

University of Massachusetts Law Review

Volume 9

Issue 2 *Trends and Issues in Veterans & the Law*

Article 4

January 2014

The Case for Extending Pretrial Diversion to Include Possession of Child Pornography

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Long, Sarah J. (2014) "The Case for Extending Pretrial Diversion to Include Possession of Child Pornography," *University of Massachusetts Law Review*: Vol. 9: Iss. 2, Article 4.

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The Case for Extending Pretrial Diversion to Include Possession of Child Pornography

Sarah J. Long

9 U. MASS. L. REV. 306

ABSTRACT

Pretrial diversion removes offenders with a low-risk of reoffending from the penal system and instead sends them to supervised treatment programs. The result is lower cost to the state and a second chance for those who successfully complete the program.

Typically, violent crimes, such as murder and attempted murder, are exempt from pretrial diversion. Notably, sex related crimes are also ineligible in all jurisdictions.

By excluding all sex-related crimes from pretrial diversion, possession of child pornography is adjudicated by the courts. As a result, young, first-time offenders who may be candidates for treatment are bundled with physical offenders, members of child pornography “circles,” and rapists, charged as felons, and faced with fifteen years as a registered sex offender.

While this may make the public feel safe, it eliminates an option for those who could truly benefit from pretrial diversion. By offering pretrial diversion for “simple” possession of child pornography, offenders who are unlikely to reoffend or to escalate their actions will receive necessary treatment, making it more likely that they move forward and become productive law abiding citizens.

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I. INTRODUCTION

Pretrial diversion moves certain offenders who meet strict criteria out of the mainstream criminal justice system and allows them to participate in treatment programs that have been preapproved by the jurisdiction.¹ Those who successfully complete the treatment program, and meet other conditions, effectively have their criminal charges dismissed.² Pretrial diversion has been available to qualifying adult offenders since the late 1960s³ and has proven to be both successful⁴ and cost effective.⁵

Those charged with possession of child pornography are generally not eligible for pretrial diversion.⁶ They should be. By bundling possession of child pornography with the broad category of criminal sex offenses, jurisdictions are forfeiting an opportunity to divert and treat non-physical offenders who have no criminal record and who may benefit from treatment. Without this opportunity, those convicted

¹ See generally, *Promising Practices in Pretrial Diversion*, NAT'L ASS'N OF PRETRIAL SERVS. AGENCIES 1, 9 (2006), http://www.pretrial.org/document-search-results/?wpfb_s=promising&search=Search.

² *Id.*

³ John P. Bellasai, *A Short History of the Pretrial Diversion of Adult Defendants from Traditional Criminal Justice Processing Part One: The Early Years*, NAT'L ASS'N OF PRETRIAL SERVS. AGENCIES, 1, 2, www.napsa.org/publications/diversionhistory.pdf.

⁴ See *Promising Practices in Pretrial Diversion*, *supra* note 1, at 16 (referencing survey response indicating eighty-five percent “successful program completion rate”); and Thomas E. Ulrich, *PreTrial Diversion in the Federal Court System*, 66 FED. PROBATION 33, 5–6 (2002) (noting “satisfactory disposition was achieved in eighty-eight percent of the cases”).

⁵ See, e.g., Charles J. Hynes, *Prosecution Backs Alternative to Prison for Drug Addicts*, 19 CRIM. JUST. 2, 2 (Summer 2004) (thirty-eight percent savings per inmate per year in New York); Kate Cahoy et. al., *SB114: Improving Pretrial Diversion to Meet the Unique Needs of Connecticut's Veterans*, YALE LAW SCHOOL, 6–8 (February 2012), http://www.law.yale.edu/documents/pdf/Clinics/SB114White_Paper.pdf (sixty-four percent estimated savings per day in Connecticut).

⁶ See, e.g., CONN. GEN. STAT. § 17a-696 (2009) (referencing list of offenses inapplicable for pretrial probation); MASS. GEN. LAWS ch. 276A, § 4 (2012) (same); *Diversion Guidelines*, OFFICE OF DIST. ATT'Y, 18TH JUDIC. DIST. OF KAN., available at <http://www.sedgwickcounty.org/da/documents/CR%20Diversion%20Form%20.pdf> (excluding all sex offenses from consideration for pretrial diversion).

of possessing child pornography may be charged with a felony, face incarceration, and be required to register as a sex offender for up to fifteen years upon release.⁷

This Note recommends pretrial diversion as an option for those charged with possession of child pornography who meet a strict set of guidelines. This Note does not address the seriousness of the crime of possession of child pornography, nor does it discuss the effect that child pornography has on those depicted. Those debates are emotional, highly charged, and continue to be broadly discussed.⁸ Further, addressing those issues would be as helpful to the context of the argument as discussing whether drug use and possession are serious crimes that victimize others. This Note solely focuses on the advantages pretrial diversion provides to the state and to those offenders who meet a strict set of guidelines.

Part II of this Note reviews the evolution of pretrial probation from a federal experiment in New York to widespread use throughout the country. Part III discusses a brief history of the law and sentencing for the crime of possession of child pornography. Part IV then argues that extending the already narrowly tailored pretrial diversion option to include those charged with possession of child pornography will be in line with two of the primary goals of pretrial diversion—providing second chances to those who qualify and saving the state money. The

⁷ 18 U.S.C. § 2252(b)(1) (2012) (setting punishment for possession of child pornography); 42 U.S.C. § 16915(A) (2012) (providing the sex offender registration requirements); *see also* Stephanie Buntin, *The High Price of Misguided Legislation: Nevada's Need for Practical Sex Offender Laws*, 11 NEV. L.J. 771 (2011) (discussing Nevada's sex offender laws).

⁸ Compare Ashleigh B. Boe, *Putting a Price on Child Porn: Requiring Defendants Who Possess Child Pornography Images to Pay Restitution to Child Pornography Victims*, 86 N.D. L. REV. 205 (2010) (recommending child pornography possession offenders compensate those depicted in the images), and Audrey Rogers, *Child Pornography's Forgotten Victims*, 28 PACE L. REV. 847 (2008) (supporting the theory that each time an image is viewed, more harm is done to the person depicted), with Jelani Jefferson Exum, *Making the Punishment Fit the (Computer) Crime: Rebooting Notions of Possession for Federal Sentencing of Child Pornography Offenses*, 16, RICH. J.L. & TECH. 8 (2010) (recommending a more practical approach to sentencing for possession of child pornography), and Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 STAN. L. & POL'Y REV. 545, 571–72 (2011) (noting that judges rarely find it useful to consider that revictimization occurs when child pornography is viewed).

argument proposes that allowing pretrial diversion for those who qualify will not put the public at increased risk of these offenders and in fact, will likely result in decreased instances of reoffending.

