<sup>45</sup> Sex offender registries are intended to protect the community by way of community notification, among other provisions.<sup>46</sup> Undeniably, significant societal stigma accompanies the community notification requirement for sex offenders.<sup>47</sup> While such a stigma serves a purpose under certain circumstances, it is doubtful whether that purpose remains applicable to juveniles convicted of a self-produced child pornography offense. Unfortunately, under the current system, these mandatory requirements may require a juvenile to register for an offense related to self-produced child pornography.<sup>48</sup> The prosecution of self-produced child pornography under traditional child pornography laws, which require sex offender registration, bespeaks laws that have been outpaced by technological advancements.

Self-produced child pornography is a critical issue facing a significant portion of the nation's children.<sup>49</sup> It is essential that the law grow with technology to insure adequate protection for these children, because a failure to address this issue imparts a great injustice upon all minors involved.

### III. THE APPROPRIATE SOURCE OF THE SOLUTION: WHY LEGISLATIVE ACTION ACHIEVES A BETTER RESULT THAN PROSECUTORIAL DISCRETION

Legal scholars and practitioners have suggested a multitude of different approaches in the ongoing debate over self-produced child pornography. The specifics of these approaches have varied greatly. Nonetheless, two general approaches have emerged: one advocating

---

case does effectively demonstrate the harsh nature of sex offender registration.

45. *See, e.g.*, § 2C:7-1 (explaining why New Jersey's legislature enacted sex offender registration requirements).
46. *See, e.g., id.*
47. *See* Shawndra Jones, Note, *Setting Their Record Straight: Granting Wrongly Branded Individuals Relief from Sex Offender Registration*, 41 COLUM. J.L. & SOC. PROBS. 479, 499 (2008) (noting that two exonerated individuals who were forced to register felt "hurt" and "stigmatized").
48. *See supra* note 45 and accompanying text.
49. While this Article focuses on the harms associated with self-produced child pornography as they relate to the subjects of the images and minors involved with the legal system, other groups are affected too. For a detailed discussion of this point, *see* Leary I, *supra* note 8, at 12-18.

for some form of prosecutorial action (or inaction), and the other advocating for some form of legislative action. Although prosecutors play a critical role in deterring self-produced child pornography, a legislation-based solution has far greater potential for effectiveness.

The term “child pornography” is remarkably broad, and understandably it encompasses different forms of conduct.<sup>50</sup> The topic of this Article, self-produced child pornography, is but one of these types of conduct. The unfortunate reality is that under some current statutory constructions, self-produced child pornography falls under the same legislative umbrella as traditional child pornography, an issue states are not adequately addressing.<sup>51</sup> The goal of this Article is the legal recognition of a distinction between self-produced and traditional child pornography, so that individuals charged with an offense involving self-produced child pornography are treated differently than those charged with an offense involving traditional child pornography. The very concept of self-produced child pornography was unimaginable when the traditional child pornography laws were enacted.<sup>52</sup> Thus, it is this behavior that has created the need for a distinction where one had previously been unnecessary, and it is this behavior that has rendered the traditional child pornography statutes obsolete to deal with this new type of child pornography.

Some scholars advocate for a system whereby prosecutors would have the ability to exercise discretion in handling complaints involving self-produced child pornography.<sup>53</sup> For instance, Professor Mary Graw Leary has suggested an approach referred to as “structured prosecutorial discretion.”<sup>54</sup> Many factors are involved in this approach, but as its title suggests, its most distinguishing characteristic is the level of reliance it places on prosecutors.<sup>55</sup> Among its most central tenants, structured prosecutorial discretion calls for the promulgation of guidelines, by prosecutor’s offices, to guide prosecutors in exercising discretion when determining how to

---

50. See 18 U.S.C. § 1466A (2012) (federal child obscenity statute).

51. See *supra* note 40, indicating only 13 states have sought to change this reality.

52. See Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978) (codified at 18 U.S.C. §§ 2251, 2252, 2253, 2423 (2012)).

53. See Leary I, *supra* note 8; Mary Graw Leary, *Sexting or Self-Produced Child Pornography? The Dialog Continues – Structured Prosecutorial Discretion Within a Multidisciplinary Response*, 17 VA. J. SOC. POL’Y & L. 486, 489 (2010) [hereinafter Leary II].

54. Leary II, *supra* note 53 at 489.

55. *Id.* at 491 (advocating for a combination of structured prosecutorial discretion and lesser charges).

proceed in a given case.<sup>56</sup> In essence, a prosecutor would analyze the case in light of these factors and decide whether to prosecute under the traditional child pornography law, a separate statute specific to self-produced child pornography, or ultimately dismiss the case.<sup>57</sup>

Undoubtedly, prosecutorial discretion is a great power. It is a power that is crucial to the functioning of our criminal justice system.<sup>58</sup> Prosecutorial discretion operates as a safety valve, preventing instances where a literal reading of the law leads to a fundamental miscarriage of justice.<sup>59</sup> But, a policy that relies on prosecutorial discretion as its central component ultimately requires prosecutors to compensate for poorly drafted, obsolete, or nonexistent legislation.<sup>60</sup> In doing so, such a policy shifts a responsibility that rightfully belongs to the legislature to prosecutors. Prosecutorial discretion has a place in this discussion, but its rightful place is that of an exception—not a rule.

Many scholars have voiced great concern with prosecutorial actions in the realm of self-produced child pornography. Some have simply advocated for a greater sense of “prosecutorial restraint” in the context of self-produced child pornography.<sup>61</sup> Some have suggested that prosecutors cease all actions regarding self-produced child pornography, and leave parents to handle the issue.<sup>62</sup> Others have gone so far as to portray prosecutors as aggressively victimizing innocent teenagers engaged in “normal, consensual adolescent sexual

- 
56. *Id.* at 497 (providing for the consideration of specific “offender based” and “offense specific” factors).
57. *Id.* (“[S]uch a protocol includes factors to be considered in differentiating between prosecutable and divertible cases.”) (citation omitted).
58. See Angela J. Davis, *The American Prosecutor: Power, Discretion, and Misconduct*, 23 CRIM. JUST. 24, 27–30 (2008-2009) (“The prosecutor’s duty is to use discretion in making the all-important decision of whether an individual should be charged, which charges to bring, and whether and how to plea bargain.”).
59. See *id.* at 28 (noting that it would be “virtually impossible” for the legal system to function correctly without prosecutorial discretion).
60. *Cf. id.* (“Without discretion, prosecutors might be required to bring criminal charges in cases that most people would view as frivolous and in cases where the evidence is weak or lacking in credibility.”).
61. Robert H. Wood, Essay, *The Failure of Sexting Criminalization: A Plea for the Exercise of Prosecutorial Restraint*, 16 MICH. TELECOMM. & TECH. L. REV. 151, 154 (2009-2010) (concluding that “prosecution of teenagers for sexting is a tremendous waste of judicial resources[.]”).
62. See Podlas, *supra* note 2 at 3 n.7 (2011) (citing numerous articles that criticize the prosecution of children for self-produced child pornography and advocate that prosecutors step out of the equation and let parents handle it).

exploration.”<sup>63</sup> Images of “the rogue prosecutor” have led to the assertion that prosecutorial discretion gives prosecutors far too much power.<sup>64</sup> Nevertheless, the argument that legislative action is necessary to constrain “overzealous prosecutors”<sup>65</sup> is hardly persuasive.<sup>66</sup> Prosecutors are not the problem in the realm of self-produced child pornography; rather, the problem lies in the outdated statutes that serve as the very basis for prosecutorial action. While this Article’s goal is certainly not to appease these critics, the multidisciplinary, legislatively based approach suggested herein should have such an effect, albeit secondary in nature.

