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A Legal Response Is Necessary for Self-Produced Child Pornography: A Legislator's Checklist for Drafting the Bill

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This Article joins the dialogue concerning the proper response to underage individuals taking and sharing sexually explicit images of themselves.¹ The dialogue recently began with only a handful of law review articles published on the topic.² The debate thus far centers on whether naked images that underage individuals take of

¹ This Article discusses the proper response for *all* participants in this activity, including producers, distributors, and possessors.

² See generally Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 *COMMLAW CONCEPTUS* 1 (2009); John A. Humbach, ‘*Sexting*’ and the First Amendment, 37 *HASTINGS CONST. L.Q.* 433 (2010); Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 *VA. J. SOC. POL’Y & L.* 1 (2007) [hereinafter Leary, *Self-Produced Child Pornography*]; 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 (2010) [hereinafter Leary, *Sexting or Self-Produced Child Pornography?*]; 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 (2009); Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 *VA. J. SOC. POL’Y & L.* 505 (2008); W. Jesse Weins & Todd C. Hiestand, *Sexting, Statutes, and Saved by the Bell: Introducing a Lesser Juvenile Charge With an “Aggravating Factors” Framework*, 77 *TENN. L. REV.* 1 (2009).

themselves should be prosecutable or whether the proper response is to decriminalize this behavior.³ Because such images meet the definition of child pornography,⁴ this Article advocates for a legal response in addition to education. Like traditionally created pornography, self-produced child pornography may lead to serious and lasting physical and emotional consequences for its participants. The State has a compelling interest in protecting the well-being of its minors, which justifies a legal response to child pornography, whether or not it is self-produced.⁵ In addition, society as a whole suffers when teenagers produce child pornography that is distributed and possessed not just by other teens but perhaps by pedophiles as well. The casual and ubiquitous use of cell phones equipped with cameras and the ease with which photos may be disseminated has made a timely response critical to safeguarding the interests of minors and society.

When discussing this issue, I follow the lead of Professor Mary Leary and use the phrase “self-produced child pornography” (originally coined in her 2007 article) to describe the conduct addressed in this Article instead of the more sensational slang term, “sexting.”⁶ Self-produced child pornography more accurately describes the conduct of concern because “sexting” may encompass material that fails to meet the narrower legal definitions of child pornography.⁷ For example, “sexting” might encompass a picture of

³ See Leary, *Self-Produced Child Pornography*, *supra* note 2, at 26 (advocating for non-mandatory juvenile adjudications in combination with nonlegal social responses); *cf.* Smith, *supra* note 2, at 541 (advocating for a limited legal response).

⁴ See 18 U.S.C. § 2256(8) (2006) (defining child pornography as “any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct”).

⁵ *Ginsberg v. New York*, 390 U.S. 629, 640 (1968) (“[T]he knowledge that parental control or guidance cannot always be provided and society’s transcendent interest in protecting the welfare of children justify reasonable regulation [on behalf of] them.” (quoting *People v. Kahan*, 206 N.E.2d 333, 334 (N.Y. 1965) (Fuld, J., concurring))).

⁶ See Leary, *Self-Produced Child Pornography*, *supra* note 2. Sexting is defined as “the sending of sexually explicit texts and pictures by cellphone.” DMatson, *Sexting a Word of the Year Finalist*, SEX CRIME CRIM. DEF. (Nov. 17, 2009), <http://www.sexcrimecriminaldefense.com/sexting-word-of-the-year-finalist/>.

⁷ In her most recent article, Professor Mary Leary distinguishes self-produced child pornography from sexting and explains the intersection of the two. See Leary, *Sexting or Self-Produced Child Pornography?*, *supra* note 2, at 491–96. As Professor Leary explains, sexting can cover a broad range of activity, some of which is protected by the First Amendment. See *id.* at 492–94. She urges professionals to use the term self-produced child pornography because it is more accurate and keeps the discussion

a girl's breast, which would not meet the federal or certain state definitions of child pornography because it is not a "lascivious exhibition of the genitals or pubic area."⁸ "Sexting" may also refer to sexually explicit text messages that do not involve images. As a result, "sexting" is much broader than self-produced child pornography, which only encompasses images that depict sexually explicit conduct specifically defined by state statutes.

Since Professor Leary's 2007 article, media reports have more frequently described the harmful effects of self-produced child pornography and the indictments of teens who produced, distributed, and possessed these images.⁹ In many states, the behavior meets the definitions of various felonies, including those involving child pornography and sexual exploitation, which prosecutors have used to charge minors.¹⁰ Child pornography laws in some jurisdictions require individuals to register as sex offenders, regardless of whether the conviction resulted from traditional child pornography or self-produced child pornography. In Florida, an eighteen-year-old man was convicted of transmitting child pornography and was required to register as a sex offender when he sent a naked photo of his sixteen-year-old girlfriend to her family and friends.¹¹ His registration on the

grounded without the sensationalism associated with the media-created term sexting. *See id.*

⁸ *See* 18 U.S.C. § 2256(2)(B)(iii).

⁹ *See, e.g.,* Richards & Calvert, *supra* note 2, at 6 (stating that an eighteen-year-old male who was convicted of child pornography charges after he disseminated nude pictures of his sixteen-year-old ex-girlfriend is now a registered sex offender); Bob Stiles, *Teens Face Porn Charges in 'Sexting,'* TRIB.-REV. (Greensburg, Pa.), Jan. 13, 2009 (stating that three female students who sent nude pictures of themselves through their cell phones, as well the male recipients, face pornography charges); *Two Teens Charged with Child Pornography After Sexting,* KIROTV.COM (Jan. 29, 2010), <http://www.kirotv.com/news/22379142/detail.html>; *The CBS Early Show: Dangers of Teen 'Sex-ting'* (CBS television broadcast Jan. 15, 2009), available at <http://www.cbsnews.com/video/watch/?id=4723169n>.

¹⁰ *E.g.,* ALA. CODE § 13A-12-191 (2010) (making it a felony to "knowingly disseminate or display" sexually explicit depictions of minors); ALA. CODE § 13A-12-192 (2010) (extending criminal liability to those possessing such materials); ALASKA STAT. ANN. § 11.61.127 (West 2010) (making possession of child pornography a felony); ARIZ. REV. STAT. ANN. § 13-3552 (2010) (establishing that permitting minors to engage in such behavior may constitute sexual exploitation of a minor); ARK. CODE ANN. § 5-27-304 (West 2010); ARK. CODE ANN. § 5-27-602 (West 2010) (making it a felony to "distribut[e], possess[], or view[] . . . matter depicting sexually explicit conduct involving a [minor]").

¹¹ Deborah Feyerick & Sheila Steffen, *'Sexting' Lands Teen on Sex Offender List*, CNN, Apr. 8, 2009, <http://www.cnn.com/2009/CRIME/04/07/sexting.busts/index.html>.

sex offender list resulted in his dismissal from college, and he has found it very difficult to find a job.¹²

Scholars, legislators, and the public currently struggle with what the appropriate societal response to self-produced child pornography should be.¹³ Some commentators argue that self-produced child pornography is a social issue and that no legal sanctions should be imposed on its participants.¹⁴ For support, these individuals describe self-produced child pornography as high-tech flirting and view it as a mere manifestation of our sex-saturated society. They doubt whether the prevalence and harms associated with teen self-produced child pornography require legal sanctions, and they argue that the better response is more supervision and education by parents and schools.¹⁵ Others see the harm associated with self-produced child pornography as a real concern that calls for a multifaceted approach involving all community resources, including the legal system.¹⁶ Even those who agree that self-produced child pornography requires a legal response disagree on the proper response. Some want statutes to be revised to exempt self-produced child pornography from child pornography laws to avoid visiting upon the protected class the harsh, draconian punishments associated with those laws.¹⁷ Others advocate for the passage of new laws (misdemeanors or status offenses) that specifically address self-produced child pornography.¹⁸ Pros and

¹² *Id.*

¹³ See, e.g., Ronelle Grier, *Teen Sexting: Technological Trend Can Lead to Tragic Consequences*, DAILY TRIB., Jan. 27, 2010, <http://www.dailytribune.com/articles/2010/01/27/news/srv0000007438542.txt> (noting the debate over criminalization of sexting); Dalia Lithwick, *Teens, Nude Photos and the Law*, NEWSWEEK, Feb. 23, 2009, at 18 (discussing whether every case of lewdness should be prosecuted by police to the fullest extent of the law and whether the law encompasses too much conduct); Donna St. George, *Sending of Explicit Photos Can Land Teens in Legal Fix*, WASH. POST, May 7, 2009, available at 2009 WLNR 8673495 (reporting that “[t]he sexting phenomenon, which has alarmed parents and educators, is also raising an array of practical questions about how police and prosecutors should respond and what the long-term fallout could be for children”).

¹⁴ DMatson, *Sexting and Overreacting*, SEX CRIME CRIM. DEF. (Dec. 22, 2009), <http://www.sexcrimemcriminaldefense.com/sexting-and-overreacting/>; see also *Provocative Photos: Don't Overreact to 'Sexting,'* LEDGER (Lakeland, Fla.), Aug. 10, 2009, at A6, available at <http://www.theledger.com/article/20090810/NEWS/908105006?Title=Provocative-Photos-Don-t-Overreact-to-Sexting->.

¹⁵ See Calvert, *supra* note 2, at 33–37.

¹⁶ See Leary, *Self-Produced Child Pornography*, *supra* note 2, at 26–28, 39.

¹⁷ See Humbach, *supra* note 2, at 439, 467.

¹⁸ Leary, *Self-Produced Child Pornography*, *supra* note 2, at 39; Cindy Kranz, *Nude Photo Led to Suicide: Family Wants to Educate Teens About Dangers of Sexting*, CINCINNATI ENQUIRER, Mar. 22, 2009, <http://news.cincinnati.com/article/20090322>

cons exist for each of these approaches; however, the best approach is to keep a legal response as part of a multifaceted solution.

Part I of this Article addresses the threshold question of whether a legal response is necessary for self-produced child pornography.¹⁹ The justifications offered for why a legal response is ill-advised are not compelling in light of the seriousness of the harms associated with child pornography, whether those images be traditionally produced or self-produced. Part II explores whether current child pornography laws apply to self-produced child pornography. Although the material fits the plain meaning of the child pornography definition, strong arguments can be made that applying these statutes to self-produced child pornography results in a punishment that does not fit the crime. Recognizing the undesirability of continuing to prosecute minors under the existing child pornography statutes, Part III focuses on alternatives and the appropriateness of each suggested option. Current legislation pending in several states provides a rich framework to discuss, analyze, and formulate an effective response to the problem of self-produced child pornography. Although several statutes offer excellent provisions, no existing or proposed statute adequately addresses the multiple facets of the self-produced child pornography problem.

This Article advances the dialogue by comparing, contrasting, and critiquing various components of legislation intended to address the issue of self-produced child pornography. Certain components relate to surviving legal challenges, and others concern meeting the goals underlying the statutes. To assist in this endeavor, the final section of this Article develops a checklist of important provisions that legislators should consider and proposed language that legislators can incorporate into their bills. These provisions are ones the author believes would best serve teenagers and their communities; however, each community will need to decide what works best for it. What is most important is for all states to begin a serious and informed dialogue about the issue of self-produced child pornography and to

/NEWS01/903220312/-1/TODAY (discussing parents who are launching a national campaign to seek laws about sexting).