II. THE ORIGINS AND EVOLUTION OF PRETRIAL PROBATION

A. Initial Focus on Juvenile Offenders

Conrad P. Printzlien is credited with creating the first pretrial diversion program.⁹ Printzlien left his former position in the United States Attorney's Office to become the second United States Probation Officer for the Eastern District of New York.¹⁰ Printzlien went on to create a unique program for juvenile offenders.¹¹ In describing the experiment, later referred to as the Brooklyn Plan, Printzlien remarked, "[t]here is a step ahead: an effort to eliminate legal procedure, in the technical sense. Whatever legal procedure is invoked, no matter how efficiently it is carried through, nor with what intelligence and humane insight it is administered, it always leaves an indelible mark—a record."¹² Printzlien posited, "[w]hy not . . . conduct an investigation prior to prosecution to determine whether or not prosecution in the first instance was warranted or necessary?"¹³

To answer that question, Printzlien approached the United States Attorney for the Eastern District of New York and offered the services of the probation office to implement that very investigation program.¹⁴ In short, the probation department would:

[c]onduct an investigation of the juvenile's background prior to then after prosecution. In the event that the investigation of a youthful offender indicated a substantial background, good home influences, no previous convictions, then on the strength of the preliminary report, coupled with the information submitted by the

⁹ Stephen J. Rackmill, *Printzlien's Legacy, The "Brooklyn Plan," A.K.A. Deferred Prosecution*, 60 FED. PROBATION 8 (1996).

¹⁰ *Id.*

¹¹ *Id.*

¹² Conrad P. Printzlien, *Deferred Prosecution: Provisional Release of Juvenile Delinquents*, 7 FED. B.J. 278 (1946) (grammar and punctuation in original).

¹³ *Id.* at 279.

¹⁴ *Id.*

investigating agencies of the government, a determination could be made not to prosecute.¹⁵

The Brooklyn Plan was fine-tuned over seven years and resulted in an endorsement by United States Attorney General Tom Clarke, who recommended its use by all United States attorneys in 1946.¹⁶

Pretrial diversion remained focused on juvenile offenders and operated throughout the country without procedural or statutory authority until 1964, when the Department of Justice formalized the use of deferred prosecution in an official memorandum.¹⁷ Interestingly, while the memorandum explicitly reserved deferred prosecution for juveniles, the results of a questionnaire issued by the United States Department of Justice as part of a formalization effort indicated that forty-eight percent of all individuals receiving deferred prosecution supervision were adults.¹⁸

B. Broader Acceptance

By 1967, several states had enacted legislation modeled after the Brooklyn Plan and the federal memorandum.¹⁹ More importantly, that year the Report on the President's Commission on Law Enforcement & Administration of Justice (Presidential Report) was released.²⁰ The 340-page document commissioned by Lyndon B. Johnson made "more than 200 specific recommendations—concrete steps the Commission [believed could] lead to a safer and more just society."²¹ Among them, "[e]arly identification and diversion to other community resources of those offenders in need of treatment, for whom full criminal

¹⁵ *Id.*

¹⁶ Rackmill, *supra* note 9, at 10.

¹⁷ *Id.*

¹⁸ *Id.* at 12.

¹⁹ Bellassai, *supra* note 3, at 2 (citing Connecticut, Illinois, and New York legislation).

²⁰ *Id.*

²¹ THE CHALLENGE OF CRIME IN A FREE SOCIETY: THE REPORT OF THE PRESIDENTIAL COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE V (1967).

disposition [did] not appear required.”²² The recommendations were not limited to simply juvenile offenders.²³

The Presidential Report, in some respects, legitimized what may have been considered experiments in pretrial diversion. In the 1970s, both the number of state jurisdictions adopting pretrial diversion legislation, as well as institutional recognition, increased.²⁴ Notably, the American Law Institute’s Model Code of Pre-Arrestment was released and included a section on pretrial diversion.²⁵

C. Pretrial Diversion Today

Today, pretrial diversion programs exist under federal law, under state law in forty-five states, in the District of Columbia, and the U.S. Virgin Islands.²⁶ Pretrial diversion programs in general involve two hurdles which offenders must overcome in order to be considered.

First, offenders must comply with a “risk and needs assessment.”²⁷ Conditions are predetermined by jurisdiction and are based upon factors such as the type of offense and the criminal history of the offender. For example, by statute, Kansas provides a minimum list of factors that must be considered before an offender may be admitted into a pretrial diversion program.²⁸ In addition to considering such

²² *Id.* at 134.

²³ *Id.*

²⁴ Bellasai, *supra* note 3, at 6.

²⁵ *Id.* at 7 (referencing the MODEL CODE OF PRE-ARRESTMENT PROCEDURE § 320.5 (1975)).

²⁶ *Promising Practices in Pretrial Diversion*, *supra* note 1, at 9.

²⁷ *Id.* at 1.

²⁸ KAN. STAT. ANN. § 22-2908 (2012). The minimum factors are:

“(1) The nature of the crime charged and the circumstances surrounding it; (2) any special characteristics or circumstances of the defendant; (3) whether the defendant is a first-time offender and if the defendant has previously participated in diversion, according to the certification of the Kansas bureau of investigation or the division of vehicles of the department of revenue; (4) whether there is a probability that the defendant will cooperate with and benefit from diversion; (5) whether the available diversion program is appropriate to the needs of the defendant; (6) the impact of the diversion of the defendant upon the community; (7) recommendations, if any, of the involved law enforcement

factors as the nature and circumstances of the crime, likelihood to reoffend, and whether the offender has any prior convictions, acceptance into a pretrial diversion program may require victim notification and approval, restitution by the offender, and a psychological assessment of the offender.²⁹

The second hurdle which an offender must overcome in a pretrial diversion program is to accept and follow the conditions for release.³⁰ Again, such conditions are generally predicated by the offense and include requirements such as attendance at a state recognized treatment or counseling program, community service, restitution, and regular urinalysis testing.³¹ Throughout the program, the offender is generally supervised by the probation department or its equivalent.³² Offenders who are granted pretrial diversion but fail to meet the terms of his or her diversion agreement are either given increased pretrial sanctions or are removed from the program and reentered into the courts for adjudication on the original charge.³³

D. Does it Work?

There are two primary considerations when addressing whether pretrial diversion is effective. The first is the overall success of the program as an alternative to incarceration. The second is the cost savings to the jurisdiction implementing the program.

A recent nationwide survey demonstrated an eighty-five percent successful program completion rate for those who are accepted into a

agency; (8) recommendations, if any, of the victim; (9) provisions for restitution; and (10) any mitigating circumstances.

Id.