An effective solution to the problems associated with self-produced child pornography requires a significant amount of attention. In this regard, legislators are in a better position to craft a solution than prosecutors. The legislative process allows for careful debate and deliberation before action is ultimately taken.<sup>67</sup> Legislators may commence studies or conduct research before acting

- 
63. Marsha Levick & Kristina Moon, *Prosecuting Sexting as Child Pornography: A Critique*, 44 VAL. U. L. REV. 1035, 1054 (2009-2010) [hereinafter Levick & Moon] (“The fact that sexting is a social and technological phenomenon that makes adults uncomfortable and prosecutors twitchy is not a justification for applying the very structure designed to *protect* children against child pornography . . . against teenagers engaging in normal, consensual adolescent sexual exploration[.]”).
64. Latzer, *supra* note 13, at 1065–67 (proposing that without guidance, the prosecutorial response to sexting will continue to be inconsistent and unreasonable).
65. Levick & Moon, *supra* note 63, at 1037 (indicating the possibility that a prosecutor is overzealous by merely fitting sexting into the definition of child pornography).
66. Such critics often point to *Miller v. Skumanick*, 605 F. Supp.2d 634, 638 (M.D. Pa. 2009), *aff’d sub nom.*, *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010), to support the proposition that prosecutors are often overzealous in their prosecution of self-produced child pornography. In *Miller*, the District Attorney threatened to file charges against numerous minors in response to the creation and distribution of photographs, which he alleged constituted child pornography, unless the minors completed a lengthy educational and counseling program. The record suggests that the images in question were merely provocative in nature and did not actually constitute child pornography, but the court declined to address this particular point. The District Attorney’s actions seem to be more attributable to a misunderstood interpretation of the law than an abuse of prosecutorial discretion. For this reason, the case is inapplicable to any discussion about prosecutorial discretion.
67. See John V. Sullivan, *How Our Laws are Made: Consideration and Debate*, THE LIBRARY OF CONG., 25 (Jul. 24, 2007) <http://www.gpo.gov/fdsys/pkg/CDOC-110hdoc49/pdf/CDOC-110hdoc49.pdf>.

on a particular issue.<sup>68</sup> The very composition of a legislative body contemplates such processes, allowing for committees and subcommittees to study a particular issue and report findings to the full legislative body.<sup>69</sup> These processes and mechanisms are necessary to achieve the proper outcome.

Additionally, uniformity in enforcement and application of the law throughout a given state must be a goal. Relying on individual prosecutors to arbitrarily decide whether to prosecute an offense under traditional child pornography laws or some other statute is contrary to this goal. Relying on individual prosecutor's office to create policies and regulations regarding the prosecution of these offenses is also contrary to the goal of uniformity. Reasonable minds can differ – so can prosecutors. The stakes are remarkably high in terms of the consequences associated with a juvenile's conviction for an offense involving child pornography, be it self-produced or traditional. The severe disparity between the consequences accompanying a traditional child pornography conviction and a conviction for a related offense not involving sex offender registration illustrates the need for legislative guidance.

There also must be uniformity across jurisdictions. What is to be said about prosecutorial discretion when two juveniles engage in the same course of illicit conduct but the juvenile residing in County A receives a probationary term after pleading guilty to harassment, while his counterpart in County B registers as a sex offender based on his conviction for distributing child pornography? Legislation can ensure a sense of consistency throughout a jurisdiction that prosecutorial discretion cannot.

It is an undeniable fact that prosecutorial discretion plays a critical role in our criminal justice system. It is a vital component of the system, and without it, the system would be greatly strained. But, the drawbacks discussed above are crucial considering the nature of what is at stake. For this reason, legislative bodies, rather than prosecutors, are in the best position to address self-produced child pornography.

#### IV. CONTRASTING LEGISLATIVE RESPONSES: SUCCESSES AND SHORTCOMINGS

Multiple states have taken legislative action regarding the legal treatment of self-produced child pornography.<sup>70</sup> The approaches have varied, resulting in the creation of diversionary programs, new

---

68. See *id.* at 5 (“In some instances, a draft is the result of a study covering a period of a year or more[.]”)

69. See *id.*, *Introduction and Referral to Committee*, at 8.

70. See *infra* sections IV(A) – (C).

statutory offenses, expungement mechanisms, and the creation of affirmative defenses to possession, and sometimes distribution, of self-produced child pornography.<sup>71</sup> One advantage of our federalist system is that individual states may conduct unique legislative experiments, while other states study the benefits and weaknesses of the various approaches.<sup>72</sup> This Section addresses the specific approaches of six states, and discusses both the advantages and drawbacks associated with each, with the ultimate goal of creating a better statutory approach.

*A. New Jersey and New York's Remedial Education Programs*

New Jersey has passed legislation creating a remedial education program for cases involving certain types of self-produced child pornography.<sup>73</sup> A court may only divert a case in which the juvenile is alleged to have committed an “eligible offense,”<sup>74</sup> which is an offense in which:

(1)The facts of the case involved the creation, exhibition or distribution of a photograph depicting nudity as defined in N.J.S.2C:24-4<sup>75</sup> through the use of an electronic communication device, an interactive wireless communications device, or a computer; and

(2)The creator and subject of the photograph are juveniles or were juveniles at the time of its making.<sup>76</sup>

If the complaint is diverted, the juvenile must complete a “remedial education program,” defined as one that will have the effect of increasing the juvenile’s awareness of:

(1)The legal consequences and penalties for sharing sexually suggestive or explicit materials, including applicable federal and State statutes;

---

71. *Id.*

72. *See* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311-12 (1932) (Brandeis, J., dissenting) (stating “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

73. N.J. STAT. ANN. § 2A:4A-71.1 (West 2012).

74. § 2A:4A-71.1(a).

75. § 2C:24-4 (omitting a definition for nudity, and listing ten prohibited sexual acts and includes “nudity, if depicted for the purposes of sexual stimulation or gratification of any person who may view such depiction.”).

76. § 2A:4A-71.1(c).

(2)The non-legal consequences of sharing sexually suggestive or explicit materials including, but not limited to, the effect on relationships, loss of educational and employment opportunities, and being barred or removed from school programs and extracurricular activities;

(3)The potential, based upon the unique characteristics of cyberspace and the Internet, of long-term and unforeseen consequences for sharing sexually suggestive or explicit materials; and

(4)The possible connections between bullying and cyber-bullying and juveniles sharing sexually suggestive or explicit materials.<sup>77</sup>

New York has taken a similar approach, and has also created an education reform program.<sup>78</sup> The New York statute creates a diversionary program for individuals charged with an offense involving “the sending or receipt through electronic means of obscenity<sup>79</sup> . . . or nudity<sup>80</sup> . . . when the sender and the receiver were both under the age of twenty at the time of such communication, but not more than five years apart in age.”<sup>81</sup>

While the New Jersey and New York statutes are remarkably similar, key differences exist between them. For instance, the New Jersey statute permits diversion only for images depicting “nudity,”<sup>82</sup> while the New York statute applies to a much broader category of

---

77. § 2A:4A-71.1(b).

78. N.Y. SOC. SERV. LAW § 458-1 (McKinney 2012).

79. Section 235.00 of the New York Penal Law defines obscenity as a material or performance that:

(a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and

(b) it depicts or describes in a patently offensive manner, actual or simulated: sexual intercourse, criminal sexual act, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and

(c) considered as a whole, it lacks serious literary, artistic, political, and scientific value.

N.Y. PENAL LAW § 235.00 (McKinney 2012)

80. Section 235.20 of the New York Penal Law defines nudity as “the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of the covered male genitals in a discernibly turgid state.” § 235.20

81. N.Y. SOC. SERV. LAW § 458-1.

82. N.J. STAT. ANN. § 2A:4A-71.1(c).

images.<sup>83</sup> In fact, the New Jersey statute's design has the ultimate effect of excluding images depicting certain behavior that the New York statute includes.<sup>84</sup>

There is also a key difference regarding the age ranges contemplated by the statutes. New York's law adopts a "Romeo and Juliet" provision<sup>85</sup> similar to the statutory rape provisions in existence in many states.<sup>86</sup> These statutory provisions are an attempt to recognize that sexual conduct occurring between minors will continue after one of them reaches the age of majority. The New York statute effectively imparts this same wisdom into the realm of self-produced child pornography.