¹⁹ This Article deals with the appropriate legal response for minors who are involved in self-produced child pornography, whether that be in its production, distribution, or possession. There are many other legal issues beyond the scope of this Article. For an excellent review of these issues, see LISA E. SORONEN ET AL., NAT'L SCH. BDS. ASS'N COUNCIL OF SCH. ATTORNEYS, *SEXTING AT SCHOOL: LESSONS LEARNED THE HARD WAY* (2010), available at <http://www.nsba.org/SecondaryMenu/COSA/Resources/InquiryAnalysis/IA-Feb-10.aspx>.

develop a multifaceted approach that includes both educational and regulatory components.

I

SHOULD THERE BE A LEGAL RESPONSE TO SELF-PRODUCED CHILD PORNOGRAPHY?

Opponents to regulation have offered various reasons why a legal response to self-produced child pornography is not necessary, practical, or effective. Addressing and dismissing each of these justifications below, this Article concludes that an appropriate legal response, in combination with parental supervision, school, and media education, will most effectively address self-produced child pornography.

A. Myth One: Self-Produced Child Pornography by Teens Is Not Prevalent Enough to Warrant a Legal Response

Although opponents to a legal response argue that not enough teens engage in this behavior to justify any legal response, statistics show that self-produced child pornography is already widespread and common among today's teens. In a 2009 Associated Press-MTV poll, more than a quarter of the 1247 participants (ages fourteen to twenty-four) surveyed had been involved in some type of "naked sexting."²⁰ This is a 5% increase from the 20% of teens (ages thirteen to nineteen) and 33% of young adults (ages twenty to twenty-six) who admitted to posting nude or seminude pictures in a 2008 survey jointly conducted by the National Campaign to Prevent Teen and Unplanned Pregnancy and CosmoGirl.com.²¹ A Pew survey found that 4% of cell-owning teens ages twelve to seventeen reported sending sexually suggestive nude or nearly nude images of

²⁰ *A Thin Line: 2009 AP-MTV Digital Abuse Study 2* (Dec. 2009), http://www.athinline.org/MTV-AP_Digital_Abuse_Study_Executive_Summary.pdf (reporting that incidence overall is higher among eighteen- to twenty-four-year-olds (33%) than among fourteen- to seventeen-year-olds (24%); Libby Quaid, *Poll Finds Sexting Common Among Young People*, ABC NEWS (Dec. 3, 2009), <http://abcnews.go.com/US/wireStory?id=9236019>.

²¹ THE NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY & COSMOGIRL.COM, *SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS 3* (2008), available at http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf [hereinafter *SEX AND TECH SURVEY*]; see also Stacey Garfinkle, *Sex + Texting = Sexting*, WASH. POST ON PARENTING (Dec. 10, 2008), <http://voices.washingtonpost.com/parenting/2008/12/sexting.html>.

themselves via text messaging.²² Although the Pew survey numbers are lower than the MTV and CosmoGirl surveys, experts acknowledge that any measurement of this activity may be low because teenagers are asked to self-report.²³ Leonard Guagliano, a Niagara County Sheriff's Investigator who lectures in schools on Internet safety stated, "I won't say [self-produced child pornography is] an epidemic, but it's common Much more common than parents think."²⁴

Beyond the growing prevalence of self-produced child pornography, the potentially harmful and abusive nature of this phenomenon and the need to prevent it from growing further calls for legislative action. States regulate many types of behavior that involve significantly fewer people than self-produced child pornography involves. For instance, states regulate marijuana use even though only 10% of young adults and 1% of the adult population smoke it regularly.²⁵

Often, opponents of a legal response attempt to avoid the problem of the growing number of children engaged in the behavior by turning to excuses for why the children engage in the behavior. Teens may engage in self-produced child pornography because of perceived social advantages and rewards, a desire to imitate celebrities, or self exploration.²⁶ Self-produced child pornography results from a confluence of the ubiquitous channeling of sexually explicit messages

²² AMANDA LENHART, PEW INTERNET & AM. LIFE PROJECT, TEENS AND SEXTING: HOW AND WHY MINOR TEENS ARE SENDING SEXUALLY SUGGESTIVE NUDE OR NEARLY NUDE IMAGES VIA TEXT MESSAGING 4 (2009), available at <http://pewinternet.org/Reports/2009/Teens-and-Sexting.aspx>.

²³ See Alexandra Marks, *Charges Against 'Sexting' Teenagers Highlight Legal Gaps*, CHRISTIAN SCI. MONITOR, Mar. 30, 2009, <http://www.csmonitor.com/layout/set/print/content/view/print/209023> ("Bill Albert, a spokesman for the National Campaign, says he believes those numbers are low because they were self-reported."); Kranz, *supra* note 18 ("Some area school resource officers and principals estimate that at least half of the students have an inappropriate photo on their cell phone."). *But cf.* Justin Berton, *Are Lots of Teens 'Sexting'? Experts Doubt It*, SAN FRANCISCO CHRON., Mar. 21, 2009, http://articles.sfgate.com/2009-03-21/news/17214573_1_sexual-health-cell-phone-sexting (As part of a three-year Digital Youth Report study, a sociologist looked at what young people were doing online and found no self-produced child pornography.).

²⁴ Dan Herbeck, *The Heavy Consequences of 'Sexting'*, BUFFALONEWS.COM (Jan. 25, 2009), http://blogs.buffalonews.com/inside_the_news/2009/01/the-heavy-consequences-if-sexting.html.

²⁵ *Marijuana Smokers Face Rapid Lung Destruction—As Much as 20 Years Ahead of Tobacco Smokers*, SCI. DAILY (JAN. 27, 2008), <http://www.sciencedaily.com/releases/2008/01/080123104017.htm>.

²⁶ See Humbach, *supra* note 2, at 446.

and content with control and possession of modern devices that enable the capture and distribution of self-produced child pornography—cell phones in the hands of teenagers. The argument goes that society should not be surprised that teens flock to this latest technological advancement; however, recognizing and understanding this reality does not mean that we should not regulate self-produced child pornography. The same explanations for why teens produce self-pornography can explain why teens engage in a number of self-destructive behaviors. Nevertheless, society uses laws to regulate underage drinking, smoking, and drug use despite teens' reasons for wanting to engage in these behaviors. Society determined that these behaviors negatively impact children's well-being and are worthy of regulation even though the reasons teens want to use them are well known and understood. The disruption to the fabric of society and to the integrity of the individual outweighs any negligible short-term enjoyment that such behavior may provide for the child.

B. Myth Two: The Harms Associated with Teen Self-Produced Child Pornography Are Not Severe Enough to Warrant a Legal Response

Congress passed child pornography laws in response to compelling data showing the horrors inflicted on the victims of traditional child pornography. Because of its recent emergence, little formal data exist documenting the effects that self-produced child pornography may have on the participants and on minors who are unwillingly exposed to the images. By contrast, the harmful effects associated with traditional child pornography involving the sexual abuse and exploitation of minors is well documented—effects that Congress studied when drafting child pornography laws.²⁷ Because the same

²⁷ See Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009–26 (1996) (codified as note to 18 U.S.C. § 2251). The findings were:

Congress finds that—

(1) the use of children in the production of sexually explicit material, including photographs, films, videos, computer images, and other visual depictions, is a form of sexual abuse which can result in physical or psychological harm, or both, to the children involved;

(2) where children are used in its production, child pornography permanently records the victim's abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years;

(3) child pornography is often used as part of a method of seducing other children into sexual activity; a child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be

convinced by viewing depictions of other children “having fun” participating in such activity;

(4) child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites, and as a model for sexual acting out with children; such use of child pornography can desensitize the viewer to the pathology of sexual abuse or exploitation of children, so that it can become acceptable to and even preferred by the viewer;

(5) new photographic and computer imaging technologies make it possible to produce by electronic, mechanical, or other means, visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct;

(6) computers and computer imaging technology can be used to—

(A) alter sexually explicit photographs, films, and videos in such a way as to make it virtually impossible for unsuspecting viewers to identify individuals, or to determine if the offending material was produced using children;

(B) produce visual depictions of child sexual activity designed to satisfy the preferences of individual child molesters, pedophiles, and pornography collectors; and

(C) alter innocent pictures of children to create visual depictions of those children engaging in sexual conduct;

(7) the creation or distribution of child pornography which includes an image of a recognizable minor invades the child’s privacy and reputational interests, since images that are created showing a child’s face or other identifiable feature on a body engaging in sexually explicit conduct can haunt the minor for years to come;

(8) the effect of visual depictions of child sexual activity on a child molester or pedophile using that material to stimulate or whet his own sexual appetites, or on a child where the material is being used as a means of seducing or breaking down the child’s inhibitions to sexual abuse or exploitation, is the same whether the child pornography consists of photographic depictions of actual children or visual depictions produced wholly or in part by electronic, mechanical, or other means, including by computer, which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children;

(9) the danger to children who are seduced and molested with the aid of child sex pictures is just as great when the child pornographer or child molester uses visual depictions of child sexual activity produced wholly or in part by electronic, mechanical, or other means, including by computer, as when the material consists of unretouched photographic images of actual children engaging in sexually explicit conduct;

(10)(A) the existence of and traffic in child pornographic images creates the potential for many types of harm in the community and presents a clear and present danger to all children; and

(B) it inflames the desires of child molesters, pedophiles, and child pornographers who prey on children, thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children who are victimized as a result of the existence and use of these materials;

(11)(A) the sexualization and eroticization of minors through any form of child pornographic images has a deleterious effect on all children by encouraging

depth of research does not currently exist for self-produced child pornography, some argue that any legal response is at best premature and unwarranted. Additionally, these commentators argue that the harm of creating child pornography through sexual abuse far outweighs the harm, if any, associated with voluntary self-production of child pornography.²⁸

This position is flawed for several reasons. First, it makes incorrect inferences that child pornography laws exist to punish the creation of material produced solely through physical sexual abuse and that all traditional child pornography is created through physical sexual abuse. Although most child pornography is created under these disturbing circumstances, not all of it is. The lack of any physical abuse, however, is not a defense to child pornography charges. A child pornography conviction does not depend on a showing of physical or emotional harm associated with sexual abuse. The only relevant factor is whether a child was used in a visual depiction of a sexual activity.

This point is illustrated by a child pornography conviction in which the minor participant was in fact old enough to consent to sexual conduct under state law.²⁹ Although some commentators argue that, if a seventeen-year-old can have consensual sex, then that same seventeen-year-old should not be prosecuted for taking pictures of the

a societal perception of children as sexual objects and leading to further sexual abuse and exploitation of them; and

(B) this sexualization of minors creates an unwholesome environment which affects the psychological, mental and emotional development of children and undermines the efforts of parents and families to encourage the sound mental, moral and emotional development of children;

(12) prohibiting the possession and viewing of child pornography will encourage the possessors of such material to rid themselves of or destroy the material, thereby helping to protect the victims of child pornography and to eliminate the market for the sexual exploitative use of children; and

(13) the elimination of child pornography and the protection of children from sexual exploitation provide a compelling governmental interest for prohibiting the production, distribution, possession, sale, or viewing of visual depictions of children engaging in sexually explicit conduct, including both photographic images of actual children engaging in such conduct and depictions produced by computer or other means which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children engaging in such conduct.

Id.

²⁸ Calvert, *supra* note 2, at 47; Humbach, *supra* note 2, at 464.