²⁹ See *id.*; see also *A Guide to Special Sessions & Diversionary Programs in Connecticut*, JDP-CR-137 (2012) <http://jud.ct.gov/Publications/CR137P.pdf> (providing similar requirements used in Connecticut).

³⁰ See MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 320.5(d) (1975) (defining rehabilitation as one of the conditions to which the prosecution and the accused may agree); see also ABA STANDARDS FOR CRIMINAL JUSTICE PLEAS OF GUILTY 11–12 (American Bar Association ed., 3rd ed. 1999) (recommending diversion agreements be in writing).

³¹ *Promising Practices in Pretrial Diversion*, *supra* note 1, at 12–13.

³² *Id.*

³³ *Id.* at 13.

pretrial diversion program.³⁴ On the federal level, a detailed analysis of the pretrial diversion program demonstrated an eighty-eight percent “satisfactory disposition” rate.³⁵ While different programs have different results,³⁶ the overall view of pretrial probation is that, for those who meet the qualifications, it is a viable, useful alternative to incarceration.³⁷

Providing an alternative to incarceration benefits not only the offender but the government as well. The prosecution saves resources, time, and money on pre-trial and trial preparation.³⁸ The Court saves resources and the docket is cleared for more serious cases.³⁹ While the cost of treatment is higher for diversionary cases, the costs of incarceration and probation may be reduced.⁴⁰ An example of the savings can be seen in a report prepared for the New York State Unified Court System, which calculated an average savings of \$5,564 per participant in state-wide drug courts.⁴¹ The report focused on judicial diversion, which takes place later in the adjudication cycle and therefore does not include savings recognized for programs that divert

³⁴ *Id.* at 16. Success as measured in the survey used for this report predominantly included completing the program. Many jurisdictions included in the survey did not maintain recidivism information. *Id.*

³⁵ Thomas E. Ulrich, *PreTrial Diversion in the Federal Court System*, 66 FED. PROBATION 33, 33 (2002).

³⁶ *See, e.g.*, Charles J. Hynes, *Prosecution Backs Alternative to Prison for Addicts*, 19 CRIM. JUST., Summer 2004, at 27 (citing a 2003 report showing over fifty-two percent of 1,000 participants enrolled in the Drug Treatment Alternative-to-Prison program since the year 2000 “graduated”).

³⁷ *See Promising Practices in Pretrial Diversion*, *supra* note 1, at 16. *See also No Entry: A National Survey of Criminal Justice Diversion Programs and Initiatives*, CENTER FOR HEALTH AND JUSTICE AT TASC, 1, 17 (Dec., 2013), http://www2.centerforhealthandjustice.org/sites/www2.centerforhealthandjustice.org/files/publications/CHJ%20Diversion%20Report_web.pdf.

³⁸ *See* Printzlien, *supra* note 13, at 285.

³⁹ *Id.*

⁴⁰ NPC Research and Center for Court Innovation, *Testing the Cost Savings of Judicial Diversion*, 1, 40 (Mar. 2013), <http://www.pretrial.org/wp-content/uploads/filebase/diversion/Testing%20the%20Cost%20Savings%20of%20%20Judicial%20Diversion%20-%20Center%20for%20Court%20Innovation%20et%20a%202013.pdf> (focusing on drug courts and judicial diversion).

⁴¹ *Id.* at 39.

participants earlier in the process.⁴² The savings from other programs, therefore, should be even greater.

III. A BRIEF HISTORY OF CHILD PORNOGRAPHY LEGISLATION AND SENTENCING

A. Obscenity and the Supreme Court

Before discussing the evolution of child pornography legislation, it is important to understand two seminal Supreme Court cases dealing with obscenity: *Roth v. United States*⁴³ and *Stanley v. Georgia*.⁴⁴

Roth involved two consolidated cases each with defendants in the business of selling books, magazines, and other materials.⁴⁵ The defendants solicited business through flyers and circulars.⁴⁶ Samuel Roth, resident of New York, had been convicted for violating the federal obscenity statute.⁴⁷ David Alberts, resident of California, had been convicted for violating the California Penal Code.⁴⁸ The ultimate issue in both cases was whether obscene speech was protected under the First Amendment.⁴⁹ In holding that obscene speech was not protected, the court stated:

[a]lthough this is the first time the question has been squarely presented to this Court, either under the First Amendment or under the Fourteenth Amendment, expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press.⁵⁰

⁴² *Id.* at 3.

⁴³ 354 U.S. 476 (1957).

⁴⁴ 394 U.S. 557 (1969).

⁴⁵ *Roth*, 354 U.S. at 479–81.

⁴⁶ *Id.* at 480–81.

⁴⁷ *Id.* at 480.

⁴⁸ *Id.* at 481.

⁴⁹ *Id.* at 479. The issue in David Albert's case was under the Fourteenth Amendment because of his conviction under state law. *Id.* While the Court addressed each conviction in turn, the focus of the case is whether obscene speech enjoys Constitutional protections. *Id.* at 481, 492-494.

⁵⁰ *Id.* at 481 (internal citations omitted).

This was the first broad decision by the Court confirming that obscenity was not protected speech and thus state and federal laws restricting or outlawing it were not unconstitutional.⁵¹

Twelve years after *Roth*, the Court considered another obscenity case in *Stanley v. Georgia*.⁵² In *Stanley*, federal and state police had secured a search warrant to investigate bookmaking activities at the defendant's home.⁵³ While executing the warrant, the police came upon material they deemed to be obscene. Stanley was convicted of violating Georgia state law for "knowingly hav(ing) possession of . . . obscene matter."⁵⁴

In overturning the defendant's conviction, the Court distinguished the case from *Roth*, emphasizing the fact that Stanley's conviction had been for the private possession of the material:

[n]one of the statements cited by the Court in *Roth* for the proposition that this Court has always assumed that obscenity is not protected by the freedoms of speech and press' were made in the context of a statute *punishing mere private possession of obscene material*; the cases cited deal for the most part with use of the mails to distribute objectionable material or with some form of public distribution or dissemination. Moreover, none of this Court's decisions subsequent to *Roth* involved prosecution *for private possession of obscene materials*.⁵⁵

Hence, *Roth* was not overruled, but rather an exception was carved out which allowed "the States [to] retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home."⁵⁶

Justice Thurgood Marshall wrote for the majority in *Stanley*, and has been lauded for the manner in which he addressed privacy rights in

⁵¹ Prior to *Roth* the Supreme Court had not ruled on the definition of obscenity or whether it was protected by the First Amendment. Donovan W. Gaede, Comment, *Constitutional Law—Policing the Obscene: Modern Obscenity Doctrine Re-Evaluated*, 18 S. ILL. U. L.J. 439, 441 (1994).

⁵² *Stanley v. Georgia*, 394 U.S. 557 (1969).

⁵³ *Id.* at 558.