Additionally, these approaches differ in terms of the exact role the remedial educational program plays in the ultimate disposition. The New York statute specifies that the program may serve as a "diversion program . . . or, as a condition of adjustment . . . or as a condition of an order of adjournment in contemplation of dismissal, suspended judgment, discharge with warning, conditional discharge or probation[.]"<sup>87</sup> The New Jersey statute, however, mandates that a juvenile complete the remedial educational program if the court approves the diversion of the complaint.<sup>88</sup> Thus, New York's program can be used in a multitude of different ways if the court, in fact, orders the juvenile into the program. The statutes are also different in regards to the actual creation and maintenance of the remedial education program. The New York statute specifically instructs the Office of Children and Family Services to develop and implement the program, but the New Jersey statute contains no such specificity regarding the program's creation.<sup>89</sup>

---

83. N.Y. SOC. SERV. LAW § 458-1.

84. *Cf.* N.J. STAT. ANN. § 2C:24-4, *with* N.Y. SOC. SERV. LAW § 458-1. Section 2C:24-4 of the New Jersey Statutes includes a list of ten specific prohibited sexual acts, including "nudity." The list also includes "sexual intercourse" and "masturbation," among others, thus leading to the conclusion that the Legislature, in enacting section 2A:4A-71.1 of the New Jersey Statutes, did not intend to allow entry into the remedial education program for individuals charged in complaints alleging the commission of a prohibited sex act other than nudity. On the other hand, section 458-1 of the New York Social Service Law, specifically provides for the inclusion of these behaviors.

85. *See, e.g.,* State v. Limon, 122 P.3d 22, 24 (Kan. 2005) (example of 'Romeo and Juliet' statute).

86. *E.g.,* N.J. STAT. ANN. § 2C:14-2(c)(4) ("The victim is at least 13 but less than 16 years old and the actor is at least 4 years older than the victim.").

87. N.Y. SOC. SERV. LAW § 458-1.

88. N.J. STAT. ANN. § 2A:4A-71.1(a).

89. *Cf.* N.Y. SOC. SERV. LAW § 458-1(2), *with* N.J. STAT. ANN. § 2A:4A-71.1.

One problematic aspect of the New Jersey and New York approaches is that neither provides a voluntariness component in their statutes. Thus, courts cannot necessarily bar juveniles from diversionary programs in matters involving the use of threats or coercion. Undeniably, these programs provide a certain concession to the “innocent” sexual curiosity of juveniles (and young adults in New York’s case), but allowing diversion in cases involving threats or coercion seems counterintuitive. The legislative intent behind the statutes is not entirely clear on this point, but such conduct should never be diverted for cases involving threats or coercion.

*B. Rhode Island’s Statute*

Rhode Island has legislatively created a separate statutory offense for minors who create self-produced child pornography.<sup>90</sup> The law states that “[n]o minor shall knowingly and voluntarily and without threat or coercion use a computer or telecommunication device to transmit an indecent visual depiction of himself or herself to another person.”<sup>91</sup> The court directs juveniles who engage in such conduct to the family court,<sup>92</sup> where the court treats the juvenile’s conduct as a “status offense.”<sup>93</sup> More importantly, the statute specifically exempts this conduct from being prosecuted under traditional child pornography statutes, stating “[a]ny minor adjudicated under subsection (b) shall not be charged under §11-9-1.3 [the child pornography statute] and, further shall not be subject to sex offender registration requirements.”<sup>94</sup>

This statute’s specificity is beneficial. The utilization of a voluntariness element<sup>95</sup> successfully limits the statute’s application to only appropriate cases. Additionally, the statute addresses images depicting “sexually explicit conduct,” which is defined in the section as “actual masturbation or graphic focus on or lascivious exhibition of the nude genitals or pubic area of the minor.”<sup>96</sup> Rhode Island’s traditional child pornography statute gives the term “sexually explicit conduct” a much broader reading, including “graphic sexual

---

90. R.I. GEN. LAWS ANN. § 11-9-1.4 (West 2012).

91. § 11-9-1.4(b).

92. § 11-9-1.4(c).

93. BLACK’S LAW DICTIONARY 1188 (9th ed. 2009) (defining a status offense as, “[a] minor’s violation of the juvenile code which would not be considered illegal if an adult did it, but that indicates a minor is beyond parental control.”).

94. § 11-9-1.4(d).

95. § 11-9-1.4(b) (“No minor shall *knowingly and voluntarily*[.]”) (emphasis added).

96. § 11-9-1.4(a)(5).

intercourse.”<sup>97</sup> Thus, images depicting any form of actual sexual contact remain actionable only under the traditional child pornography statute, as they are not contemplated under the new statute.

Rhode Island’s statute also effectively deals with the minor-subject of a self-produced child pornography image.<sup>98</sup> However, the statute only deals with one part of the problem – it does not contemplate any change in legal treatment for minors who may receive, possess, or redistribute the image at a later time. Thus, any minor, other than the subject, who is found to have committed an offense involving self-produced child pornography will presumably continue to be prosecuted under the state’s traditional child pornography law. These minors remain subject to Rhode Island’s sex offender registry.<sup>99</sup>

### *C. Florida, Nevada, and Texas’s Hybrid Approach*

Florida’s legislature enacted a law that created the new offense of “sexting.”<sup>100</sup> The statute creates two offenses: distribution and possession.<sup>101</sup> A minor violates the statute if he or she distributes “to another minor any photograph or any video of any person which depicts nudity<sup>102</sup> . . . and is harmful to minors.”<sup>103</sup> Additionally, a

---

97. Section 11-9-1.3(c)(6)(i) of the Rhode Island General Laws defines “graphic sexual intercourse” as “including genital-genital, oral-genital, anal-genital, or oral-anal, or lascivious sexual intercourse where the genitals, or pubic area of any person is exhibited.” § 11-9-1.3(c)(6)(i).

98. § 11-9-1.4(b) (“No minor shall . . . use a computer or telecommunication device to transmit an indecent visual depiction of himself or herself to another person.”).

99. § 11-37.1-3(a) (setting forth the requirements that mandate a person register as a sex offender).

100. FLA. STAT. ANN. § 847.0141 (West 2012).

101. § 847.0141(1)(a) – (b).

102. Section 847.0141(1)(b) of the Florida Statutes refers to “nudity” as defined in section 847.001(9) of the Florida Statutes. Section 847.001(9) states:

“Nudity” means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering; or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state. A mother’s breastfeeding of her baby does not under any circumstance constitute “nudity,” irrespective of whether or not the nipple is covered during or incidental to feeding.

§ 847.0141(1)(b)

juvenile violates the statute if he or she possesses “a photograph or video of any person that was transmitted or distributed by another minor which depicts nudity and is harmful to minors.”<sup>104</sup> An affirmative defense is available; a juvenile can defend himself against a possession charge if he or she did not solicit the material, took reasonable steps to report the image, and did not redistribute the image.<sup>105</sup> This statute also creates a system of escalating severity based on the type of conduct and any previous violations.<sup>106</sup> Similar to New Jersey’s approach, this statute only applies when the images or videos involve nudity; images or videos that depict “sexual conduct” or “sexual excitement” do not fall under this statute and may still be prosecuted under the traditional child pornography laws.<sup>107</sup>

Nevada’s legislators have also taken action.<sup>108</sup> The Nevada statute regarding self-produced child pornography distinguishes three specific types of conduct: (1) distribution by the subject; (2) distribution by another; and, (3) possession.<sup>109</sup> The legislature drafted the statute to provide an affirmative defense to possession for situations in which the possessor did not solicit the image and promptly either took reasonable steps to destroy the image, or reported the incident to law enforcement.<sup>110</sup> A juvenile is charged

---

103. Section 847.0141(1)(a) of the Florida Statutes defines “harmful to minors” as put forth in section 847.001(6) of the Florida Statutes. Section 847.001(6) states:

“Harmful to minors” means any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:

(a) Predominantly appeals to a prurient, shameful, or morbid interest;

(b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material or conduct for minors; and

(c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

§ 847.0141 (1)(a)

104. § 847.0141.

105. § 847.0141(1)(b)(1) – (3).

106. § 847.0141 (2)–(3).

107. *Cf.* § 847.0141(4), *with* N.J. STAT. ANN. § 2A:4A-71.1(c)(1) – (2) (West 2012) (creating a diversion program for sexting cases involving nudity only).