²⁹ See *State v. Senters*, 699 N.W.2d 810 (Neb. 2005).

exploits,³⁰ valid societal reasons exist to distinguish between consent for having sex at seventeen and consent to being the subject of child pornography.³¹ In fact, courts have held that Congress needs only a rational basis to regulate child pornography of children under eighteen, even though the age of consent for marriage or sexual intercourse is younger.³² Congress's rational basis is grounded and compelling because the previous age of sixteen "hampered enforcement of child pornography laws."³³

Child pornography laws remain relevant even in situations involving consensual sexual intercourse without allegations of sexual abuse. Even a consensual intimate act intended to remain a secret between two people can make its way to the open market if filmed; therefore, filming should be prohibited if it involves a minor under eighteen.³⁴ In *State v. Senters*, a seventeen-year-old high school student engaged in consensual sex with a twenty-eight-year-old high school teacher.³⁵ The teacher filmed their sexual activities with the permission of the seventeen-year-old and planned to use the tape only for private purposes.³⁶ Although Nebraska allowed consensual sex at the age of seventeen and absolutely no evidence of sexual abuse existed, the taping of the sexual activity resulted in the conviction of the teacher for producing child pornography.³⁷

The teacher challenged his conviction, arguing that "[t]he Act (1) violate[d] his substantive due process right to sexual privacy, (2) violate[d] his right to equal protection under the law, and (3) [did] not

³⁰ Smith, *supra* note 2, at 525.

³¹ Children cannot consent to child pornography. This refusal to find a minor's consent valid is not limited to child pornography; it exists in various areas of law. *See* Cardwell v. Bechtol, 724 S.W.2d 739, 745 (Tenn. 1987) (stating that the law recognizes a rebuttable presumption that minors between the ages of seven and fourteen do not have the ability to consent to medical procedures); RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981) (stating that a minor's capacity to contract creates only voidable contractual duties, unless a statute provides otherwise); 65 AM. JUR. 2D Rape § 14 (2010) (stating that convictions under state statutory rape laws have in part become dependent upon the age of the child and whether at such age consent was legally valid).

³² United States v. Sherr, 400 F. Supp. 2d 843, 850 (D. Md. 2005).

³³ United States v. Bach, 400 F.3d 622, 629 (8th Cir. 2005); *see also* *Senters*, 699 N.W.2d 810; United States v. Shreck, No. 03-CR-0043-CVE, 2006 WL 2945368 (N.D. Okla. Oct. 13, 2006).

³⁴ *See Senters*, 699 N.W.2d at 818.

³⁵ *Id.* at 813.

³⁶ *Id.*

³⁷ *Id.* at 814.

provide sufficient notice under the Act of who is a child.”³⁸ The Nebraska Supreme Court found none of his challenges persuasive.³⁹ Using *Lawrence v. Texas*,⁴⁰ the teacher argued that, although the holding applied to consensual sex between adults and specifically exempted minors, the Supreme Court did not intend for *Lawrence* to cover situations involving a child permitted by state law to consent to sexual relations.⁴¹ The Nebraska Supreme Court found Senter’s argument unpersuasive, citing other cases that allowed legislatures to establish different age requirements for child pornography and consensual sex.⁴² The court determined that this distinction was rationally related to the legislature’s legitimate goal of preventing the abuse and sexual exploitation of children.⁴³

The teacher then argued that only distribution should be punished and that he should not be punished because he intended to keep the recording private.⁴⁴ The court found this distinction unconvincing, stating:

Even for those who record an intimate act and intend for it to remain secret, a danger exists that the recording may find its way into the public sphere, haunting the child participant for the rest of his or her life. It is reasonable to conclude that persons 16 and 17 years old, although old enough to consent to sexual relations, may not fully appreciate that today’s recording of a private, intimate moment may be the Internet’s biggest hit next week.⁴⁵

The court found that preventing production of these depictions would help protect the child “from the reputational harm that would occur if the recordings were distributed.”⁴⁶ This court’s reference to *reputational* harm is important when analyzing the self-produced child pornography issue. Although this case did involve a significantly older male, the facts show no evidence of abuse, molestation, or exploitation.⁴⁷ In fact, the minor’s consent to sexual

³⁸ *Id.*

³⁹ *Id.* at 819.

⁴⁰ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴¹ *Senters*, 699 N.W.2d at 816.

⁴² *Id.* at 816–17.

⁴³ *Id.* at 817.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 818.

⁴⁷ *See id.* at 813–14.

intercourse in this case was legally valid.⁴⁸ Yet, the court recognized that harm to the child could still result if these pictures found their way into the public sphere.⁴⁹

This reputational harm mentioned by the court is the very same emotional harm associated with self-produced child pornography, and it should not be summarily dismissed as somehow being trivial. Although the production of traditional child pornography may involve an underlying crime in its creation, which distinguishes it somewhat from self-produced child pornography, the pictures in either case “live on,” creating feelings of anxiety, regret, and fear that are similar to those experienced by traditional child pornography victims. Several stories reveal the tragic consequences self-produced child pornography can have on real teenagers, and it seems irresponsible to ignore these harms until more formal studies document them.⁵⁰ Children often suffer embarrassment, humiliation, shame, and regret after they participate in this activity.⁵¹ Readily identifiable harms from self-produced child pornography include: mental anguish, harassment, economic harm, and social stigma.⁵² These harms impact the psyche of the person and often negatively affect the person’s relationship with peers, leading to incidents of bullying. The teen’s physiological, emotional, and mental health can all be negatively impacted from a self-produced child pornography incident. This may lead teens to withdraw, to do poorly in school, to become

⁴⁸ *Id.* at 813.

⁴⁹ *Id.* at 818.

⁵⁰ See Mike Celizic, *Her Teen Committed Suicide Over ‘Sexting,’* TODAY: PARENTING (Mar. 6, 2009), <http://today.msnbc.msn.com/id/29546030> (stating that eighteen-year-old Jesse Logan took her own life after a nude picture of her was passed around via e-mail); Michael Inbar, *‘Sexting’ Bullying Cited in Teen’s Suicide*, TODAY: PEOPLE (Dec. 2, 2009), http://today.msnbc.msn.com/id/34236377/ns/today-today_people/ (discussing a thirteen-year-old female who committed suicide after her topless photograph was spread around her school); see also Elizabeth K. Englander, Letter to the Editor, *‘Sexting’ Blackmail*, BOS. GLOBE, Jan. 18, 2010, http://www.boston.com/bostonglobe/editorial_opinion/letters/articles/2010/01/18/sexting_blackmail/ (responding to an editorial that criticized the media for blaming suicides on sexting instead of bullying by stating that “56 percent of the kids [in a Harvard survey conducted by the author stated] that sexting is often or sometimes used as a form of cyberbullying . . . to blackmail or coerce other kids” and that “sexting is not always innocent and it may be just another form of bullying”).

⁵¹ See St. George, *supra* note 13 (noting that an eighteen-year-old male who was convicted of child pornography charges and is now a registered sex offender asked himself “where did I even get this idea?”).

⁵² See *id.*

depressed, and in extreme cases to take their lives.⁵³ Self-produced child pornography can even detrimentally impact a student's college applications or job search.⁵⁴ To ignore these detrimental effects and compare self-produced child pornography to playing spin the bottle, as one commentator does,⁵⁵ is naive, and society should not underestimate the damage self-produced child pornography can cause in the lives of teens.

Finally, just as it would be a faulty assumption to think that traditional child pornography necessarily involves coercion,⁵⁶ it is equally as false to think self-produced child pornography is always voluntary. Although a self-produced child pornography situation may not involve a power differential with an adult, such pornography may be produced under extreme pressure from the receiver of the images. Automatically assuming the picture is taken willingly and without coercion does not conform to the many anecdotal stories of boyfriends and girlfriends harassing peers for pictures.⁵⁷ Again, the

⁵³ Elizabeth Meyer, 'Sexting' and Suicide, PSYCHOL. TODAY (Dec. 16, 2009), <http://www.psychologytoday.com/blog/gender-and-schooling/200912/sexting-and-suicide>.

⁵⁴ *The Perils of Teen Sext*, CHI. TRIB., Apr. 20, 2009, at 24, available at 2009 WLNR 7336148 ("For a teen, the consequences can go well beyond the embarrassment of appearing naked on every cell phone in physics class. A nude image loose in cyberspace can torpedo a college application or a job search."); Richards & Calvert, *supra* note 2, at 6, 9 (stating that an eighteen-year-old male who was convicted of child pornography charges after he disseminated nude pictures of his sixteen-year-old ex-girlfriend is now a registered sex offender, was forced to leave the community college he was attending, and has found it impossible to secure employment).

⁵⁵ Rosemary Black, *Sexting: Just a Modern Version of Spin-the-Bottle*, N.Y. DAILY NEWS, May 27, 2009, http://www.nydailynews.com/lifestyle/2009/05/27/2009-05-27_sexting_just_a_modern_version_of_spinthebottle.html.

⁵⁶ Coercion is not an element of the child pornography laws.

⁵⁷ See *A Thin Line: 2009 AP-MTV Digital Abuse Study*, *supra* note 20 (reporting that 61% of teens sent a picture because they were pressured to do so); see also SEX AND TECH SURVEY, *supra* note 21, at 4 (finding that 51% of teen girls say a boy pressured them to send a sexual image, that 18% of teen boys say they do it because of pressure from a girl, that 23% of teen girls say friends pressured them, and that 24% of teen boys attribute sending images or messages to peer pressure). One teenage girl stated the following reason for sending the picture:

When I was about 14-15 years old, I received/sent these types of pictures. Boys usually ask for them or start that type of conversation. My boyfriend, or someone I really liked asked for them. And I felt like if I didn't do it, they wouldn't continue to talk to me.

LENHART, *supra* note 22, at 8. Another survey respondent confirmed the pressure:

I haven't, but most of the girls who have are usually pressured by a guy that they like or want to like them, or their boyfriends. It's probably more common than what it seems because most people who get involved in this were probably pressured by someone to do it.

critical factor in the analysis is the depiction of a child engaged in sexual activity, regardless of whether it is the result of sexual abuse, coercion, or the free choice of the participant.

In addition, research indicates that dating violence remains a serious problem among adolescent girls.⁵⁸ The statistics documenting the frequency of dating violence among high school girls causes alarm.⁵⁹ A recent study found that one in three teenagers will experience abuse in a teen dating relationship.⁶⁰ In a 2003–2004 California survey, 9% of ninth-graders and 13% of eleventh-graders were the victims of teenage dating violence within the previous twelve months.⁶¹ Recognizing the seriousness of the problem, California recently proposed a bill that “would recognize the month of February 2010 as ‘National Teen Dating Violence Awareness and Prevention Month’ and would encourage all Californians to observe the month with appropriate programs and activities that promote awareness and prevention of teen dating violence in their communities.”⁶² The resolution explicitly addresses self-produced child pornography and its detrimental effects on teens stating:

WHEREAS, Digital abuse and “sexting,” the electronic distribution of pictures, videos, or text messages that are sexually explicit, are becoming new frontiers for teen dating abuse; and

WHEREAS, One out of four teens in a relationship say they have been called names, harassed, or put down by their partner through the use of cell phones or texting; and

WHEREAS, Three out of 10 young people have sent or received nude pictures of other young people on their cell phone or online, and 61 percent who have “sexted” report being pressured to do so at least once; and

WHEREAS, Targets of digital abuse are almost three times as likely to contemplate suicide as those who have not encountered

Id.