⁵⁴ *Id.* at 558–59.

⁵⁵ *Id.* at 560–61 (emphasis added).

⁵⁶ *Id.* at 568.

light of the First Amendment in his holding.⁵⁷ In *Stanley*, Justice Marshall notably stated:

[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.⁵⁸

The pendulum favoring First Amendment rights would soon swing back.

B. Child Pornography Legislation

Before 1977, fewer than six states had enacted statutes prohibiting child pornography⁵⁹ and there were no such statutes at the federal level.⁶⁰ By 2011, every state had enacted child pornography laws and Congress had enacted and amended legislation multiple times, often in rapid response to Supreme Court decisions.⁶¹

The states were the first to become aware of the lack of legislation regarding child pornography.⁶² As the use of children to create pornography increased, the interstate nature of the resulting videos and images also increased.⁶³ Faced with few resources and a growing problem, the states pressured Congress for federal involvement.⁶⁴ Congress responded and, in 1977, The Protection of Children Against

⁵⁷ See, e.g., J. Clay Smith, Jr. & Scott Burrell, *Justice Thurgood Marshall and the First Amendment*, 26 ARIZ. ST. L.J. 461, 464 (1994) (noting, *inter alia*, that a recent tribute to Marshall by the members of the Bar of the Supreme Court included his stand in the *Stanley* case).

⁵⁸ *Stanley*, 394 U.S. at 565.

⁵⁹ Todd J. Weiss, *The Child Protection Act of 1984: Child Pornography and the First Amendment*, 9 SETON HALL LEGIS. J. 327, 331 (1985) (citing S. REP. NO. 95-438, at 10 (1977) (finding six states had proscribed the use of children in pornographic material)); Jennifer M. Payton, Note, *Child Pornography Legislation*, 17 J. FAM. L. 505, 519-20 (1978-1979) (finding one state had a statute proscribing the same).

⁶⁰ See Payton, *supra* note 59, at 511.

⁶¹ *State Statutes—Child Pornography Possession*, NAT'L DIST. ATT'YS. ASS'N, (Mar. 2010), <http://www.ndaa.org/pdf/Child%20Pornography%20Possession%20Statutes%203-2010.pdf>.

⁶² Weiss, *supra* note 59, at 332.

⁶³ See *id.* at 332-33.

⁶⁴ *Id.* at 333.

Sexual Exploitation Act was signed into law.⁶⁵ “[P]remising its jurisdiction over such activity as an extension of its command over interstate commerce,”⁶⁶ the federal statute barred the use of children in the production of pornography.⁶⁷

The definition of obscenity was a barrier to the enforcement of the federal statute and to a rapidly increasing number of state laws proscribing child pornography.⁶⁸ In 1973, the Supreme Court announced a legal definition of “obscenity” which hampered prosecution under the federal statute and state equivalents.⁶⁹ *Miller v. California*⁷⁰ was one of a family of pornography cases the Court decided together.⁷¹ The holding in *Miller*, enunciated by Justice Berger, stated:

In sum, we (a) reaffirm the *Roth* holding that obscene material is not protected by the First Amendment; (b) hold that such material can be regulated by the States, subject to the specific safeguards enunciated above, without a showing that the material is ‘utterly without redeeming social value’; and (c) hold that obscenity is to be determined by applying ‘contemporary community standards,’ . . . not ‘national standards.’⁷²

By focusing the definition of “obscenity” on “contemporary community standards,” it was difficult to establish a uniform manner in which to enforce the federal and state child pornography statutes.⁷³

In 1982, the Supreme Court directly addressed the issue of child pornography in *New York v. Ferber*.⁷⁴ *Ferber* involved a New York statute “prohibiting persons from knowingly promoting a sexual performance by a child under the age of sixteen by distributing material which depicted such a performance,”⁷⁵ *Ferber*, a bookstore

⁶⁵ *Id.* at 333 (citing 18 U.S.C. §§ 2251-2253).

⁶⁶ *Id.* at 334-335.

⁶⁷ *See generally id.*

⁶⁸ Weiss, *supra* note 59, at 336.

⁶⁹ *Id.*

⁷⁰ *Miller v. California*, 413 U.S. 15 (1973).

⁷¹ *Id.*

⁷² *Id.* at 36-37 (citations omitted).

⁷³ *See Weiss, supra* note 59, at 336.

⁷⁴ *New York v. Ferber*, 458 U.S. 747 (1982).

⁷⁵ *Id.* at 747.

owner, was convicted of violating the statute when he sold films showing boys masturbating.⁷⁶ Ferber's argument, *inter alia*, was that the films were protected speech under *Miller*.⁷⁷ In upholding the constitutionality of the New York statute, the Court noted:

The test for child pornography is separate from the obscenity standard enunciated in *Miller*, but may be compared to it for the purpose of clarity. The *Miller* formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole. We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection.⁷⁸

While *Ferber* did not specifically provide a legal definition for child pornography, it provided guidelines which encouraged Congress to revisit its earlier legislation proscribing child pornography.⁷⁹ The ultimate result was the Child Protection Act of 1984 (CPA).⁸⁰

The Child Protection Act of 1984 amended the 1977 Protection of Children Against Sexual Exploitation Act in several significant ways. First, the CPA removed references to "obscenity" that had hindered enforcement under the *Miller* standard.⁸¹ Second, the requirement that the images be created for commercial purposes was removed.⁸² Third, a new offense was created for "knowingly reproducing any visual depiction of a child engaging in sexually explicit conduct through the mails."⁸³ Fourth, the age under which a child would be protected was

⁷⁶ See generally *id.*

⁷⁷ See generally *id.*

⁷⁸ *Id.* at 764–65 (citations omitted).

⁷⁹ Weiss, *supra* note 59, at 342.

⁸⁰ *Id.* Weiss offers a detailed discussion of the path from the Supreme Court's decision in *Ferber* to the signing of the Child Protection Act by President Reagan. *Id.* at 342–48.

⁸¹ Annemarie J. Mazzone, Comment, *United States v. Knox: Protecting Children From Sexual Exploitation Through the Federal Child Pornography Laws*, 5 FORDHAM INTELL. PROP. MEDIA. & ENT. L.J. 167, 185 (1994).