108. NEV. REV. STAT. ANN. § 200.737 (Lexis-Nexis 2011).

109. § 200.737(1) – (3).

110. § 200.737(3).

differently based on the underlying offense.<sup>111</sup> Additionally, a prosecutor may bring more serious charges against a juvenile for a second or subsequent offense.<sup>112</sup> Notably, juveniles convicted of violating the statute's provisions are specifically exempted from sex offender registration.<sup>113</sup>

The Nevada statute includes an age restriction.<sup>114</sup> The statute's applicability, in regards to the transmission or distribution, is limited to a minor who is older than, the same age as, or not more than four years younger than the minor depicted in the image.<sup>115</sup> In cases of possession, the statute applies when the minor is older than, the same age as, or not more than four years younger than the minor depicted in the image.<sup>116</sup> The statute's age limitation allows the prosecution to charge other, arguably more severe offenses under traditional child pornography laws in appropriate cases.

On September 1, 2011, Texas enacted sweeping legislation to combat the production and creation of self-produced child pornography.<sup>117</sup> The statute is multi-faceted in nature. The statute includes two new provisions: a statutory offense to deal with self-produced child pornography,<sup>118</sup> and affirmative defenses.<sup>119</sup> Other newly-enacted statutes include provisions for a remedial education program<sup>120</sup> and an expungement mechanism.<sup>121</sup>

The Texas statute distinguishes between the distribution and possession of self-produced child pornography.<sup>122</sup> This distinction guides not only the grading of the offense, but also the accompanying sentence, which depends on the level of the offense.<sup>123</sup> In Texas, both distribution and possession of self-produced child pornography are generally Class C misdemeanors, but the level of the offense escalates

---

111. § 200.737(4) – (6).

112. § 200.737(4)(b).

113. § 200.737(4)(a)(2), (4)(b)(2), 5(b), & 6(b).

114. § 200.737(2) – (3).

115. § 200.737(2).

116. § 200.737(3).

117. TEX. PENAL CODE ANN. § 43.261 (West 2012) (effective Sept. 1, 2011).

118. PENAL § 43.261(b).

119. PENAL § 43.261(e) – (f).

120. TEX. FAM. CODE ANN § 54.0404(a) (West 2011); TEX. EDUC. CODE ANN. § 37.218(b)(1) – (3) (West 2011).

121. TEX. CODE CRIM. PRO. ANN. § 45.0216(b) (West 2011).

122. PENAL § 43.261(b)(1) – (2).

123. PENAL § 43.261(c) – (d).

when there are certain aggravating factors such as malice or previous convictions.<sup>124</sup>

The Texas legislature also drafted the statute to create two specific affirmative defenses.<sup>125</sup> A minor who is charged with either promotion (distribution) or possession may escape criminal liability if the image depicts “only the actor or another minor,” the image was “promoted or received only to or from the actor and the other minor,” and the parties either had a dating relationship at the time of the offense and were not more than two years apart in age, or were married at the time of the offense.<sup>126</sup> A separate affirmative defense exists for instances when a juvenile is only charged with possession.<sup>127</sup> In such cases, the possessor may escape criminal liability if they “did not produce or solicit the visual material,” they “possessed the visual material only after receiving it from another minor,” and they “destroyed the visual material within a reasonable amount of time after receiving the visual material from another minor.”<sup>128</sup>

The statute also provides for additional measures to educate juveniles about self-produced child pornography.<sup>129</sup> As a distinctive proactive approach, the Texas statute requires school districts to educate students regarding the deleterious consequences of self-produced child pornography.<sup>130</sup> Additionally, a court may order a juvenile to complete a remedial educational program regarding the legal and social consequences of self-produced child pornography as a part of sentencing.<sup>131</sup> Furthermore, a juvenile convicted under the Texas statute may apply for an expungement, provided the juvenile was convicted only once.<sup>132</sup>

The Texas statute, however, does not preclude prosecutions under other laws if the conduct falls within the purview of another statute.<sup>133</sup> It does not specify the exact application of this provision, but presumably, it applies to cases involving threats or coercion, allowing prosecution of these offenses under the traditional child pornography laws.

---

124. *Id.*

125. PENAL § 43.261(e) – (f).

126. *Id.*

127. PENAL § 43.261(f).

128. *Id.*

129. TEX. FAM. CODE ANN § 54.0404(a) (West 2011); TEX. EDUC. CODE ANN. § 37.218(b)(1) – (3) (West 2011).

130. EDUC. § 37.218(b)(1) – (2).

131. FAM. § 54.0404(a).

132. TEX. CODE CRIM. PRO. ANN. § 45.0216 (West 2011).

133. TEX. PENAL CODE ANN. § 43.261(g) (West 2012).

Arguably, the Texas statute strikes an effective balance whereby the consequences a juvenile faces for creating or distributing self-produced child pornography are significant, but not unduly harsh. Additionally, the specificity of the provisions provides ample clarity for judges and prosecutors, and grants the judge discretion to order the juvenile to complete a remedial program. This approach is notable because other states have enacted similar programs, but utilize them as diversionary programs in lieu of criminal prosecution, whereas Texas has opted to use the program as a tool in conjunction with criminal prosecution.<sup>134</sup>

The broad scope of the prohibited conduct makes Nevada and Texas' statutes similar to that of New York; all three statutes contemplate images depicting sexual conduct including sexual intercourse, oral sex, and masturbation.<sup>135</sup> The expansive nature of the Nevada, Texas, and New York statutes stands in contrast to the Florida and New Jersey statutes, which contemplate only images depicting nudity.<sup>136</sup>

The effort taken to combat the creation and dissemination of self-produced child pornography in these states is commendable. Outlining both the strengths and the weaknesses of these legislative responses provides a model upon which future legislation may be based.

## V. A PROPOSED LEGISLATIVE RESPONSE

The ultimate goal of this Article is to advocate for appropriate legal treatment for cases involving self-produced child pornography. For this to be possible, the law must distinguish traditional and self-produced child pornography. The most effective path to such a distinction lies in the creation of a new statutory offense that addresses self-produced child pornography. Once this distinction is made, the states must establish mechanisms to address self-produced child pornography, and this approach must be multi-faceted if the goal is to stop the creation and dissemination of self-produced child pornography. Simply enacting reactive legislation that deals with juveniles *after* they have been charged with a self-produced child pornography offense is shortsighted and addresses this problem from only one angle. An effective solution must contain a proactive

---

134. Compare TEX. FAM. § 54.0404(a), with, e.g., N.Y. SOC. SERV. LAW § 458-1 (McKinney 2012).

135. TEX. PENAL § 43.25(a)(2); NEV. REV. STAT. § 200.700(3) (West 2011); N.Y. PENAL LAW § 235.00 (McKinney 2012).

136. Cf. *id.*, with FLA. STAT. ANN. § 847.0141 (1) (a)-(b) (West 2012) and N.J. STAT. ANN. § 2A:4A-71.1(1) (West 2012).

component, that is, some mechanism to thwart the actual creation of self-produced child pornography. Thus, it is paramount that legislators craft an all-encompassing legislative package that provides for both proactive measures to halt the creation of self-produced child pornography and reactive measures to respond when other approaches have failed.

#### A. *The Proactive Response*

Prevention is critical to solving the self-produced child pornography epidemic. The only way to achieve prevention is through education, which must come from as many sources as possible. Parents, school systems, and various other governmental entities each play a vital and distinct role because each has a unique relationship with at-risk minors. Thus, all of these persons and organizations must work together towards a solution.

Parents play an integral role regarding the education of their children, and this is especially true in the realm of sexuality and issues associated with it.<sup>137</sup> Unfortunately, many parents do not understand the dangers associated with self-produced child pornography.<sup>138</sup> In some ways this can be attributed to generational differences regarding technology<sup>139</sup> but, if parents are not addressing this behavior simply due to a lack of understanding, a vital resource is not being utilized. For this reason, it is imperative that education regarding self-produced child pornography, and the dangers associated with it, also be directed towards parents.