⁵⁸ See generally Jay G. Silverman et al., *Dating Violence and Associated Sexual Risk and Pregnancy Among Adolescent Girls in the United States*, 114 PEDIATRICS 220 (2004), available at <http://pediatrics.aappublications.org/cgi/reprint/114/2/e220>.

⁵⁹ *Id.* at 221.

⁶⁰ Sarah Avery-Leaf & Michele Cascardi, *Dating Violence Education: Prevention and Early Intervention Strategies*, in PREVENTING VIOLENCE IN RELATIONSHIPS: INTERVENTIONS ACROSS THE LIFE SPAN 79, 82 (Paul A. Schewe ed., 2002).

⁶¹ Cal. Women’s Law Ctr., *S.T.O.P Teen Dating Violence Initiative*, http://www.cwlc.org/files/docs/TDV_Factsheet.pdf (last visited Nov. 10, 2010); see also *To The Contrary* (PBS television broadcast Mar. 28, 2009), available at http://www.youtube.com/watch?v=leHkukY8ChM&feature=player_embedded (discussing sexting and saying it is an early precursor to violence against women).

⁶² Assemb. Con. Res. 100, 2010 Reg. Sess. (Cal. 2010).

such abuse (8 percent vs. 3 percent), and targets of digital abuse are nearly three times more likely to have considered dropping out of school; and

WHEREAS, The severity of violence among intimate partners has been shown to be greater in cases where the pattern of violence has been established during adolescence⁶³

Research should continue on what role self-produced child pornography plays in causing dating violence.⁶⁴ To accurately analyze the potential harms self-produced child pornography may produce, research also needs to be conducted to determine the extent to which pedophiles might gain access to these pictures. Opponents of legal solutions dismiss this as a real possibility, arguing that these pictures remain within the teen population. However, the National Campaign survey documented that 15% of teens sent pictures to people whom they knew only online.⁶⁵ Cox Communications, Harris Interactive, and the National Center for Missing and Exploited Children conducted a survey that reported 11% of the fifty-four participants admitted to sending messages with nude or seminude pictures to people whom they did not know.⁶⁶ The MTV survey found 29% of the teens surveyed sent “sexts” to people whom they knew only online or had not met in person.⁶⁷ Although the receivers may not definitely be sexual predators, they may be, and the pictures could eventually end up in the hands of a predator even if not as the first recipient.⁶⁸

⁶³ *Id.*

⁶⁴ The National Foundation for Women Legislators advocates for legislation to address teen dating violence and thinks self-produced child pornography plays a role in this violence. See Kara Rowland, ‘Sexting’ Is Thorny Legal Issue, WASH. TIMES, June 23, 2009, <http://www.washingtontimes.com/news/2009/jun/23/sexting-is-thorny-legal-issue/>.

⁶⁵ SEX AND TECH SURVEY, *supra* note 21, at 2.

⁶⁶ COX COMM’NS, TEEN ONLINE & WIRELESS SAFETY SURVEY: CYBERBULLYING, SEXTING, AND PARENTAL CONTROLS 36 (2009), available at http://www.cox.com/takecharge/safe_teens_2009/research.html.

⁶⁷ *A Thin Line: 2009 AP-MTV Digital Abuse Study*, *supra* note 20.

⁶⁸ JANIS WOLAK ET AL., ONLINE VICTIMIZATION OF YOUTH: FIVE YEARS LATER 15 (2006), available at <http://www.unh.edu/ccrc/pdf/CV138.pdf> (finding that one in seven adolescents receive unwanted sexual solicitations on the Internet); see also Wendy Koch, *More Teens Caught Up in ‘Sexting,’ Many Don’t Realize They Can Be Charged with Porn*, USA TODAY, Mar. 12, 2009, available at 2009 WLNR 4679528 (explaining that, of the 2100 children that the National Center for Missing & Exploited Children has identified as victims of online pornography, one-fourth posted the images themselves); Wendy Koch, *Study: 4% of Kids Online Solicited for Sexual Photos*, USA TODAY, July 20, 2007, available at 2007 WLNR 13861342 (noting that one in twenty-five children who surf the Internet are solicited to send sexual photos). See generally JANIS WOLAK ET AL., TRENDS IN ARRESTS OF “ONLINE PREDATORS” (2009).

Another favorite argument is that we should not regulate self-produced child pornography because more serious issues exist in teenagers' lives. This argument could be used to oppose any regulation except for the most serious crimes. Nobody would contend that self-produced child pornography ranks as the most important issue lawmakers and law enforcement officials face. Yet, it is doubtful that it is the least important issue they face either.⁶⁹ Although lawmakers have packed legislative agendas, the welfare of children is rightfully ranked among the top priorities. To the extent that self-produced child pornography produces social harms to children and society at large, it deserves attention from state and national lawmakers. Just as the state has a compelling interest in protecting children from those who sexually exploit them, it should have an interest in protecting children from self sexual exploitation.⁷⁰

C. Myth Three: Self-Produced Child Pornography Is Just a Modern Form of Flirting and Is a Mere Manifestation of Our Sex-Saturated Society

The argument that self-produced child pornography is just another form of flirting and sexual exploration by teens fails to fully appreciate the substantial differences between this behavior and sexual activities of teenagers in the past. Making this simplistic argument ignores the complexities that this new format has on the lives of teens and society. As technology advances, the rules of the game change. Nobody would dispute that the development of the atomic bomb changed the rules of warfare. Anyone who claims this bomb is just another weapon in modern warfare is arguing with blinders on.

The accessibility and popularity of the Internet and cell phones among teens make self-produced child pornography cheap, easy, and unlike any type of dating behavior teens engaged in during prior

⁶⁹ See, e.g., S. 342, 2010 Sess. (Kan. 2010) (proposing to ban the sale of novelty cigarette lighters); H.R. 2184, 75th Leg., Reg. Sess. (Or. 2009) (proposing to increase the refund value for redemption of certain beverage containers).

⁷⁰ The Government has a compelling state interest in protecting the well-being of children. See Leary, *Self-Produced Child Pornography*, *supra* note 2, at 40; see also *New York v. Ferber*, 458 U.S. 747, 756–57 (1982) (“It 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.’” (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982))).

decades.⁷¹ This technology, combined with research concluding that the frontal lobes and prefrontal cortex remain under construction until the early twenties, results in a perfect storm.⁷² These portions of the brain curb impulsive, risk-seeking behavior and provide the human mind with the capacity to thoroughly consider the future consequences of actions. The delay in the development of these cognitive functions results in adolescents engaging in more impulsive and reckless behavior without regard for the effects these actions might have in the future. For example, investigators found that children drink or smoke, despite knowing the risks, because they rated the benefits higher than the risks, while undervaluing or ignoring long-term consequences.⁷³

In addition, teens grow up in a sex-saturated society, but this interest in sex generally and in the activities of youth particularly does not justify a hands-off approach to regulating self-produced child pornography.⁷⁴ The U.S. Supreme Court acknowledges that

⁷¹ VICTORIA J. RIDEOUT ET AL., KAISER FAMILY FOUND., *GENERATION M²: MEDIA IN THE LIVES OF 8- TO 18-YEAR-OLDS 1* (2010) (finding that eight- to eighteen-year-olds use some type of media 7.5 hours per day); Donna St. George, *6,473 Texts a Month, But at What Cost?*, WASH. POST, Feb. 22, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/21/AR2009022101863.html> (finding that teens with cell phones average 2272 text messages a month); Amanda Lenhart, *Teens and Mobile Phones Over the Past Five Years: Pew Internet Looks Back*, PEW INTERNET (Aug. 19, 2009), <http://www.pewinternet.org/Reports/2009/14--Teens-and-Mobile-Phones-Data-Memo.aspx> (finding that teens use of cell phones has steadily risen, with 71% of all teens ages 12–17 owning a cell phone by early 2008); Amanda Lenhart & Mary Madden, *Social Networking Websites and Teens*, PEW INTERNET (Jan. 7, 2007), <http://www.pewinternet.org/Reports/2007/Social-Networking-Websites-and-Teens.aspx> (stating that, by the end of 2006, 55% of online youth ages twelve to seventeen used social networking sites).

⁷² DANIEL R. WEINBERGER ET AL., *THE ADOLESCENT BRAIN: A WORK IN PROGRESS* 12 (2005), available at <http://www.thenationalcampaign.org/resources/pdf/BRAIN.pdf>.

⁷³ See Christopher Slobogin & Mark R. Fondacaro, *Juvenile Justice: The Fourth Option*, 95 IOWA L. REV. 1, 18–21 (2009) (discussing research on adolescent brain development and stating that “adolescents focus on short-term consequences and rewards”). See generally Valerie F. Reyna & Frank Farley, *Risk and Rationality in Adolescent Decision Making: Implications for Theory, Practice, and Public Policy*, 7 PSYCHOL. SCI. PUB. INT. 1, 2 (2006) (discussing adolescent risk taking); Laurence Steinberg, *Risk Taking in Adolescence: New Perspectives from Brain and Behavioral Science*, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 55, 57 (2007) (discussing changes in the adolescent brain during puberty).

⁷⁴ For background on the dangers of normalizing unhealthy sexual attitudes, see Cordelia Anderson, *Raising Sexually Healthy Children; Being Sexually Healthy; In a Sexually Toxic/Pornified Culture*, http://www.cordeliaanderson.com/cordeliaanderson.com_files/documents/Raising%20Kids.pdf (last visited Nov. 10, 2010). See generally GIGI M. DURHAM, *THE LOLITA EFFECT: THE MEDIA SEXUALIZATION OF YOUNG GIRLS AND WHAT WE CAN DO ABOUT IT* (2008) (describing five core myths of sexuality that impede girls’ healthy sexual development); DIANE E. LEVIN & JEAN KILBOURNE, *SO*

culturally we have always had a fascination with “the lives and destinies of the young.”⁷⁵ However, in *New York v. Ferber* the Court stated that it is “unrealistic to equate a community’s toleration for sexually oriented materials with the permissible scope of legislation aimed at protecting children from sexual exploitation.”⁷⁶ Society has long had a “social interest in order and morality,” which led the Supreme Court to find that obscenity fell outside of First Amendment protections.⁷⁷ This same interest in order and morality became the basis for the Court’s decision that child pornography also fell outside of the First Amendment, whether or not it was obscene.⁷⁸ Although society may have changed and become even more sex-saturated since *Ferber* was decided in 1982, society has not waived on its intolerance for child pornography involving real children.⁷⁹ The Supreme Court should not distinguish self-produced child pornography from that produced by sex offenders, which would normalize the former and endorse it as acceptable teenage behavior. It appears from their decision in *Ashcroft*, which involved virtual child pornography, that the Justices are concerned with the use of real children in the production, distribution, and possession of child pornography. If self-produced child pornography can be shown to be “intrinsically related” to the sexual abuse of children, the Justices are likely to be unmoved by a justification that society is sex-saturated. But even if the Supreme Court finds that self-produced child pornography is not “intrinsically related” to the sexual abuse of children, it is likely the self-produced photographs would meet the definition of obscenity, which likewise falls out of the First Amendment protection. Although it may be too broad to hold that self-produced child pornography is by definition without value, it

SEXY SO SOON: THE NEW SEXUALIZED CHILDHOOD AND WHAT PARENTS CAN DO TO PROTECT THEIR KIDS (2008) (exploring how advertising hijacks young people’s sexuality and the detrimental effects this has on relationships and sexual behavior).