⁸² *Id.*

⁸³ *Id.* at 185–86.

increased from sixteen to eighteen.⁸⁴ Additionally, Congress replaced the word “lewd,” which had been associated with the *Miller* obscenity standard, with “lascivious.”⁸⁵

Because of the difficulty in establishing a link between private possession and interstate commerce, it is noteworthy that the federal proscription of child pornography did not apply to privately owned images or items otherwise prohibited by the statute. In other words, possession of images of child pornography was not implicated in the federal statute.⁸⁶ States, however, were not necessarily so restricted.⁸⁷ Several states enacted laws prohibiting private possession of child pornography and by 1990 the Supreme Court took the opportunity to address the issue in *Osborne v. Ohio*.⁸⁸

Osborne involved an Ohio statute that prohibited the possession of nude photographs of children.⁸⁹ *Osborne* was convicted of violating this statute after police seized four illegal images from his home. He appealed his conviction on First Amendment grounds.⁹⁰ In order to hold that the Ohio statute did not violate the First Amendment, the Court had to distinguish the case from *Stanley*.⁹¹ To do so, the Court focused on the intent of the laws in question, noting that while *Stanley* “sought to proscribe possession of obscenity because [the Georgia law in question] was concerned that obscenity would poison the mind of its viewers,” the intent of the Ohio law in question in *Osborne* was “to protect the victims of child pornography [and] destroy a market for the exploitative use of children.”⁹²

Having disposed of the *Stanley* precedent, the Court applied strict scrutiny and found that:

⁸⁴ *Id.* at 186. Literally, the statute reduced the age from “under sixteen” to “under eighteen.” *Id.*

⁸⁵ *Id.* at 187. Additionally, in 1988 during the nascent years of computers, Congress amended the federal child pornography statute by prohibiting the use of computers to “transport, distribute, or receive” child pornography. *Id.*

⁸⁶ *Id.* at 187.

⁸⁷ Mazzone, *supra* note 81.

⁸⁸ *Id.* (citing *Osborne v. Ohio*, 495 U.S. 103 (1990)).

⁸⁹ OHIO REV. CODE ANN. § 2907.323(A)(3) (Anderson Supp.1990).

⁹⁰ *Osborne v. Ohio*, 495 U.S. 103 (1990).

⁹¹ *Id.* at 109–10. *See also supra* III.B.

⁹² *Osborne*, 495 U.S. at 109 (internal citations omitted).

[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.' . . . The legislative judgment, as well as the judgment found in relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment. It is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand.⁹³

Again freed from First Amendment fetters, Congress amended the federal child pornography laws.⁹⁴ In a 1990 amendment, Congress added the offense of possession of child pornography.⁹⁵

The next major change to the federal pornography laws occurred in 1996.⁹⁶ Concerned by the ease with which images could be manipulated with computer technology, Congress passed the Child Pornography Prevention Act of 1996.⁹⁷ The 1996 amendment extended the definition of child pornography to include "virtual child pornography."⁹⁸ Virtual child pornography is child pornography that has not been created with real children.⁹⁹

The 1996 extension of the federal law was challenged on First Amendment grounds and was heard by the Supreme Court in *Ashcroft v. Free Speech Coalition*.¹⁰⁰ In a 6–3 opinion, the Court held:

By prohibiting child pornography that does not depict an actual child, the statute goes beyond *New York v. Ferber*, which distinguished child pornography from other sexually explicit speech because of the State's interest in protecting the children

⁹³ *Id.* at 109–10 (internal citations omitted).

⁹⁴ *See* Mazzone, *supra* note 81, at 191.

⁹⁵ *Id.*

⁹⁶ John Schwartz, *New Law Expanding Legal Definition of Child Pornography Draws Fire*, WASH. POST, Oct. 4, 1996, at A10.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Shepard Liu, *Ashcroft, Virtual Child Pornography and First Amendment Jurisprudence*, 11 U.C. DAVIS J. JUV. L. & POL'Y 1, 2–3 (2007). Virtual child pornography may be created, for example, with actors digitally manipulated to look like children or by using animation. *Id.*

¹⁰⁰ *See generally* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (presenting a case challenging the virtual child pornography statute).

exploited by the production process. As a general rule, pornography can be banned only if obscene, but under *Ferber*, pornography showing minors can be proscribed whether or not the images are obscene under the definition set forth in *Miller v. California*. *Ferber* recognized that “[t]he *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State’s particular and more compelling interest in prosecuting those who promote the sexual exploitation of children.”¹⁰¹

Again, Congress responded, this time enacting the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Act of 2003 (the PROTECT Act).¹⁰² This act created a new crime for “pandering or soliciting material” which “reflects the belief, or that is intended to cause another to believe that it contains child pornography.”¹⁰³ Not unexpectedly, this law, too, made it to the Supreme Court on First Amendment grounds in *United States v. Williams*, where it was challenged as being overbroad and vague.¹⁰⁴ In upholding the constitutionality of the PROTECT Act, the Court observed that the determination called for was fact-based, stating:

The statute requires that the defendant hold, and make a statement that reflects, the belief that the material is child pornography; or that he communicate in a manner intended to cause another so to believe. Those are clear questions of fact . . . To be sure, it may be difficult in some cases to determine whether these clear requirements have been met. ‘But courts and juries every day pass upon knowledge, belief and intent—the state of men’s minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred.’¹⁰⁵

The Court ended its decision with the following observation:

¹⁰¹ *Id.* at 240 (citations omitted).

¹⁰² Michael J. Henzey, *Going on the Offensive: A Comprehensive Overview of Internet Child Pornography Distribution and Aggressive Legal Action*, 11 APPALACHIAN J.L. 1, 23 (2011). Several other laws were passed at this time dealing with child pornography and abuse. Their relevance to this Note is not material so they are not addressed.

¹⁰³ *See id.* at 25 (citing 18 U.S.C. § 2252A(a)(3)(B)).

¹⁰⁴ *United States v. Williams*, 553 U.S. 285 (2008).

¹⁰⁵ *Id.* at 306.

Child pornography harms and debases the most defenseless of our citizens. Both the State and Federal Governments have sought to suppress it for many years, only to find it proliferating through the new medium of the Internet. This Court held unconstitutional Congress's previous attempt to meet this new threat, and Congress responded with a carefully crafted attempt to eliminate the First Amendment problems we identified. As far as the provision at issue in this case is concerned, that effort was successful.¹⁰⁶

Congress' authority, of course, extends beyond statutes defining federal crimes. Congress also sets penalties for violating those statutes.

C. Child Pornography Sentencing

As Congress amended the federal child pornography statutes, it also increased the penalties for violation¹⁰⁷ by increasing the minimum and maximum penalties for the offenses associated with child pornography.¹⁰⁸ Importantly, sentence-enhancements were added which increased penalties based upon the details of the offense.¹⁰⁹ For example, the number of images possessed and the age of the children depicted results in a sentence-enhancement.¹¹⁰ Interestingly, using a

¹⁰⁶ *Id.* at 307.

¹⁰⁷ Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 STAN. L. & POL'Y REV. 545, 552 (2011).

¹⁰⁸ *Id.* at 552.

¹⁰⁹ See generally Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of Child Pornography Guidelines*, OFFICE OF DEFENDER SERVS. (2009), <http://www.fd.org/docs/Select-Topics---sentencing/child-porn-july-revision.pdf>.