School districts are in the best position to educate parents, as they have significant resources at their disposal: districts can disseminate information to parents at parent-teacher conferences, through regular or electronic mail, or at school-wide meetings. Districts must be open to the fact that although a school's main goal is the education of children, they also have a responsibility to educate parents about problems facing their children. States are beginning to consider legislatively delegating this responsibility to school districts,

---

137. Erum Ikramullah, et al., *Parents Matter: The Role of Parents in Teens' Decisions About Sex*, CHILD TRENDS RESEARCH BRIEF (Nov. 2009), [http://www.childtrends.org/Files/Child\\_Trends-2009\\_11\\_11\\_RB\\_Parents&TeenSex.pdf](http://www.childtrends.org/Files/Child_Trends-2009_11_11_RB_Parents&TeenSex.pdf) (stating “[n]early one-half of 12- to 19-year-olds (47%) reported that their parents had the most influence on their decisions about sex.”).

138. Chris Wagner, *The latest cell phone use: Sexting*, CENTER FOR PARENT/YOUTH UNDERSTANDING, (Summer 2008), <http://www.cpyu.org/page.aspx?id=366143> (explaining how a parent's lack of understanding about technology may make it difficult for him or her to distinguish sexting from regular text messaging).

139. *Id.*

so that schools are mandated to educate parents about the dangers associated with self-produced child pornography.<sup>140</sup>

However, school districts should not rely solely on parents to get the message across. Districts must also educate children in the classroom about the dangers of creating and distributing self-produced child pornography. This could be achieved in physical education or health classes, as a component of the traditional sex-education curriculum. The curriculum should include a discussion of all the ways in which this behavior can impact a child's life.<sup>141</sup>

The states should utilize various other forums to reach children. The problems associated with self-produced child pornography are similar, in many respects, to those associated with other issues facing teenagers. In recent years, governmental entities and other organizations have gone to great lengths to raise awareness about the problems associated with underage drinking, tobacco use, drug use, or unprotected sexual activity.<sup>142</sup> These campaigns have employed very creative strategies and marketing campaigns to reach teenagers,<sup>143</sup> and these same methods should be utilized to address self-produced child pornography.

This Article is certainly not the first to advocate for the involvement of parents and schools in the fight against self-produced child pornography. In her Note, *An Integrated Response to Sexting: Utilization of Parents and School in Deterrence*, Sarah Theodore suggests an approach involving a "coordinated response involving

---

140. See, e.g., S. 2698, 214th Leg., Reg. Sess. (N.J. 2011), available at <http://www.njleg.state.nj.us/bills/BillView.asp> (requiring school districts to annually disseminate to parents and students information regarding the dangers of sharing sexually explicit material.) The bill was introduced into the New Jersey State Senate on February 17, 2011, and was referred to the Senate Education Committee, but no further action has been taken on as of November 2012.

141. In essence, this curriculum should proactively highlight all of the topics addressed in the New York and New Jersey Remedial Education Programs. See *supra*, section IV(A).

142. See *About the Campaign*, OFFICE OF NAT'L DRUG CONTROL POL'Y, <http://www.whitehouse.gov/ondcp/Campaign-Effectiveness-and-Rigor> (last visited Dec. 15, 2012), for an example of the effectiveness of a national campaign geared towards children; see also *About the Campaign*, OFFICE OF NAT'L DRUG CONTROL POL'Y, <http://www.whitehouse.gov/ondcp/about-anti-drug-media-campaign> (last visited Oct. 29, 2012). This campaign relies upon advertisements on television and websites such as Facebook and YouTube to provide information regarding the consequences of substance abuse and resources for those who may already be impacted.

143. See *id.*

prosecutors, parents, and schools.”<sup>144</sup> Although, the proactive nature of Theodore’s proposal is useful, the way in which it distributes responsibility amongst school officials, parents, and prosecutors is untenable. In essence, Theodore would limit the role of the prosecutor to collaborating with schools and parents and only prosecuting cases involving “abuse or coercion.”<sup>145</sup> Further, Theodore’s proposal allows prosecutors to forego the prosecution of a juvenile and in lieu, defer the incident to school disciplinary protocols.<sup>146</sup> While a certain level of collaboration between prosecutors and school districts is beneficial in preventing self-produced child pornography, the collaboration must cease after the prevention phase. Schools are certainly free to establish internal protocols regarding self-produced child pornography incidents, but the legal component of these cases, specifically the commission of a crime, must be addressed by the legal system. Unquestionably, parents and school districts are critical components of a solution, but their role is distinct and separate from that of the prosecutor and juvenile justice system, and any solution must observe the boundaries between these roles.

The objective for any proactive response is prevention, the key to which is education. Parents, schools, and the legal system, to name a few, must provide teenagers with as much information as possible about the harms associated with self-produced child pornography. Simply stated, minors should know exactly what they are getting into before they take a picture and push “send.” A successful approach to combating this epidemic must involve the creation of an informational network that utilizes numerous avenues, including parents, school districts, and media outlets to highlight the consequences associated with self-produced child pornography.

### *B. The Reactive Response*

Inevitably, a proactive response to combating self-produced child pornography will not always succeed. An appropriate response from the juvenile justice system must quickly follow when proactive measures fail and the response must be balanced so as to fairly communicate the severity of the juvenile’s conduct.

---

144. Sarah Theodore, Note, *An Integrated Response to Sexting: Utilization of Parents and Schools in Deterrence*, 27 J. CONTEMP. HEALTH L. & POL’Y 365, 367 (2010-2011).

145. *Id.* at 381 (“Prosecution of sexting is thus a valuable resource for prosecutors in limited circumstances. However, prosecutors must exercise discretion in charging juveniles and utilize parents and schools to help in deterrence.”).

146. *Id.* at 397 (suggesting that prosecutors “investigate and decide which juveniles are appropriate for being charged and which juveniles should be handled through the school’s disciplinary policy.”).

## 1. Definitions

In order for any proposed legislation to be effective, it is critical that its provisions are clear, understandable, and workable. In this regard, a section setting forth specific definitions of the statutory provisions is appropriate.

Understandably, the most important definition involved in this section is that of self-produced child pornography. The best definition of self-produced child pornography is images or videos that meet a particular jurisdiction's statutory definition of child pornography, and were created by the subject of the image without threats, coercion, or adult involvement.<sup>147</sup> In essence, this definition respects the differences in the various state and federal definitions of child pornography and adds two additional components to distinguish self-produced child pornography from traditional child pornography.

Self-produced child pornography generally takes one of two different forms: primary or ancillary. While both of these scenarios fall under the same general umbrella, the particular behaviors that are encompassed by each are accompanied by varying levels of severity that call for different legal treatment. Effective legislation must make this distinction and target the behaviors accordingly.

Primary distribution and possession of self-produced child pornography involves the creation and distribution of sexually explicit photographs or videos by the actual subject of the image to another minor and the possession of such images by the initial recipient of such images.<sup>148</sup> Scholars have referred to this specific scenario as "consensual" sexting because the subject of the image voluntarily distributed the image of himself or herself.<sup>149</sup>

Ancillary distribution and possession of self-produced child pornography involves scenarios where images of self-produced child pornography are redistributed either by the original recipient or another recipient further along in the chain of distribution. Cases involving this type of fact pattern have been referred to as "non-consensual" because the subject of the image is neither involved in the redistribution of the images, nor consents to it.<sup>150</sup> These cases may

---

147. Leary II, *supra* note 53, at 491.

148. 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, 361 (2010) [hereinafter Ryan] (defining "primary" sexting as when the subject of the image is the distributor).

149. See Latzer, *supra* note 13, at 1067.

150. *Id.* at 1068 (arguing that "[p]unishment should be reserved for the senders not the juvenile recipient").

also be known as “secondary” sexting incidents.<sup>151</sup> The differences between these definitions are not purely semantic. The term “non-consensual” focuses solely on the subject of the image, rather than the actual redistribution and the term “secondary” fails to account for redistribution further along in the chain. Thus, the term “ancillary” better addresses this category.

Admittedly, the fact patterns associated with ancillary distribution of self-produced child pornography are more varied than those associated with the primary counterpart. The *mens rea* is especially important for a case involving ancillary distribution because requiring malicious intent suggests that prosecution under traditional child pornography laws is more appropriate. Even so, such malicious intent is not always associated with ancillary distribution.