⁷⁵ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 248 (2002).

⁷⁶ *New York v. Ferber*, 458 U.S. 747, 761 n.12 (1982); *see also* *Ginsberg v. New York*, 390 U.S. 629 (1968) (affirming a conviction under a New York law prohibiting the selling of material that had a predominant appeal to prurient interest of minors).

⁷⁷ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

⁷⁸ *Ferber*, 458 U.S. at 774.

⁷⁹ In recent years Congress also has become concerned about images of children created by computers and not involving any real children. Known as virtual pornography, Congress attempted to pass a law banning this practice, but the Supreme Court held it unconstitutional. *See Ashcroft*, 535 U.S. 234.

arguably has no serious literary, artistic, or other value, which is the obscenity standard used in *Miller v. California*.⁸⁰

D. Myth Four: The Only Proper Response to Self-Produced Child Pornography Is Increased Parental and School Supervision and Discipline

The problem of self-produced child pornography will require a combination of community responses, including ones aimed at prevention and at punishment when prevention methods fail. Parents and schools absolutely need to educate teens about the risks and liabilities associated with self-produced child pornography.⁸¹ Everyone would agree that making sure parents and educators understand what self-produced child pornography is, and how widespread it has become, is a critical first step.⁸² Too many adults are largely unaware of self-produced child pornography, and even those who have knowledge naively think their children would not engage in this activity.⁸³ To that end, parents need to familiarize themselves with what self-produced child pornography is and the effects it can have on teens. Although buying phones without cameras may help reduce self-produced child pornography, the likelihood that a child will engage in this activity is no different between children whose parents checked their phone usage and children whose parents did not.⁸⁴ More discussions about boundaries and age-appropriate behaviors, supervision, and punishment by parents and schools will definitely help address this problem.

⁸⁰ *Miller v. California*, 413 U.S. 15, 39 (1973).

⁸¹ See Richards & Calvert, *supra* note 2, at 10, 14 (discussing an attorney who argues that self-produced child pornography is a social problem that should be dealt with through education and community involvement, rather than prosecution).

⁸² The School and Family (SAFE) Internet Act is proposed legislation that would promote Internet safety education and cybercrime prevention initiatives. The Act's findings and purpose section states that "parents ranked Internet safety fifth among their top health concerns for children. Educating parents about Internet safety is key to empowering them to understand actual risks and to take an active role in protecting their children." SAFE Internet Act, S. 1047, 111th Cong. § 2(a)(8) (2009).

⁸³ Christina Boyle, *Parents Don't Get the Message About Their Teens' 'Sexting' Habits: Survey*, N.Y. DAILY NEWS, Oct. 20, 2009, http://www.nydailynews.com/lifestyle/2009/10/20/2009-10-20_parents_dont_get_the_message_on_teen_sexting_habits_survey.html (discussing an informal survey in *Family Circle Magazine*, which found that "45% of teens admit to sending provocative pictures or texts on their phones, but 78% of moms and dads are convinced their child has never 'sexted'").

⁸⁴ Jonnelle Marte, *Anti-Sexting Campaigns Heat Up*, WALL ST. J., Jan. 13, 2010, <http://blogs.wsj.com/digits/2010/01/13/anti-sexting-campaigns-heat-up/>.

Schools also need to educate students about the risks associated with self-produced child pornography. A New Jersey bill would “require[] school districts to annually disseminate information to students . . . and . . . parents or guardians on the dangers of distributing sexually explicit images through electronic means.”⁸⁵ Massachusetts also has pending bills that would require school officials to implement bullying prevention policies that encompass and develop strategies for reporting and investigating incidents of cyberbullying.⁸⁶ Schools have started to include prohibitions against self-produced child pornography in their behavior policies.⁸⁷

Recently the Ad Council launched a provocative campaign addressing the self-produced child pornography issue with the goal of educating teens about its dangers.⁸⁸ A girl who appears to be naked explains that she sent her picture to her boyfriend because she loved him and because he asked her to send him a picture.⁸⁹ She asks what the big deal is because “the whole world is not going to see [her] naked” as the camera pans out to a full-frontal shot with her breasts and genitals barely obscured.⁹⁰ The announcer’s voice-over explains that there is “a thin line between him and the whole school.”⁹¹ Other nonprofits also focus on educating teens on the perils of self-produced

⁸⁵ S. 2923, 213th Leg. (N.J. 2009); *see also* Assemb. 4068, 213th Leg. (N.J. 2009). New Jersey did not limit the responsibility of education to schools alone. A separate bill proposes requiring cell phone companies to include a brochure regarding the dangers of “sexting” to customers. *See* S. 2925, 213th Leg. (N.J. 2009); *see also* Assemb. 4070, 213th Leg. (N.J. 2009).

⁸⁶ S. 228, 2009 Leg. (Mass. 2009); H.R. 483, 2009 Leg. (Mass. 2009). The bills cover cyberbullying generally, rather than self-produced child pornography specifically, but one bill sponsor said he considered “sexting” to fit within the spirit of the bills. Nancy Reardon, ‘Sexting’ Crackdown Bills Before State Legislature, ENTERPRISE NEWS, Jan. 14, 2010, <http://www.enterprisenews.com/news/x1530318823/-Sexting-crackdown-bills-before-state-Legislature>.

⁸⁷ *Sexting Condemned with New Policy*, WANE.COM (May 29, 2009), http://www.wane.com/dpp/video/crime/local_wane_kendallville_school_sexting_condemned_with_new_policy_200905291551_rev1. Some may argue that this is problematic from a First Amendment perspective if the Supreme Court holds that schools may not punish students for off-campus speech. However, if courts classify the images as child pornography, they would not be protected speech.

⁸⁸ Marte, *supra* note 84.

⁸⁹ *Controversial Campaign* (Fox News television broadcast Dec. 30, 2009), available at <http://video.foxnews.com/v/3956673/controversial-campaign>.

⁹⁰ *Id.*

⁹¹ *Id.*

child pornography.⁹² A New York legislator recently proposed a bill requiring the Office of Children and Family Services

[t]o establish an educational outreach program . . . about the harm that may arise from adolescents sending, receiving or posting on the internet messages that may include . . . provocative or nude images and photographs of themselves.

. . . Such program shall be designed to promote . . . increased awareness of the potential long-term harm to privacy interests associated with the sending, receiving or posting of such images and photographs⁹³

This outreach program would involve multimedia outlets.⁹⁴

However, advocating for parental and school involvement alone without any legal component will be ineffective. Like so many of the other positions addressed in this Article, school and parental involvement sounds perfectly logical at first blush, but it is too simplistic. Schools may be reluctant to discipline teens⁹⁵ out of fear that they may be sued.⁹⁶ This fear is not unfounded, as parents of cheerleaders in Washington State recently sued the school after their daughters were suspended from the cheerleading team for sending nude photos of themselves to their boyfriends.⁹⁷ The parents alleged that their daughters' due process rights were violated because the school "needlessly shar[ed] the photos with other school staff members and fail[ed] to promptly report the matter to police as possible child pornography."⁹⁸ An attorney representing the families stated that it was troubling that the school did not also punish the receivers of the messages.⁹⁹

In addition, it is unfair to place the entire responsibility for eliminating self-produced child pornography on parents. Although

⁹² See, e.g., The Inst. for Responsible Online & Cell-Phone Commc'n, *Are You Practicing Responsibility 2.1C*, IROC2.ORG, <http://www.sextingisstupid.com/> (last visited Nov. 10, 2010).

⁹³ Assemb. 8622 § 1, 2009–2010 Leg., Reg. Sess. (N.Y. 2009).

⁹⁴ *Id.*

⁹⁵ The parents of Jessica Logan filed suit against Sycamore High School, alleging that the school failed to rectify their daughter's harassment after being notified of it. Complaint, Logan v. Salyers, No. A0904647 (Ct. C.P. Hamilton County, Ohio May 8, 2009), available at <http://news.cincinnati.com/assets/AB134652512.pdf>.

⁹⁶ Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 94–95 (1996).

⁹⁷ *Bothell High School Cheerleaders*, ALL THE LATEST NEWS (Nov. 23, 2008), <http://a11news.com/1057/bothell-high-school-cheerleaders/>.

⁹⁸ *Id.*

⁹⁹ *Id.*

parents should supervise their children's cell phone usage more closely, the mobile nature of cell phones makes it difficult for parents to monitor their children at all times. The law often supplements the parent's role in preventing teens from engaging in socially unacceptable behaviors. If a teen is caught drinking underage or selling drugs, the teen may be punished by both parental and legal authorities. Nobody would advocate placing the burden of prohibiting underage drinking squarely and exclusively on the shoulders of parents. A multifaceted approach to educating and deterring teens through punishment that involves parents, schools, and the legal system is the ideal method of tackling these social issues.

II

DO EXISTING CHILD PORNOGRAPHY LAWS APPLY TO SELF-PRODUCED CHILD PORNOGRAPHY?

Whether prosecutors should charge minors under the existing child pornography laws begs the question of whether self-produced child pornography actually fits within the parameters of the existing laws. Although prosecutors currently utilize child pornography laws to charge minors engaged in self-produced child pornography,¹⁰⁰ some commentators argue that these laws are inapplicable to these activities.¹⁰¹ This threshold question of whether existing child pornography laws even encompass self-produced child pornography must be addressed before analyzing what the best legal response may be. Even if the child pornography statutes do apply to self-produced child pornography, reasons may exist for exempting minors from the statute or for creating new statutes with penalties more proportionally related to the crime.

¹⁰⁰ See Don Corbett, *Let's Talk About Sext: The Challenge of Finding the Right Legal Response to the Teenage Practice of "Sexting,"* 13 J. INTERNET L. 3, 5 (2009) (citing numerous cases of sexters between the ages of fourteen and eighteen who were charged with various crimes such as possession and distribution of child pornography and electronic solicitation for nude images contained on cell phones); Richards & Calvert, *supra* note 2, at 7-9 (stating that an eighteen-year-old male who was convicted of child pornography charges after he disseminated nude pictures of his sixteen-year-old ex-girlfriend is now a registered sex offender); Stiles, *supra* note 9 (stating that three female students who sent nude pictures of themselves by way of their cell phones, as well as the male recipients, face pornography charges).

¹⁰¹ See Humbach, *supra* note 2, at 466 (arguing that autopornography by teenagers differs from traditional pornography because the teenagers are taking their own initiative and because there is no power struggle, invasion of autonomy, or attack on dignity); Craig Layne, *ACLU Criticizes State Sexting Bill*, FOX NEWS, Feb. 5, 2010, <http://www.fox43.com/news/wpmt-pmnews-sexting-02-05-10,0,6075140.story>.

Federal law¹⁰² defines child pornography:

“child pornography” means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.¹⁰³

Sexually explicit conduct is defined as

actual or simulated—

(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) bestiality;

(iii) masturbation;

(iv) sadistic or masochistic abuse; or

(v) lascivious exhibition of the genitals or pubic area of any person.¹⁰⁴

These definitions all require something more than nudity to be considered child pornography. A depiction of a child who is merely nude qualifies as expression that is protected by the First Amendment.¹⁰⁵ To fit the federal statutory definition of child pornography, there must be an exhibition of the genitals, and that exhibition must be lascivious.¹⁰⁶

¹⁰² All states passed similar child pornography statutes outlawing production, distribution, and possession of material meeting the definition of child pornography. See *supra* note 10 and accompanying text.