¹¹⁰ *Id.* at 26.

Base Offense Level: (a)(1): 18 if a violation of 18 U.S.C. § 1466A(b) or § 2252(a)(4) or § 2252A(a)(5)(a)(2): 22 otherwise; BUT If (a)(2), + conduct was limited to receipt or solicitation, + no intent to traffic or distribute, then -2. Specific Characteristics: (b)(1) prepubescent or a minor under 12 years +2; (b)(2) if distribution A) For pecuniary gain, see 2B1.1, but not less than +5; B) For value but not pecuniary gain +5; C) To a minor +5; D) To a minor to persuade the minor to engage in illegal activity other than E) +6; E) To persuade a minor to engage in sexual conduct +7; F) Other than for the reasons above +2; (b)(3) if material portrays sadistic or masochistic conduct, or other violence, +4; (b)(4) Pattern of Abuse +5; (b)(5) transmission of material or notice by

computer to access pornography increases the sentence that may be imposed.¹¹¹

An oft-cited example of the effect of these changes provides the clearest depiction of the consequences of sentence escalation. The example originated in a paper by Troy Stabenow.¹¹² In his paper, Stabenow compares hypothetical defendants.¹¹³ Defendant #2¹¹⁴ is convicted of possession of child pornography.¹¹⁵ Stabenow provides the following characteristics for Defendant #2:

Possessed a picture depicting a child under the age of twelve

Used a computer to obtain the image

Had one disk containing two movie files and ten pictures, equating to 160 pictures

[H]as no criminal history and has never abused or exploited a child.

[P]leads guilty in a timely fashion and receives the maximum standard reduction for acceptance of responsibility¹¹⁶

Depending upon when Defendant #2 was convicted, his sentence range would be as follows:

April 30, 1987: No punishment—not illegal

November 1, 1991: 6–12 months

November 27, 1991: 12–18 months

November 1, 1996: 21–27 months

April 30, 2003: 30–37 months

November 1, 2004: 41–51 months¹¹⁷

computer +2; (b)(6) If A) 10–150 images +2; B) 150–300 +3; C) 300–600 +4 D) 600+ +5.

Id.

¹¹¹ *Id.*

¹¹² *Id.* at 26–30.

¹¹³ *Id.*

¹¹⁴ Defendant #1 is charged with distribution of child pornography and is thus not relevant to this discussion.

¹¹⁵ Stabenow, *supra* note 109, at 28.

¹¹⁶ *Id.* at 28 (omitting the percent of typical defendants represented).

¹¹⁷ *Id.* at 29.

By comparison, Stabenow then considers the federal sentence guidelines for a hypothetical physical offender.¹¹⁸ The physical offender is a fifty-year-old man who meets a thirteen-year-old girl on the Internet and successfully persuades her to meet him and have sex.¹¹⁹ “[T]he Guideline range for this Category I offender would be 37–46 months.”¹²⁰

Observe the stunning difference between the crimes and the punishments. Defendant #2 has not committed a physical sex offense involving a minor. The fifty-year-old man has. Both crimes are sex crimes against minors. Both offenders are charged, convicted, and sentenced under the federal guidelines. Defendant #2, however, receives a greater sentence than the physical offender.¹²¹

IV. EXPANDING PRETRIAL DIVERSION TO ADDRESS POSSESSION OF CHILD PORNOGRAPHY

Today, under federal law and all state laws, possession of child pornography generally results in a felony conviction, incarceration for up to ten years, and mandatory registration as a sex offender for at least fifteen years.¹²² There is no doubt that a felony conviction and registration as a sex offender, even at the lowest level, curtails one’s ability to live and work.¹²³ The inability to find a job, and the fact that a sex offender must carefully choose where to live and monitor with whom he or she associates, forces many registered sex offenders to live in increased isolation and arguably results in a return to the online behavior that led to the initial conviction.¹²⁴

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Stabenow, *supra* note 109, at 29.

¹²¹ *Id.* (emphasis added).

¹²² *State Statutes—Child Pornography Possession, supra* note 61, (noting that the maximum sentence for possession at the federal level has been increased since Stabenow’s report); *Id.* at 96, (also noting that possession combined with, e.g., prior offenses carries a minimum ten year sentence and a maximum twenty year sentence).

¹²³ See Hamilton, *supra* note 107, at 563–64.

¹²⁴ See Ethel Quayle et. al., *Sex Offenders, Internet Child Abuse Images and Emotional Avoidance: The Importance of Values*, 11 AGGRESSION AND VIOLENT BEHAVIOR 1 (2006) (providing that often those using child pornography do so because of isolation or underlying addiction, depression issues).

Perhaps many of the offenders charged with possession of child pornography should be so restricted.¹²⁵ But what about the nineteen-year-old boy who goes off to college and for the first time acquires unfettered Internet access?¹²⁶ Should he be branded with a felony conviction for the rest of his life and the label of sex offender until he is in his late thirties?¹²⁷ Or like a similarly situated nineteen-year-old drug offender, should he be considered for further evaluation and possible treatment in lieu of prosecution?

A. Risk and Needs Assessment

To qualify for a pretrial diversion program, the offender must demonstrate certain eligibility.¹²⁸ Eligibility generally depends upon the nature of the offense and can include the risk of recidivism and the identification of viable rehabilitation services.¹²⁹ For example, Miami Dade County diverts drug offenders to a drug court system that manages the pretrial program.¹³⁰ An offender qualifies for drug court in Dade County if he has no history of violent crime, has no prior arrests for drug sales or trafficking, and has no more than two previous

¹²⁵ For example, if a possessor of child pornography is an active trader in child pornography, he will likely fail many of the risk tests that are used today to determine likelihood of reoffending. Troy Stabenow, *A Method for Careful Study: A Proposal for Reforming the Child Pornography Guidelines*, 24 FED. SENT'G REP. 108, 116 (2011). Similarly, an offender who is likely to reoffend will not generally be a candidate for pretrial probation. See *supra* Part II.C.

¹²⁶ Because high schools are permitted to restrict Internet access and most parents have put Internet filtering in place at home, most young men and women first experience unrestricted Internet access at university. See Children's Internet Protection Act, 47 U.S.C. § 254 (2012) (restricting funding to public primary and secondary schools who do not filter harmful material from the Internet); Amanda Lenhart, *Protecting Teens Online*, PEW INTERNET & AM. LIFE PROJECT 1, 7–8 (March 17, 2005), http://www.pewinternet.org/pdfs/PIP_Teens_Report.pdf (finding over fifty-four percent of parents used internet filters in the home in 2005, predicting growth to sixty-five percent by 2009).