Drawing the distinction between primary and ancillary self-produced child pornography is not simply an academic exercise - very different motivations characterize these behaviors. Some scholars have suggested that self-produced child pornography is the result of a certain sexual curiosity among minors.<sup>152</sup> This point certainly does not excuse the illegality of the conduct, but it does help explain the phenomena. Sexual curiosity explains the primary conduct, but this notion ceases to be of use once ancillary distribution occurs. Thus, ancillary distribution suggests that a different motive underlies the redistribution. Therefore, the legislature must draft statutes that provide different legal treatment for primary and ancillary self-produced child pornography.

The legislation must draft specific forms of prohibited sexual conduct into the proposed statute. That is, legislators should consider all of the possible forms of prohibited sexual conduct included in traditional child pornography statutes, and determine which, if not all, the respective self-produced child pornography statute should address. As discussed above, different states have taken different approaches.<sup>153</sup> Some self-produced child pornography statutes only address images depicting nudity,<sup>154</sup> while others address additional conduct, such as masturbation<sup>155</sup> or sexual contact.<sup>156</sup> Specificity in

---

151. *E.g.*, Ryan, *supra* note 150 (defining “secondary sexting” as incidents “where the distributor of the photo receives the photo from the subject or another distributor and then distributes the photo to one or more additional recipient(s)”) [http://www.uiowa.edu/~ilr/issues/ILR\\_96-1\\_Ryan.pdf](http://www.uiowa.edu/~ilr/issues/ILR_96-1_Ryan.pdf).

152. *E.g.*, Levick & Moon, *supra* note 63, at 1035 (“[T]eens have always found ways to explore their sexual identity and express themselves sexually. Sexting . . . is merely the newest form of doing this.”).

153. *See supra* section IV.

154. *See* N.J. STAT. ANN. § 2A:4A-71.1 (West 2012); FLA. STAT. ANN. § 847.0141(1)(a) – (b) (West 2011).

155. *See* R.I. GEN. LAWS ANN. § 11-9-1.4(a)(5) (West 2011).

this regard is critical because exclusion of a particular type of conduct from the self-produced child pornography statute, whether intentional or otherwise, leads to a presumption that prosecution as traditional child pornography is legislatively intended where such conduct is, in fact, contemplated under the traditional child pornography statute.<sup>157</sup>

Situations in which the prohibited sexual conduct involves two or more minors require special care. Presumably, the image depicts some form of actual sexual contact between the participants, be it oral, vaginal, anal, or otherwise. A teenager's inspiration to create these images is seemingly different than the motivation to create images depicting nudity or masturbation. Thus, the law must treat these images differently. The creation of a separate statute for offenses involving self-produced child pornography is, in part, a concession to minors' sexual curiosity. It is counterintuitive to suggest that images depicting actual sexual contact between minors are also mere representations of sexual curiosity. Rather, these images represent a sense of boasting or bragging about the particular minor's participation in the respective endeavor.<sup>158</sup> For this reason, legislation must treat images depicting actual sexual conduct more severely than images depicting nudity or masturbation.

## 2. Statutory Treatment of Proscribed Conduct

The law must establish appropriate mechanisms to address minors engaging in self-produced child pornography behavior. It is imperative that the statutory offense effectively communicates the severity of the conduct while not imposing unnecessarily harsh punishments.

As detailed herein, teenagers play many different roles when they become involved in self-produced child pornography,<sup>159</sup> and any specific juvenile may occupy one or more of these roles, each of which requires a very different response from the juvenile justice system. But, conduct alone should not determine the ultimate sanction; rather when a judge contemplates the ultimate disposition, he should also consider any prior offenses in which the teenager was involved in this behavior. This ultimately points to the need for a system whereby consequences escalate with repeat offenses.

---

156. See N.Y. PENAL LAW § 263.00 (McKinney 2003); NEV. REV. STAT. § 200.700(3) (Lexis-Nexis 2011); TEX. PENAL CODE ANN. § 43.25(a)(2), (7) (West 2011).

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

158. See *A.H. v. State*, 949 So. 2d 234, 237 (Fla. Dist. Ct. App. 1 2007) (“[A] number of teenagers want to let their friends know of their sexual prowess. Pictures are excellent evidence of an individual’s exploits.”)

159. The juvenile involved may be the willing or unwilling subject of the image, the possessor of the image, and/or the distributor of the image, or any combination of these.

Enacting a system of escalating consequences in the juvenile justice system is more challenging than doing so in the adult criminal justice system. Key differences exist between the two systems, especially in regards to the final disposition or sentence. Juvenile justice systems generally rely on a system of indeterminate sentencing where judges have great discretion.<sup>160</sup> By contrast, the majority of sentencing in the adult criminal justice system is statutorily mandated.<sup>161</sup> While a juvenile judge's decision about a juvenile's ultimate sentence is certainly guided by specified factors, the system is designed to allow that judge far more discretion than his or her counterparts in the adult criminal justice system.<sup>162</sup> As judicial discretion is imperative when sentencing juveniles, the legislature should not incorporate the *per se* grading systems utilized in the adult criminal justice system into the proposed statute. Rather, the proposed statute should embrace certain mandatory components that should be present in a given adjudication.

Understandably the goal of the juvenile justice system is rehabilitation, and counseling and remedial education programs are certainly rehabilitative, but adjudications must also have a punitive element. However, significant questions exist as to exactly how severe the punishment for engaging in this behavior should be. Unquestionably, incarceration falls under the umbrella of punishment, but it seems doubtful that detention has a place in this discussion.<sup>163</sup> Rather, the courts should utilize alternative avenues such as community service, fines, and probationary terms. These alternatives are sufficiently punitive, while not unduly harsh. Additionally, these alternatives can and should be quantitatively adjusted based on severity or frequency of offense.

In certain cases, minors should not be held liable for possessing self-produced child pornography. An affirmative defense must be available in some situations to avoid prosecuting a blameless juvenile. A minor charged with possession of self-produced child pornography should not be held liable if that minor can demonstrate that he or she did not solicit the image, he or she did not redistribute the image, and the juvenile took steps to remedy the situation by either deleting the

---

160. *See, e.g.*, N.J. STAT. ANN. § 2A:4A-43(b) (West 2012) (listing numerous factors to consider in the sentence, instead of providing strict guidelines).

161. *See, e.g.*, § 2C:43-1 (designating certain degrees for criminal offenses); *see also* § 2C:43-6(a) (specifying terms of incarceration based on the degree of crime).

162. *Cf.* § 2C:43-2, *with* § 2A:4A-43(b).

163. *Contra* Mujahid, *supra* note 13, at 199-202 (suggesting mandatory prison terms for certain minors convicted of an offense involving the mass distribution of another minor's self-produced child pornography).

image outright or notifying police or school personnel. Simply stated, the principle of ‘guilty by association’ has no place in the realm of self-produced child pornography. Providing for such an affirmative defense ensures that accidental participants are not held liable.

While it may seem obvious that removing self-produced child pornography from the purview of the traditional child pornography statute expresses a legislative intent to also remove self-produced child pornography from the realm of sex-offender registration, this point must not be left to assumption. It is widely argued that convictions under the self-produced child pornography laws should not trigger sex offender registration.<sup>164</sup> Registration as a sex offender has severe consequences, and these consequences are excessively harsh when considered in the realm of self-produced child pornography.<sup>165</sup> Admittedly, mandatory sex offender registration is one of the driving forces behind the movement to remove self-produced child pornography from the scope of the traditional child pornography statutes.<sup>166</sup> Requiring sex offender registration for minors convicted of an offense involving self-produced child pornography is not only detrimental to those minors, but also to society overall. The purpose of sex offender registries is to alert the public to potential predators in the community.<sup>167</sup> Including these specific juveniles within this group would essentially minimize the threat level the public associates with registered sex offenders, and, in effect, water down the class.<sup>168</sup> When a minor is convicted of an offense involving self-produced child