¹⁰³ 18 U.S.C. § 2256(8) (2006).

¹⁰⁴ § 2256(2)(A).

¹⁰⁵ *United States v. Horn*, 187 F.3d 781, 789 (8th Cir. 1999) (applying 18 U.S.C. § 2256(2)(E)).

¹⁰⁶ Various courts have attempted to articulate a test for determining lasciviousness. Many have relied upon a six-factor test that originated in *United States v. Dost*:

- 1) whether the focal point of the visual depiction is on the child’s genitalia or pubic area;
- 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;

Based on the plain meaning of the statute, certain self-produced images fit within the definition because they involve a “visual depiction . . . of a minor engaging in sexually explicit conduct.”¹⁰⁷ As long as the images are a “lascivious exhibition of the genitals or pubic area,” they qualify as child pornography.¹⁰⁸ Several law professors agree that the statute by its plain meaning would apply to self-produced child pornography, although they differ on whether the severe penalties associated with the statute should be meted out to participants in self-produced child pornography.¹⁰⁹ Some argue that the child pornography statutes were designed not to address the communication habits of teenagers but instead to prevent abuse of children by pedophiles.¹¹⁰ In making these arguments, scholars rely on several points that distinguish self-produced child pornography from the more traditional form. Each of these points will be addressed below.

A. Argument One: Congress’s Rationale Does Not Support Including Self-Produced Child Pornography Under Child Pornography Laws

Opponents of extending child pornography laws to self-produced child pornography argue that no sexual abuse or exploitation by an adult occurs when a teen takes a picture that would otherwise qualify as child pornography.¹¹¹ These scholars would require the sex abuse element to be present for a picture to qualify as child pornography and receive no First Amendment protection. A brief summary of the relevant cases is provided here as background to understanding this argument.

- 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
- 4) whether the child is fully or partially clothed, or nude;
- 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
- 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986); *see also* United States v. Brunette, 256 F.3d 14, 18 (1st Cir. 2001) (adopting and applying the *Dost* factors); United States v. Villard, 885 F.2d 117, 122 (3d Cir. 1989) (adopting and applying the *Dost* factors).

¹⁰⁷ 18 U.S.C. § 2256(8)(A).

¹⁰⁸ § 2256(2)(A)(v).

¹⁰⁹ *See* Leary, *Self-Produced Child Pornography*, *supra* note 2, at 19; Smith, *supra* note 2, at 506, 513 (rejecting a prosecution-based approach to the problem of sexting).

¹¹⁰ *See, e.g.*, Smith, *supra* note 2, at 516.

¹¹¹ *See* Humbach, *supra* note 2, at 466.

I. New York v. Ferber

In 1982, the Supreme Court decided that child pornography did not deserve constitutional protection.¹¹² The Court declined to use the three-part obscenity test developed in *Miller*.¹¹³ This case originated when a bookstore owner was convicted for selling films of young boys masturbating in violation of a New York statute that prohibited “persons from knowingly promoting sexual performances by children under the age of 16 by distributing material which depicts such performances.”¹¹⁴ The Supreme Court granted the State’s petition for certiorari on the sole question of whether the State could regulate child pornography, regardless of whether it was obscene.¹¹⁵

The Court answered the question in the affirmative, holding that State had more leeway in regulating “works which portray sexual acts or lewd exhibitions of genitalia by children.”¹¹⁶ The Court traced the legal development of obscenity, which is “not within the area of constitutionally protected speech or press,”¹¹⁷ but determined child pornography did not need to meet the three-part test for obscenity for five reasons. First, because of the physiological, emotional, and mental health harms to children associated with child pornography, the states have a compelling interest in the prevention of sexual exploitation and abuse of children.¹¹⁸ Second, distribution of photographs harms children because they “are a permanent record of the children’s participation” and horrible reminders of prior sexual abuse.¹¹⁹ Additionally, the only way to decrease production is to close the market for distribution.¹²⁰ Third, distribution is an economic motive for production.¹²¹ Fourth, the value of child pornography is “exceedingly modest, if not *de minimis*.”¹²² Fifth, not granting child pornography First Amendment protection is consistent

¹¹² *New York v. Ferber*, 458 U.S. 747, 774 (1982).

¹¹³ *Id.* at 761.

¹¹⁴ *Id.* at 749.

¹¹⁵ *Id.* at 753.

¹¹⁶ *Id.* at 753, 774.

¹¹⁷ *Id.* at 754 (quoting *Roth v. United States*, 354 U.S. 476, 485 (1957)).

¹¹⁸ *Id.* at 756–57.

¹¹⁹ *Id.* at 759.

¹²⁰ *Id.*

¹²¹ *Id.* at 761.

¹²² *Id.* at 762.

with earlier decisions, which exempted content from constitutional protection when its harm outweighed its benefit.¹²³

2. *Osborne v. Ohio*

Having already recognized that production and distribution of child pornography violated the law, the Supreme Court in *Osborne v. Ohio* upheld the constitutionality of a statute prohibiting the possession of pornography.¹²⁴ This case involved the conviction of a man who possessed photographs of a nude male adolescent in various sexual poses in violation of an Ohio statute prohibiting any person from possessing “any material or performance that shows a minor who is not the person’s child or ward in a state of nudity.”¹²⁵ The defendant argued that *Stanley v. Georgia*¹²⁶—a previous case allowing the private possession of obscene material—made Ohio’s statute unconstitutional.¹²⁷ In refusing to extend *Stanley* to child pornography, the Court held that the State’s interest in protecting victims of child pornography exceeded the rights of individuals to possess obscene material not involving children. In addition, criminalizing possession would help the State in its goal of decreasing production of child pornography.¹²⁸ Finally, the Court approved of the State’s goal of encouraging the destruction of these photographs because their continued existence caused ongoing harm to the children in the photographs and because the photographs were used by sexual predators “to seduce other children into sexual activity.”¹²⁹

3. *Ashcroft v. Free Speech Coalition*

In the intervening decade between the Court’s 1990 decision in *Osborne* and its 2002 decision in *Ashcroft v. Free Speech Coalition*,¹³⁰ technological advances spurred Congress to pass legislation banning virtual child pornography.¹³¹ Virtual child

¹²³ *Id.* at 763–64.

¹²⁴ *Osborne v. Ohio*, 495 U.S. 103, 111–14 (1990).

¹²⁵ *Id.* at 106.

¹²⁶ *Stanley v. Georgia*, 394 U.S. 557 (1969) (invalidating a Georgia statute that prohibited private possession of obscene material).

¹²⁷ *Osborne*, 495 U.S. at 108.

¹²⁸ *Id.* at 109.

¹²⁹ *Id.* at 111.

¹³⁰ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

¹³¹ Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified at 18 U.S.C. § 2256) (adding three new categories of child pornography):

pornography involves the use of computer imaging technologies that produce visual depictions of what appear to be real children engaging in sexual activity.¹³² Although the production of the material does not involve the use of any real children, the images are virtually indistinguishable from ones that do use real children. In *Ashcroft*, a trade association of businesses that produced and distributed adult-oriented material filed suit.¹³³ In striking down the portion of the statute prohibiting virtual child pornography,¹³⁴ the Court distinguished pornography using real children from pornography using computer-generated images involving no children.¹³⁵ In so doing, the Court refused to prohibit all child pornography but did prohibit that which was created by the use of real children or that which met the definition of obscenity.¹³⁶

In striking down this part of the statute, the Court found insufficient the Government's argument that pedophiles might use virtual pornography to whet their appetites or to solicit children to engage in illegal sexual activities.¹³⁷ The Court refused to allow the prospect of a future crime to serve as a basis to regulate otherwise constitutional speech when it did not involve actual children.¹³⁸ Finally, the Government could not persuade the Court that allowing virtual pornography would make it much more difficult to prosecute those who use real children because of the difficulty in determining if the image was computer generated or not.¹³⁹

virtual child pornography, images created by computer morphing, and any sexually explicit images that were "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material . . . [depicts] a minor engaging in sexually explicit conduct").

¹³² *Ashcroft*, 535 U.S. at 240.

¹³³ *Id.* at 243.

¹³⁴ *Id.* at 258.

¹³⁵ *Id.* at 251–52.

¹³⁶ *See id.* at 258.

¹³⁷ *Id.* at 253.

¹³⁸ *Id.* at 253–54.

¹³⁹ *Id.* at 254–55. In his concurrence, Justice Thomas stated that,

While this speculative interest cannot support the broad reach of the CPPA, technology may evolve to the point where it becomes impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children. In the event this occurs, the Government should not be foreclosed from enacting a regulation of virtual child pornography that contains an appropriate affirmative defense or some other narrowly drawn restriction.

Id. at 259 (J. Thomas, concurring).

Based on this trio of cases, several commentators argue that applying child pornography laws to self-produced child pornography blatantly disregards the obvious purpose and intent of the laws, which were enacted to protect children from those who would exploit or sexually abuse them.¹⁴⁰ Because self-produced child pornography does not involve sexual exploitation and abuse of children by adults, people argue that the harm and rationale underlying the child pornography statutes does not exist for self-produced child pornography.¹⁴¹ The argument against extending existing child pornography laws to self-produced child pornography relies upon the assumption that traditional child pornography results from the abuse of children by sex offenders; however, as discussed above, sexual abuse is not a necessary prerequisite or always present in traditional child pornography. The Court in *Ferber* noted that sexual molestation is often involved in the production of child sexual performances but did not state that sexual assault or exploitation always accompanied child pornography or must accompany it. Moreover, in *Ashcroft*, nobody challenged, and thus the Court did not address, the provision of the statute dealing with morphed children. The morphing process, however, involves the use of *real* children who have not been sexually abused. Its failure to be challenged may possibly support the proposition that, as long as real children are involved, Congress has a legitimate interest in regulating the behavior despite a lack of sexual abuse in its production.

Congress found “the *use* of children in the production of sexually explicit material, including photographs, films, videos, computer images, and other visual depictions, *is a form of sexual abuse* which can result in physical or psychological harm, or both, to the children involved.”¹⁴² Just because the *use was spurred by* the teen’s own choice, and not because an adult encouraged it, does not mean the resulting harms will not occur. Furthermore, the *use* alone is a form of sexual abuse, which is separate from the sexual abuse of molestation that may also occur in traditional child pornography.¹⁴³ In addition, although it is argued that the teen takes the picture on her

¹⁴⁰ See *supra* note 2 and accompanying text.

¹⁴¹ But see *supra* notes 57–58 and accompanying text (arguing that not all self-produced child pornography is free of coercion).

¹⁴² Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009 (1996) (codified at 18 U.S.C. § 2251) (emphasis added).