¹²⁷ Or, perhaps age forty because getting to trial or even to a pretrial plea bargaining can sometimes take years.

¹²⁸ *Id.* at 12.

¹²⁹ *Id.* at 24.

¹³⁰ See *supra* Part II.C.

non-drug-related felony convictions.¹³¹ Similarly, the Essex County Pretrial Intervention Program (PTI) in New Jersey considers all offenders charged with criminal or penal offenses except those with minor violations likely to result in a suspended sentence.¹³² However, New Jersey's PTI program excludes those who have previously been diverted, or convicted, and those currently serving parole or probation.¹³³

When considering offenders charged with possession of child pornography, eligibility may be divided into two areas of consideration—general eligibility and specific eligibility. General eligibility would be based on facts similar to those of the Miami Dade drug court and New Jersey PTI program.¹³⁴ The general eligibility would be a threshold condition. If an offender does not satisfy these general conditions, he or she cannot be considered for the option.

Specific eligibility would rely upon a psychological determination of an offender's ability to be accepted into, and respond positively to, treatment. In Massachusetts, for example, a district court judge may refer a candidate for diversion to the director of a program.¹³⁵ The director of the program has fourteen days to perform an analysis of the defendant and provide a report to determine if the candidate will be able to benefit from the services.¹³⁶

¹³¹ Miami Dade County Drug Works, *Who is Eligible for Drug Court*, MIAMI-DADE COUNTY DRUG COURT, http://www.miamidrugcourt.com/index.php?option=com_content&view=article&id=44&Itemid=54.

¹³² New Jersey Courts, *Pre Trial Intervention Program*, <http://www.judiciary.state.nj.us/criminal/crpti.htm> (last visited May 9, 2014).

¹³³ *Id.*

¹³⁴ *Supra* notes 131–32. Note that the Miami Dade and New Jersey examples, as well as the examples given above, in *supra* Part II.C, are illustrative of the numerous programs available. This Note proposes that each jurisdiction should use the eligibility criteria it already has in place.

¹³⁵ MASS. GEN. LAWS ch. 276A, § 5 (2012). Under Massachusetts General Laws Chapter 276A a program is defined as including, but not limited to, “medical, educational, vocational, social and psychological services, corrective and preventive guidance, training, performance of community service work, counseling, provision for residence in a halfway house or other suitable place, and other rehabilitative services designed to protect the public and benefit the individual.” *Id.* at § 1.

¹³⁶ *Id.*

When considering possession of child pornography, the issue becomes whether there is a way to perform risk assessment evaluations that can be associated with treatment. This is a controversial issue. There is a “moral panic about the sexual exploitation of children”¹³⁷ that has been the driving force behind the severe penalties for those convicted of possession of child pornography.¹³⁸ One author referred to this as punishment by proxy.¹³⁹ Because of the public’s fear of those who physically harm children, society treats those who view such acts as equally culpable and punishes them accordingly.¹⁴⁰ The flames of fear were further fueled by an oft-cited and provocatively titled study published in 2006.¹⁴¹ The study indicated that possession of child pornography was a valid indicator of the likelihood to commit future physical crimes against children.¹⁴² The primary author of that report, however, continued his research and published a series of follow-up analyses.¹⁴³ The author has more recently reported that “the research has shown that relatively few child pornography offenders go on to commit sexual offenses, that are detected by authorities.”¹⁴⁴ In fact, current scientific evidence taken from multiple studies linking possession of child pornography to physical child molestation shows:

Child pornography consumption sometimes correlates to pedophilia, and many child pornography consumers report a past history of abuse (i.e., dual offending histories). *However, child pornography consumption on its own does not appear to correlate to a significant risk that an offender will progress to a contact offense or recidivate generally post-conviction. Overall recidivism*

¹³⁷ Hamilton, *supra* note 107, at 547.

¹³⁸ *Supra* Part II.B.

¹³⁹ Hamilton, *supra* note 107, at 548.

¹⁴⁰ *Id.*

¹⁴¹ See generally Michael C. Seto et. al., *Child Pornography Offenses Are a Valid Diagnostic Indicator of Pedophilia*, 115 J. ABNORMAL PSYCHOL. 610 (Aug. 2006).

¹⁴² *Id.*

¹⁴³ See, e.g., Angela W. Eke, Michael C. Seto, & Jennette Williams, *Examining the Criminal History and Future Offending of Child Pornography Offenders: An Extended Prospective Follow-up Study*, 35 LAW & HUM. BEHAV. 466, 472 (2011).

¹⁴⁴ Michael C. Seto, *Assessing the Risk Posed by Child Pornography Offenders*, 2 G8 GLOBAL SYMPOSIUM AT THE UNIV. OF NORTH CAROLINA—CHAPEL HILL (2009), available at http://txn.fdn.org/Seto_Position_Paper.pdf.

*rates are very low across all demographics for these offenses, although offenders with prior criminal histories are more likely to recidivate, as are those with concurrent violent offenses (including contact sexual offenses) to their child pornography crimes. Overall, child pornography offenders appear to be far more compliant with supervision than other offender populations, and recidivism rates for offenders on supervision or in treatment are particularly low.*¹⁴⁵

If the real risk that possessors of child pornography will escalate to become physical offenders is low, then the next question is whether there is a way to assess an individual offender's risk to reoffend. The answer to this question is yes. Tests have long been established and accepted by law enforcement and the courts to determine a sex offender's attraction to children.¹⁴⁶ Many jurisdictions have established mandatory testing for sex offenders that determine their eligible for release after incarceration.¹⁴⁷

General eligibility criteria for entry into pretrial probation exist. Consistent and recent research indicates that offenders who have possessed child pornography are not at risk to escalate to child abuse. To ensure individual offenders are not a threat, existing risk assessment protocols used to evaluate sex offenders can be used. No risk assessment hurdle exists to prevent these offenders from being considered for pretrial diversion.

B. Services

Successful diversion programs marry services with treatment.¹⁴⁸ Drug and alcohol offenders who enter pretrial diversion programs are generally compelled to attend substance abuse treatment, mental health

¹⁴⁵ Stabenow, *supra* note 109, at 121(emphasis added) (citations omitted).

¹⁴⁶ See, e.g., Missouri Sentencing Advisory Commission, *Sex Offender Risk Assessment* (June 30, 2006), <http://www.mosac.mo.gov/file.jsp?id=45355> (suggesting six different tests); Ohio Department of Rehabilitation and Correction, *Best Practices Tool-Kit: Sex Offender Assessment and Treatment* (Oct. 2009), http://www.drc.state.oh.us/web/iej_files/SO_AssessmentTreatment.pdf (recommending four different sex offender evaluations); Washington State Institute for Public Policy, *Risk Assessment Instruments to Predict Recidivism of Sex Offenders: Practices in Washington State* (June 2008), <http://www.wsipp.wa.gov/rptfiles/08-06-1101.pdf> (listing the risk assessment tools used by Washington for both juvenile and adult sex offenders).