- 
164. *See, e.g.*, Stephanie Gaylord Forbes, Note, *Sex, Cells, and SORNA: Applying Sex Offender Registration Laws to Sexting Cases*, 52 WM. & MARY L. REV. 1717, 1744 (2011) [hereinafter Forbes] (“Traditional sexting offenders “lack[] virtually all of the characteristics of a child predator . . . [and] the [sex offender registration] Act imposes a ‘grossly unfair’ sentence as applied to [their] particular case.”) (citation omitted).
165. *See generally* Emily J. Stine, Note, *When Yes Means No, Legally: An Eighth Amendment Challenge to Classifying Consenting Teenagers as Sex Offenders*, 60 DEPAUL L. REV. 1169 (2011) (questioning the wisdom of convicting minors who engage in consensual sexual relations with each other as sex offenders).
166. *See, e.g.*, Forbes, *supra* note 166, at 1744 (“By creating a new law specifically targeting sexting offenses that sets the statutory punishment less than the imprisonment threshold, states hope to avoid registering juveniles as sex offenders.”).
167. *E.g.* N.J. STAT. ANN. § 2C:7-1 (West 2012) (finding the danger of sex offender recidivism is a driving force behind sex offender registration laws).
168. Robert D. Richards & Clay Calvert, *When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case*, 32 HASTINGS COMM. & ENT. L.J. 1, 36 (2009) (describing how requiring juveniles to register would dilute the meaning of sex offender registries).

pornography, he or she should not be required to register as a sex offender; this must be clearly stated in the proposed statute.

3. Structured Diversionary Programs: an Appropriate Response for Appropriate Candidates

Conceivably, many juveniles engaged in this behavior would benefit from corrective mechanisms in lieu of conventional prosecution. In these situations, courts should utilize diversionary programs.<sup>169</sup> A well-structured diversionary program can effectively correct an individual's behavior that led to illegal conduct in a way that benefits both society and the individual. Such programs certainly have a place in the realm of self-produced child pornography, but they must be meticulously structured and treated as only one component of the larger solution.

Diversionary programs should only be available under specific circumstances. Courts should treat these programs as a wake-up call for certain first-time offenders and not allow juveniles to continually abuse the programs as unlimited get-out-of-jail-free cards. Legislators who create diversionary programs should carefully structure these programs so the exception does not become the rule.

New Jersey's Pre-Trial Intervention ("PTI") program is a model of an effective diversionary program.<sup>170</sup> Generally, criminal defendants apply to PTI prior to indictment, or shortly thereafter.<sup>171</sup> If a defendant is accepted into the PTI program, certain conditions are imposed.<sup>172</sup> PTI entrants are generally placed on a term of probation and assigned a specified amount of community service.<sup>173</sup> Additionally, rehabilitative conditions, such as educational classes or counseling, can be ordered if warranted by the specific facts of the

---

169. See BLACK'S LAW DICTIONARY 546 (9th ed. 2009) (defining a diversion program as "[a] program that refers certain criminal defendants before trial to community programs on job training, education, and the like, which if successfully completed may lead to the dismissal of the charges.").

170. See N.J. STAT. ANN. § 2C:43-12 (West 2007) (establishing and outlining the procedures for New Jersey's Pre-Trial Intervention program); see also N.J. CT. R. 3:28 (outlining guidelines for the pretrial intervention program).

171. § 2C:43-12(e) ("At any time prior to trial but after the filing of a criminal complaint, or the filing of an accusation or the return of an indictment . . . the assignment judge or a judge designated by him may postpone all further proceedings against an applicant and refer said applicant to a program of supervisory treatment approved by the Supreme Court.").

172. § 2C:43-13 (outlining the procedures of the supervisory treatment).

173. *Id.*

case.<sup>174</sup> In exchange for the defendant's successful completion of the specified conditions, the prosecutor will recommend dismissal of the original charges.<sup>175</sup> Conversely, if a defendant fails to complete PTI, the court may reactive the underlying charges for prosecution.<sup>176</sup> Thus, a defendant must earn dismissal of his or her charges; it is not guaranteed.<sup>177</sup>

Generally, only non-violent, first-time offenders are eligible for entry into the PTI program.<sup>178</sup> In the case of self-produced child pornography-related offenses, this restriction on eligibility to certain persons should apply to diversionary programs as well. Only first-time offenders who are charged with engaging in the distribution or possession of self-produced child pornography at the primary level should be considered for admission into a diversionary program.

Education is a crucial component to any diversionary program, but it is not the only necessary element. These programs must encompass both rehabilitative and punitive measures. An educational component serves the rehabilitative goals of the juvenile justice system. But, the juveniles who are entering into a diversionary program have committed a crime and there must be some punitive component involved in the programs. Community service is an especially appropriate punitive measure for a diversionary program because it allows a juvenile to reflect on his or her past conduct while completing projects that benefit the community.

Logistically, diversionary programs must also encompass a mechanism for oversight. The legislation should charge an agency or governmental body with overseeing the process so that the juveniles' progress can be monitored and adjusted when necessary. Following the example set forth in New Jersey, the court may accomplish this by placing the juvenile on a period of supervised probation.<sup>179</sup>

---

174. § 2C:43-12(a)(1) (“[W]hen such services or supervision can reasonably be expected to deter future criminal behavior by an applicant, and when there is apparent causal connection between the offense charged and the rehabilitative or supervisory need”).

175. § 2C:43-13(d) (“Upon completion of supervisory treatment, and with the consent of the prosecutor, the complaint, indictment or accusation against the participant may be dismissed with prejudice.”).

176. § 2C:43-13(e) (explaining the process and effect of violation of conditions).

177. *See* N.J. Ct. R. 3:28 guideline 4, cmt. (West 2007) (“A PTI program is presented to defendants as an opportunity to earn a dismissal of charges for social reasons and reasons of present and future behavior.”).

178. § 2C:43-12(e) (listing seventeen factors which are taken into account when recommending PTI).

179. *See* § 2C:43-12(i) (“[P]rograms... offering counseling or any other social service likely to aid in the rehabilitation of the participant and to deter the commission of other offenses.”).

A well-drafted statute creating a diversionary program will serve multiple purposes. First, it will limit admission to certain individuals, which maximizes the program's resources by focusing them on only those individuals best suited for the program. Second, a program that embraces both rehabilitative and punitive elements will serve not only to correct illegal conduct, but also to prevent its reoccurrence. Therefore, the legislature should include narrowly tailored diversionary programs with specific conditions in any proposed self-produced child pornography statute.

#### 4. Discerning the Interplay of Self-Produced and Traditional Child Pornography

A lot of confusion exists in the realm of self-produced child pornography, mainly due to a lack of specificity in differentiating it from traditional child pornography. Any proposed legislation should not entirely displace the application of traditional child pornography laws in the juvenile justice system. Rather, it should remove one specific course of conduct from their purview while leaving the remaining portion of the statute intact. In this sense, two additional elements can be added to any jurisdiction's definition of traditional child pornography to help prosecutors distinguish between the two. These two elements are self-creation and the lack of threats, coercion, or adult involvement. These additional elements distinguish the "innocent" nature of self-produced child pornography from the harms traditional child pornography statutes seek to prevent.<sup>180</sup>

First, the concept of "voluntariness" is central to the concept of self-produced child pornography. The mere fact that a minor participated in the creation and was the subject of pornographic images is not dispositive of whether the images are self-produced or traditional child pornography. Instead, the focus should be on the circumstances surrounding the participation. Only images created without threats, coercion, or adult participation should be considered self-produced. Juveniles who threaten or coerce another minor into taking photographs or videos that constitute child pornography should be prosecuted under the traditional child pornography statutes. In making this distinction, legislators should review the legislative intent of the original child pornography statute. The fact that a minor is being forced, threatened, or coerced into taking these images by another juvenile, as opposed to an adult, is not compelling grounds upon which to remove prosecution from the purview of the traditional child pornography laws. This is because coercing a minor into creating pornographic images of him or herself inflicts harm that

---

180. See, e.g., Gabrielle Russell, Note, *Pedophiles in Wonderland: Censoring the Sinful in Cyberspace*, 98 J. CRIM. L. & CRIMINOLOGY 1467, 1493 (2008) (suggesting that the overarching legislative intent behind child pornography statutes is preventing the abuse of children).

is similar, if not identical, to the harm associated with traditional child pornography. Additionally, the predatory nature of this type of conduct is remarkably similar to that associated with traditional child pornography.