¹⁴³ *Ashcroft*, 535 U.S. at 254 (“[T]he creation of the speech is itself the crime of child abuse . . .”).

own volition, many times she is pressured to take the picture by another teen. If *use* of a child in this way is sexual abuse, Congress has an obligation to try to stop the abuse even if it is self-inflicted.¹⁴⁴

Besides protecting individual children, regulating self-produced child pornography helps Congress meet its dual purpose for regulating the production of traditional child pornography, which is to protect all children and society as a whole.¹⁴⁵ In passing the child pornography statute, Congress found that

(A) the sexualization and eroticization of minors through *any form of child pornographic images* has a deleterious effect on all children by encouraging a societal perception of children as sexual objects and leading to further sexual abuse and exploitation of them; and

(B) this sexualization of minors creates an unwholesome environment which affects the psychological, mental and emotional development of children and undermines the efforts of parents and families to encourage the sound mental, moral and emotional development of children¹⁴⁶

These findings alone may not justify regulating activity that results in the sexualization and eroticization of minors. However, the Government has a strong interest in regulating this behavior when these detrimental societal effects are combined with the harm that self-produced child pornography inflicts on its participants. Congress's dual purpose of protecting minors and society is fulfilled by prohibiting child pornography whether or not the sexual images originate from a sexual predator or a teen.

¹⁴⁴ See § 121, 110 Stat. at 3009–26. Although the Court in *Ashcroft* found certain provisions of the statute unconstitutional, it never rejected the legislative findings that formed the basis of the statute. See *Ashcroft*, 535 U.S. 234.

¹⁴⁵ See § 121, 110 Stat. at 3009–26. Courts have rejected the notion that society in general can be the primary victim in child pornography offenses, classifying such crimes as “victimless.” See Audrey Rogers, *Child Pornography’s Forgotten Victims*, 28 PACE L. REV. 847, 850 (2008). However, this nation has a long history of upholding “crimes” or “status offenses” as a violation of community standards which involve no apparent harm or injury but rather a risk of harm. For example, health protection crimes such as drug prohibitions, seat belt laws, and motorcycle helmet laws all exist to protect people. In addition, youth protection laws involving curfews are upheld on the basis that the risk of harm justifies the regulation. This nation’s drug laws, gambling laws, and prostitution laws all criminalize behavior found to be detrimental even if those engaging in the acts are consenting adults. The laws prohibiting conduct exist to protect societal values, and violating these laws hurts society as a whole.

¹⁴⁶ § 121(11), 110 Stat. at 3009–27.

B. Argument Two: Applying Child Pornography Laws to Self-Produced Child Pornography Would Lead to an Absurd Result Because There Is No Victim or Because the Victim Cannot Also Be the Perpetrator

Opponents of applying existing child pornography laws to self-produced child pornography argue that, with self-produced child pornography, there are no exploited victims and that Congress cannot pass a law to protect children against themselves. Again, this is a faulty assumption because self-produced child pornography does have victims. If self-produced child pornography is accomplished by one minor taking a picture of another minor, the photographed child is clearly the victim. The minor is no less a victim when snapped by a minor or an adult in a non-sexual abuse setting.¹⁴⁷

The more difficult and interesting situation arises when the same person is the subject of the image and also its producer. The argument is that a subject cannot be both the perpetrator and the victim of an offense and therefore applying the statute to that person would lead to an absurd result. Yet, one could argue that a “minor subject” of a sexually explicit image cannot consent to being in child pornography no matter how it is produced. There is a strong body of case law refusing to find a minor’s consent valid in various areas of the law, specifically in relation to the production of child pornography.¹⁴⁸ If, as a matter of law, a child cannot consent to being in pornography, it seems inconsistent to argue a child cannot victimize him or herself.

Courts do not agree on which approach to take with this dilemma. For example, although not concerning self-produced child pornography, the same question arose in a Utah case involving a thirteen-year-old girl who became pregnant after having sex with her twelve-year-old boyfriend.¹⁴⁹ The girl was convicted of violating a state law prohibiting sex with someone under the age of fourteen.¹⁵⁰

¹⁴⁷ *A.H. v. State*, 949 So. 2d 234, 236 (Fla. Dist. Ct. App. 2007) (upholding a conviction against a minor for self-produced child pornography and stating that a “compelling interest exists whether the person sexually exploiting the child is an adult *or a minor*” (emphasis added)).

¹⁴⁸ See, e.g., *People v. Spargo*, 431 N.E.2d 27, 31 (Ill. App. Ct. 1982) (“The inability of children to give an informed consent to participation in child pornography justifies the statute’s prohibition against the material’s later exhibition.”).

¹⁴⁹ *State ex rel Z.C.*, 165 P.3d 1206 (Utah 2007).

¹⁵⁰ *Id.* at 1207–08.

The boy was also convicted under the same law.¹⁵¹ The appellate court affirmed the decision of the juvenile court, and the Utah Supreme Court granted certiorari.¹⁵² The girl's attorney argued that prosecuting children under a law that was meant to protect them was illogical.¹⁵³ The Utah Supreme Court agreed with the girl's attorney and held that "applying the statute to treat Z.C. as both a victim and a perpetrator of child sex abuse for the same act leads to an absurd result that was not intended by the legislature."¹⁵⁴ Before arriving at its conclusion, the court acknowledged that, under the plain language of the statute, a child could be guilty of sexually touching another child with the requisite intent.¹⁵⁵ However, the court "conclude[d] that the legislature could not possibly have intended to punish both children under the child sex abuse statute for the same act of consensual heavy petting."¹⁵⁶ In support of its position, the court stated, "[i]n this situation, there is no discernible victim that the law seeks to protect, only culpable participants that the State seeks to punish."¹⁵⁷

The court distinguished this from cases involving a delinquency petition for a victimless offense, such as adultery or fornication.¹⁵⁸ The court acknowledged that these crimes sought to punish the "acts of both participants for violating a moral standard" as compared to a sexual abuse statute, which seeks to punish the perpetrator for a crime against an identified victim.¹⁵⁹ The court recognized that the legislature could intend some degree of culpability associated with consensual acts by minors to "discourage their admittedly reckless and age-inappropriate behavior," although this would need to be brought under a law other than the sexual abuse statute.¹⁶⁰

Not all courts, however, agree with the Supreme Court of Utah. For example, a Florida court of appeals upheld a trial court's conviction of a juvenile for producing, directing, or promoting a

¹⁵¹ *Id.* at 1207.

¹⁵² *Id.*

¹⁵³ *Id.* at 1208.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1209.

¹⁵⁶ *Id.* at 1211.

¹⁵⁷ *Id.* at 1212.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

photograph that she knew included sexual conduct of a child.¹⁶¹ The minor challenged her conviction, arguing that the statute was unconstitutional as applied to her because it was not the least intrusive means of furthering the State's interest.¹⁶² The case involved two minors taking digital photos of themselves while they were naked and engaging in sexual conduct.¹⁶³ Although the photos were not shared with a third party, the minors e-mailed the pictures to another computer.¹⁶⁴ Each of the minors was charged with one count of producing, directing, or promoting child pornography.¹⁶⁵

One of the minors, A. H., argued that, because the photographs were not shared with a third party, the only interest Florida had was "protection of the co-defendants from engaging in sexual behavior until their minds and bodies had matured."¹⁶⁶ The court would not accept A. H.'s argument that, because minors under Florida law had a right to engage in sexual intercourse, this right of privacy extended to the minor memorializing the act through pictures or video.¹⁶⁷ The court based its decision on several considerations, including the risk of the photographs later being given to a third party, possibly for a profit that would fuel the child pornography industry.¹⁶⁸ In addition, the court noted that teens may often share these pictures to gain social approval and might be likely to make the photos public after the relationship ends.¹⁶⁹ The court did not accept the argument that A. H. could not be a victim due to a lack of sexual abuse, instead ruling that "[m]ere production of these videos or pictures may also result in psychological trauma to the teenagers involved. Further, if these pictures are ultimately released, future damage may be done to these minors' careers or personal lives."¹⁷⁰ Consequently, the court held that the State has a compelling interest in ensuring that self-produced child pornography is never produced.¹⁷¹

¹⁶¹ A.H. v. State, 949 So. 2d 234, 239 (Fla. Dist. Ct. App. 2007).

¹⁶² *Id.* at 236.

¹⁶³ *Id.* at 235.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 236.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 237.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 239.

¹⁷¹ *Id.*

The Florida appellate court seemed to acknowledge the *dual* purpose behind a child pornography statute: protecting children not only from actual harm arising from the production of pornography but also from future harm associated with its distribution and possession.¹⁷² This future harm is both actual and threatened. The harm is actual harm to the child depicted because the picture is a permanent record of the event and therefore victimizes the child each time the image is viewed.¹⁷³ The harm is threatened harm to other children if the images are used to “groom future victims.”¹⁷⁴ The *Ashcroft* decision found this future harm too attenuated from actual harm to be punished when it did not involve an actual victim.¹⁷⁵ Self-produced child pornography does involve actual victims who experience actual physiological and emotional harm as discussed more fully in Part II.A.¹⁷⁶

In any event, this victimless-crime argument at most bars charges against a creator who happens to be the subject and should not affect prosecution for the distribution, redistribution, or possession of the image. Accordingly, a child who takes a picture that meets the definition of child pornography and sends it to another over a computer or phone would still be punishable under existing child pornography statutes for transmission, even if not for production.

In summary, self-produced child pornography fits within the plain meaning of the child pornography definitions. Additionally, statutes regulating self-imposed child pornography are consistent with Congress’s objectives of protecting children from actual and future harm. Finally, self-produced child pornography produces victims just

¹⁷² See Rogers, *supra* note 145, at 848.

¹⁷³ *Id.* at 862.

[T]he possessor causes actual harm because re-publication inflicts shame and humiliation upon the child depicted. This psychological damage can lead to anti-social, destructive and depressive behavior. The circulation over the Internet to innumerable individuals who receive, possess and view the images causes the victims to suffer further in the knowledge that the images are forever in cyberspace, able to resurface at any time.

Id.

¹⁷⁴ *Id.* at 858–59. The harm might also be threatened harm to the original child, who is in danger of being blackmailed, harassed, and exploited by adults and other youth. See *Policy Statement on Sexting*, NAT’L CENTER FOR MISSING & EXPLOITED CHILD. (Sept. 21, 2009), http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=4130.

¹⁷⁵ Rogers, *supra* note 145, at 859.

¹⁷⁶ See discussion *supra* Part II.A.

as traditional child pornography does, and these victims suffer the same psychological damage when these images are produced, transmitted, and distributed.

III

ALTERNATIVE LEGAL RESPONSES TO ADDRESS SELF-PRODUCED CHILD PORNOGRAPHY

Having concluded that child pornography laws do cover self-produced child pornography, the next question is whether the laws need to be changed to avoid that result. The harsh penalties associated with child pornography laws include possible jail time, felony convictions, and sex offender registration. These penalties for self-produced child pornography seem disproportionate when compared to the penalties for traditional child pornography. Treating teens the same way as sexual predators remains problematic—especially for people who prefer to educate teens about the dangers of their behavior instead of punishing them for making poor choices. As a result, some states are amending their laws to reflect the reality that the behavior and motivation behind creation of child pornography is completely different between pedophiles and teens.¹⁷⁷

When contemplating how to address the issue of self-produced child pornography, the Virginia Crime Commission discussed three options: “leave the law unchanged, with prosecutors determining whether to press charges; make [self-produced child pornography] a misdemeanor; or exempt juvenile [self-produced child pornography] from child pornography laws.”¹⁷⁸ To date, examples of each are reflected in the proposed bills across the United States. Some bills exempt the subject of the image and the original receiver from any punishment; others specifically include these actors. Some states create new crimes, and the penalties associated with these differ

¹⁷⁷ To date, there have been no federal prosecutions involving self-produced child pornography or proposed federal bills modifying the child pornography laws in recognition of self-produced child pornography. Parents of a girl who committed suicide as a result of a self-produced child pornography incident and an attorney specializing in Internet issues suggest that such a law is necessary to harmonize the many different state laws. See Kranz, *supra* note 18. Even in the absence of such a law, lack of harmonization should not be grounds for failing to take action in the states.