¹⁴⁷ See *id.*

¹⁴⁸ *Promising Practices in Pretrial Diversion*, *supra* note 1, at 13.

treatment, and counseling.¹⁴⁹ Some special diversion programs targeted at veterans also provide job and education services as well.¹⁵⁰ Treatment is designed to address the root cause of the offense in light of the offender's needs and demographics—in short, to ensure success.¹⁵¹

Programs for treating convicted sex offenders exist today.¹⁵² Often they involve counseling and cognitive behavior therapy.¹⁵³ Generally, the same types of post-release counseling that have been available and provided to date can be used in a pretrial diversion setting. Treatment opportunities are also expanding. Accepting, *arguendo*, that the vast majority of offenders obtain child pornography via the Internet,¹⁵⁴ an issue that has been greatly discussed is the legitimacy of Internet addiction, otherwise known as Internet abuse disorder.¹⁵⁵ Viewed with mixed feelings by clinicians and the media,¹⁵⁶ Internet abuse disorder appears to be emerging as a legitimate psychiatric concern.¹⁵⁷ The fifth

¹⁴⁹ *Id.* at 12.

¹⁵⁰ See, e.g., Kate Cahoy, Jon Fougner, Sofia Nelson, & Eric Parrie, SB 114: IMPROVING PRE-TRIAL DIVERSION TO MEET THE UNIQUE NEEDS OF CONNECTICUT'S VETERANS 3 (2012) available at http://www.law.yale.edu/documents/pdf/Clinics/SB114White_Paper.pdf.

¹⁵¹ See generally Thomas E. Ulrich *supra* note 4, at 34–35.

¹⁵² See *supra* note 147.

¹⁵³ See generally Ethel Quayle et. al, *supra* note 124, at 1 (discussing cognitive therapy as one current treatment used for sex offenders).

¹⁵⁴ G. Patrick Black & Kenneth R. Hawk, II, *Computer Crimes & Computer/Internet Based Child Pornography Crimes*, DEFN'DR SERVS. OFFICE OF THE ADMIN. OFFICE UNITED STATES COURTS, at 22 (Feb., 2012) http://www.fd.org/pdf_lib/WS2012/Computer_Crimes101.pdf (noting that child pornography saw a resurgence that started in the 1990s due to online access).

¹⁵⁵ American Psychiatric Association, *APA Corrects New York Times Article on Changes to DSM-5's Substance Use Disorders*, (June 12, 2012), available at <http://dsmfacts.org/issue-accuracy/apa-corrects-new-york-times-article-on-changes-to-dsm-5s-substance-use-disorders/>.

¹⁵⁶ Compare Brent S. Colasurdo, Note, *Behavioral Addictions and the Law*, 84 S. CAL. L. REV. 161 (2010) (arguing against legally recognizing behavioral addictions because there is no chemical dependency), with Blake R. Bertagna, *Internet—Disability or Distraction? An Analysis of Whether “Internet Addiction” Can Qualify as a Disability Under the Americans with Disabilities Act*, 25 HOFSTRA LAB. & EMP. L. J. 419 (2008) (arguing that Internet addiction should be recognized by the Americans with Disability Act).

¹⁵⁷ See generally American Psychiatric Association, *supra* note 156.

edition of the American Psychiatric Association's (APA) Diagnostic and Statistical Manual (DSM-V) is scheduled for release in May 2013.¹⁵⁸ The DSM-V lists "Internet use disorder" in the section dedicated to areas which have been recommended for "further study before they should be considered disorders . . . [in order to] encourage research on the condition."¹⁵⁹ Presumably, inclusion in the DSM-V can be expected to result in more specific treatments targeted at Internet abuse by viewers of child pornography.

As with risk assessments, treatment programs are in place and in use by the courts and probation departments for post-release treatment. New, more targeted, treatments may not be far behind. An inability to provide treatment programs for offenders is not an obstacle to providing pretrial diversion for child pornography possessors.

C. Supervision

Successful pretrial diversion programs require supervision.¹⁶⁰ Pretrial diversion is a second chance and, given that opportunity, the offender is required to follow the terms of his diversion. Supervision ensures the terms of the diversion are being met.¹⁶¹ Depending upon the offence, supervision may entail random drug screens, verification of attendance at treatment programs, and the offender "checking in" regularly with the supervising officer.

Existing pretrial diversion programs often provide supervision through a jurisdiction's probation office or pre-trial service agencies.¹⁶² As it pertains to possession of child pornography, the supervision will include utilization of resources that are already in place—meetings with the supervisory officer, verification that treatment is occurring, and confirmation that other conditions of the diversion are being met.¹⁶³ There is no doubt that additional resources will be needed to supervise the increased number of diverted offenders, but the costs of adding those resources can be covered by

¹⁵⁸ See generally AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

¹⁵⁹ American Psychiatric Association, *supra* note 156.

¹⁶⁰ *Promising Practices in Pretrial Diversion*, *supra* note 1, at 13.

¹⁶¹ *Id.*

¹⁶² *Id.* at 11.

¹⁶³ *Id.* at 13.

the overall savings in other areas.¹⁶⁴ Indeed, the savings discussed in *supra* II-D included the costs of additional probation resources.

There are no significant barriers to providing supervision to offenders charged with possession of child pornography. Indeed, of the three items discussed in this section, providing supervision should be the least difficult.

V. CONCLUSION

Pretrial diversion is an option available throughout the country for low-risk offenders who can benefit from treatment. It provides those offenders with an opportunity to turn themselves around, rather than face incarceration and the stigma of a conviction. It is a successful and cost-effective alternative to incarceration for those offenders who meet the requirements.

Possession of child pornography is a sex offense and, therefore, defendants charged with possession of child pornography are not eligible for pretrial diversion. This stems in part from the public's fear of child abuse and the belief that those who are viewing the abuse are either as morally culpable as those who perform it, or are also capable of becoming a physical offender. This over-inclusive view results in harsh sentencing guidelines at the federal level. In many cases, possessors of child pornography are incarcerated for longer periods of time than those who actually abused the child. The result is that all possessors risk not only a felony conviction, but also face registration as a sex offender for a minimum of fifteen years.

Studies indicate, however, that defendants accused of possession of child pornography are potentially successful subjects for diversion. They generally meet the guidelines regarding prior offenses and age. Risk assessment is currently available, as is treatment. Apart from society's repugnance of the crime and its fears of what these offenders represent, or theoretically may do, there is arguably no reason not to consider them for pretrial diversion.

¹⁶⁴ See *supra* Part II.D and discussion therein.