Second, the legislation must address the *mens rea* of the distributor. There is a certain lack of malice associated with the production self-produced child pornography, that is, the creation is usually associated with a lapse in judgment, albeit a very serious one. However, juveniles who come into possession of self-produced child pornography and redistribute these images with the intent to harm the subject of the images should be prosecuted under the traditional child pornography statutes. These juveniles lack the “innocent” state of mind that justifies removing self-produced child pornography cases from the purview of traditional child pornography statutes. While the original image in question certainly constitutes self-produced child pornography, a juvenile’s malicious redistribution of the images demonstrates a predatory nature that is best handled under the traditional child pornography statutes.

In conclusion, legislators must take much care when drafting the self-produced child pornography statute. The statute must not be so overbroad as to displace the portions of the traditional child pornography statute that should remain applicable in the juvenile justice system. Instead, a narrowly-tailored statute, which specifically defines the behaviors the legislature seeks to address, best achieves the desired result of fairly and uniformly addressing this issue.

## VI. A PROPOSED STATUTE

This Act shall be known as the “Prevention of Self-Produced Child Pornography Act.”

### 1. *Definitions*

a. **Self-Produced Child Pornography** consists of images and/or videos depicting a minor engaged in prohibited sexual conduct that were voluntarily created by the minor, who is the subject of the image or video, without coercion or threat from another, or adult involvement.

b. **Primary Self-Produced Child Pornography** consists of the creation and distribution of self-produced child pornography by the minor, who is the subject of the image or video in question, to another and the possession of that image by the intended recipient.

c. **Ancillary Self-Produced Child Pornography** consists of the distribution of self-produced child pornography by a minor, other than the minor subject of the image, and the possession of that image by someone other than the original intended recipient.

d. **Minor** shall have the meaning ascribed to it by the traditional child pornography law.

e. **Prohibited Sexual Conduct** consists of:

i. Nudity or masturbation, as these terms are defined in the traditional child pornography statute; or

ii. Sexual contact, including oral, anal, or vaginal penetration, as these terms are defined in the traditional child pornography statute.

## 2. *Prohibited Acts*

a. Primary Distribution of Self-Produced Child Pornography:

i. A minor commits an offense if he or she voluntarily creates, and purposefully or knowingly distributes images or videos of himself or herself engaged in prohibited sexual conduct, as defined in Section (1)(e)(i), to another minor.

ii. A minor commits an offense if he or she voluntarily creates, and purposefully or knowingly distributes images or videos of himself or herself and another minor engaged in prohibited sexual conduct, as defined in Section (1)(e)(ii), to another minor also depicted in the same image or video.

b. Possession of Self-Produced Child Pornography:

i. A minor commits an offense if he or she knowingly and intentionally possesses an image or video depicting another minor engaged in prohibited sexual conduct.

ii. A minor commits an offense if he or she knowingly and intentionally possesses an image or video depicting himself or herself engaged in prohibited sexual conduct, as defined in Section (1)(e)(ii), with another minor.

iii. An individual who has reached the age of majority but is not over twenty years of age shall be prosecuted under Section (b)(i) or (b)(ii) where it is shown that:

1. The individual was not more than four years older than the minor subject of the image at the time the image was created; and

2. A dating relationship existed between the individual and the minor subject of the image.

c. Ancillary Distribution of Self-Produced Child Pornography:

i. A minor commits an offense if he or she purposefully or knowingly distributes an image or video of another minor(s), depicting the minor(s) engaged in prohibited sexual conduct as defined in Sections (1)(e)(i) or (1)(e)(ii).

ii. A minor commits an offense if he or she voluntarily creates and purposefully or knowingly distributes images or videos of himself or herself and another minor engaged in prohibited sexual conduct, as defined in Section (1)(e)(ii), to a minor not depicted in the image or video.

3. *Affirmative Defense:*

a. A minor shall not be liable for a violation of section (2)(b) of this Statute if the minor:

i. Did not solicit or participate in the creation of the image or video;

ii. Took reasonable steps to delete or destroy the image; and

iii. Took steps to report the incident by either contacting law enforcement or appropriate school authorities.

4. *Disposition*

a. Diversionary Program:

i. A diversionary program shall be available for eligible minors charged with violating sections (2)(a)(i) or (2)(b)(i) of this Statute.

1. An Eligible Minor is one who has never been adjudicated delinquent, or found guilty of an offense involving child pornography, whether self-produced or other.

ii. The diversionary program specified in Section (4)(a)(i) shall consist of:

1. A period of not less than 12 months of supervised probation;

2. No less than 8 hours of remedial education focusing on the legal and non-legal consequences of engaging in self-produced child pornography behavior;

3. No less than 40 hours of service to the community at a site to be specified by an appropriate person at the respective probation department; and
  4. Any other terms or conditions deemed necessary by the court.
- iii. Successful completion of all requirements set forth in Section (4)(a)(ii) shall result in the dismissal of the original charges against the juvenile.
- b. Minors convicted of a first offense involving Sections (2)(a)(ii), (2)(b)(ii), (2)(c)(i), or (2)(c)(ii) shall:
    - i. Be placed on probation for a period of 2 years;
    - ii. Complete at least 8 hours of remedial education focusing on the legal and non-legal consequences of engaging in self-produced child pornography behavior;
    - iii. Complete between 80 and 100 hours of service to the community at a site to be specified by an appropriate person at the probation department;
    - iv. Complete any other terms or conditions deemed to be necessary by the court.
  - c. Minors convicted of a second or subsequent violation under Sections (2)(a)(i) through (2)(c)(ii) shall be subject to house arrest and/or electronic monitoring as the court deems necessary.
  - d. The court shall have the discretion to order any minor to undergo a psychosexual evaluation and complete all recommendations in any cases arising under Sections (2)(a)(i) through (2)(c)(ii) regardless of the number of violations.

### 5. *Limitations*

- a. This statute shall not apply in any cases involving:
  - i. The utilization of coercion or threats to obtain an image of a minor engaged in prohibited sexual conduct, whether towards the original subject or another;
  - ii. The participation of adults, except as specified in Section (2)(b)(iii);
  - iii. The possession or distribution of images depicting a minor that is more than 4 years younger than the actor;

iv. The redistribution of images, otherwise constituting self-produced child pornography, where the minor acts with malice or intent to cause either emotional, physical, or reputational harm to the minor-subject of the image; or

v. The depiction of Sexual Contact, as defined in Section (1)(e)(ii), where one or more subjects of the image did not consent to its creation.

b. Persons convicted or adjudicated delinquent under Section (2)(a), (b), or (c) shall not be required to register as sex offenders.

#### 6. *Department of Education Requirements*

a. The Department of Education shall require school districts to annually disseminate information to parents regarding the dangers of self-produced child pornography.

b. The Department of Education shall require school districts to include information regarding the dangers of self-produced child pornography in health or physical education classes as part of the required curriculum.

### VII. CONCLUSION

The impact on minors who engage in some form of self-produced child pornography behavior cannot be overstated. Taking part in the production of these images may inflict psychological and emotional harm on the subjects, and all participants, including the subjects, face legal consequences that are often overly harsh.<sup>181</sup> As stated above, numerous studies demonstrate that a significant percentage of teenagers are engaged in this behavior.<sup>182</sup> Clearly, an appropriate societal response is warranted.

While prosecutorial discretion may effectively deal with some instances involving self-produced child pornography, it is but a mere tourniquet. An effective, permanent solution must come from the legislature. This response must propose both proactive and reactive measures. Although the goal must be to halt the creation of self-produced child pornography, the statute must contemplate situations in which proactive measures fail, thus providing an appropriate legal response.

Striving for the cessation of self-produced child pornography is certainly an ambitious aspiration. While this goal may ultimately

---

181. See *supra* notes 44, 45, 47, and 48 and accompanying text.

182. See *supra* notes 16 – 23 and accompanying text.

prove unattainable, the law can certainly stand to be improved from its current state. The stakes are high in the realm of self-produced child pornography, and a failure to appropriately address this problem results in a great hardship for all children. Legislation can effectively address this problem, and the time for such action has arrived.