¹⁷⁸ Associated Press, *Va. Panel Refuses to Recommend Legislation Regarding ‘Sexting,’* WASH. POST, Dec. 15, 2009, <http://www.Washingtonpost.com/wp-dyn/content/article/2009/12/15/AR2009121503362.html>.

among states. In this section, the various approaches will be examined and critiqued.

Deciding what the proper legal response should be in addressing self-produced child pornography involves answering several questions.

A. *Who Should Be Punished?*

Self-produced child pornography often involves multiple participants. The subject of the photograph may or may not be the producer of the photograph.¹⁷⁹ Other participants include the person who distributes the photograph and the original recipient who then becomes a possessor. Any recipient who passes along the photograph becomes a redistributor to further recipients.

Some argue that no legal punishment should be imposed on either the person taking the image who is the actual subject or the person who receives it.¹⁸⁰ In this regime, the law would punish only a person who further disseminates the picture. Limiting the punishment to the redistributor reflects the belief that the real dangers associated with self-produced child pornography occur not between the original participants but when the image becomes widely distributed. For example, a proposed New York law provides an affirmative defense for minors from prosecution for dissemination of indecent materials and possession and promotion of sexual performances of children.¹⁸¹ A minor will not be prosecuted under these provisions as long as (1) the person is less than four years older than the other person at the time of the act, (2) “such other person expressly or impliedly acquiesced in the defendant’s conduct,” and (3) the defendant did not intend to profit. As written, this appears to protect only the two individuals who agreed to the conduct but not a person who sends an image to an individual who has not agreed to it.

A new law in Nebraska signed by the Governor on May 20, 2009, provides an “affirmative defense” against conviction for those younger than eighteen who send a visual depiction of sexually explicit conduct to a friend, as long as the image is of only the sender and the sender believed he or she was sending it to a willing recipient who

¹⁷⁹ See *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010) (involving facts in which the subject of the picture is neither the producer nor the distributor).

¹⁸⁰ See *Calvert*, *supra* note 2, at 62.

¹⁸¹ Assemb. 8622, 2009–2010 Leg., Reg. Sess. (N.Y. 2009).

was at least fifteen years old.¹⁸² The same defense is available to those younger than nineteen who possess these images, as long as they were generated “willingly and voluntarily” and were not the product of any coercion.¹⁸³

Both of these states allow “original participants” to avoid any liability, which seems inconsistent with society’s goals of protecting the well-being of children and preventing the existence of child pornography. If producing child pornography is wrong, it should make no difference whether teenagers are the ones producing it. In addition, Nebraska’s law is flawed because it allows for felony prosecution for “intent to distribute child pornography” but allows affirmative defenses to charges of creation, distribution, or possession.¹⁸⁴

In response to prosecutors’ frustration that no law existed to charge the original producer of the picture, Ohio legislators proposed a law that is the exact opposite of the New York and Nebraska statutes. The Ohio law would not provide a defense for minors charged with recklessly creating, receiving, exchanging, sending, or possessing a photograph, video, or other material showing themselves in a state of nudity.¹⁸⁵ Kentucky would likewise punish the person who transmits a nude visual depiction of a minor, regardless of whether the depiction is of the transmitter or another person.¹⁸⁶ Including the producer as well as the receiver is important to ensure equal treatment of all participants in this activity. No good rationale exists for only punishing the receiver and not the producer, especially if the receiver did not coerce the producer into taking or sharing the image. Exempting the producer from punishment, unless that person was coerced, would lead to fairness problems.

B. Redistributor Liability

One of the most cumbersome proposed bills is North Dakota’s, which differentiates the punishment for distribution based on whether the distributor has the intent to cause emotional harm or humiliation to any individual or has been specifically informed by the parent or

¹⁸² Leg. 97, 101st Leg., 1st Sess. (Neb. 2009).

¹⁸³ *Id.*

¹⁸⁴ Weins & Hiestand, *supra* note 2, at 37–38.

¹⁸⁵ H.R. 132, 128th Gen. Assemb., Reg. Sess. (Ohio 2009).

¹⁸⁶ H.R. 57, Gen. Assemb., 10 Reg. Sess. (Ky. 2010).

the subject of the image not to distribute the image.¹⁸⁷ If either of these factors is present, the punishment escalates from a Class B Misdemeanor to a Class A Misdemeanor.¹⁸⁸ Redistributors should definitely be punished; however, having to determine the distributor's intent seems unnecessary because, even if the distributor does not intend to cause harm or humiliation, harm or humiliation will likely result. The act of forwarding the image should be punished without wasting judicial resources to explore the intent behind the distribution.

Indiana likewise provides to minors

a defense to child exploitation, possession of child pornography, and dissemination of material harmful to minors if . . . (1) the photograph, video, or other material does not show a child less than thirteen (13) years of age; or (2) the defendant did not knowingly or intentionally transmit or display¹⁸⁹ the photograph, video, or other material to ten or more persons.

Instead of focusing on intent of the sender, Indiana makes a distinction between the redistributor who mass distributes to more than ten people and the person who redistributes to a smaller number of people.¹⁹⁰ Although the distinction recognizes mass distributing as more egregious conduct than redistributing to a small group, it seems that any redistribution, no matter how small, could expose a teen to the possible harmful effects discussed earlier in this Article. One additional, interesting component of Indiana's proposed law is the option for a juvenile court to order a parent to participate in an outpatient treatment or educational program if the child is ordered to receive outpatient treatment or attend an educational program.¹⁹¹

C. What Should the Punishment Be?

1. Make Self-Produced Child Pornography a Misdemeanor

Utah also modified its criminal code by lessening the penalties for minors committing the offenses of distribution of pornographic material and dealing in material harmful to minors.¹⁹² The statute

¹⁸⁷ See H.R. 1186, 61st Legis. Assemb., Reg. Sess. (N.D. 2009).

¹⁸⁸ *Id.*

¹⁸⁹ *Senate Bill 224: Synopsis*, INDIANA GEN. ASSEMBLY (Jan. 26, 2010), <http://www.in.gov/legislative/bills/2010/SB/SB0224.1.html>.

¹⁹⁰ S. 224, 116th Gen. Assemb., 2d Reg. Sess. (Ind. 2010).

¹⁹¹ *Id.*

¹⁹² See H.R. 14, 2009 Leg., Gen. Sess. (Utah 2009).

classifies the offenses as Class A Misdemeanors for persons sixteen or seventeen years of age and Class B Misdemeanors for persons younger than sixteen years of age.¹⁹³ Although a reason may exist for differentiating the punishment based on age, sixteen does not seem to be the appropriate age. Further, it seems contrary to common sense to punish older teens more harshly than younger teens. After all, adults are free to engage in this behavior as long as they do so with other adults. In addition, Utah leaves the option of charging a minor under either this new regime or the existing child pornography statutes because it did not specify whether the new law supersedes the prior law. A better approach, at least for the first offense, is to exempt minors from prosecution under the child pornography statutes in order to educate them about why their behavior causes harm to individuals and society.

Kentucky, Mississippi, Arizona, Pennsylvania, and South Carolina likewise have pending bills that propose new crimes punished as misdemeanors to address minors creating, receiving, exchanging, sending, or possessing nude images.¹⁹⁴ The bills filed in Kentucky and Mississippi are problematic because they regulate nudity alone, without reference to the images being lewd or lascivious. As currently written, these bills would violate the First Amendment because they encompass protected speech.¹⁹⁵

Arizona's proposed law creates a new offense making it unlawful for a minor to intentionally or knowingly transmit or possess "a visual depiction of a minor that depicts explicit sexual material."¹⁹⁶ However, like the proposed law in Kentucky, the definition of explicit sexual material is too broad, including nudity and "material that depicts human genitalia . . . sexual activity, sexual conduct, sexual

¹⁹³ *Id.*

¹⁹⁴ S. 1266, 49th Leg., 2d Reg. Sess. (Ariz. 2010); H.R. 57, Gen. Assemb., 10 Reg. Sess. (Ky. 2010); H.R. 143, Gen. Assemb., 10 Reg. Sess. (Ky. 2010); H.R. 643, Leg., Reg. Sess. (Miss. 2010); H.R. 2189, Gen. Assemb., 2010 Sess. (Pa. 2010); H.R. 4504, Gen. Assemb., 118th Sess. (S.C. 2010).

¹⁹⁵ See *supra* notes 77–78 and accompanying text. The only way these bills would not violate the First Amendment is if case law exists that interprets the definition of nudity to cover only situations involving lewd or lascivious conduct, even if not specifically articulated within the statutory definition. Ohio is an example of a state that has a definition that appears to violate the First Amendment but has been narrowly interpreted by its courts to save the statute. *State v. Tooley*, 872 N.E.2d 894, 901 (Ohio 2007) (citing *State v. Young*, 525 N.E.2d 1363 (Ohio 1988) (upholding the statute against a constitutional challenge but interpreting the statute narrowly)).

¹⁹⁶ S. 1266, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

excitement or sadomasochistic abuse.”¹⁹⁷ This bill does not cover teens if (1) “the juvenile did not solicit the visual depiction” and (2) “the juvenile took reasonable steps to destroy or eliminate the visual depiction or report the visual depiction to the juvenile’s parent, guardian, school official or law enforcement official.”¹⁹⁸ This bill does not specifically state that child pornography laws do not apply to minors, as Kentucky’s proposed law does.¹⁹⁹

Pennsylvania specifically exempts from its new offense materials that depict sexual activities, including sexual intercourse, deviate sexual intercourse, penetration of the genitals or anus of a minor, masturbation, sadism, or masochism.²⁰⁰ This approach may be important to states because it recognizes that some materials are more egregious than others.

South Carolina includes important components in its new law, including the possibility of a fine of no more than one hundred dollars, a provision allowing for expungement upon completion of an educational program, and a provision that specifically exempts violators from having to register as sex offenders.²⁰¹ The expungement provision would be extremely important to include, especially if states opt to treat this as a misdemeanor crime and not a status offense. It would be advisable for states to include this language if the minor will not be proceeding in juvenile court.

Oklahoma also proposes a misdemeanor, but in addition to exempting minors from the harsher penalties associated with its child pornography laws, it also exempts a person who is “eighteen (18) years of age or older, is currently in a courtship, dating or engagement relationship with the other person and the other person is not under the age of fourteen (14).”²⁰² The punishment regime includes a first offense “punishable by incarceration in the county jail for a term not to exceed six months, or a fine not to exceed Five Hundred Dollars (\$500.00), or by both the fine and incarceration.”²⁰³ For a second violation, the fine increases to \$1,000 and possible jail time of one year.²⁰⁴ “A third and subsequent violation shall be a felony” with the

¹⁹⁷ ARIZ. REV. STAT. ANN. § 8-309(G)(2) (2010).

¹⁹⁸ S. 1266.

¹⁹⁹ *See id.*; H.R. 57.

²⁰⁰ H.R. 2189, Gen. Assemb., 2010 Sess. (Pa. 2010).

²⁰¹ H.R. 4504, Gen. Assemb., 118th Sess. (S.C. 2010).

²⁰² H.R. 3321, 52d Leg., 2d Sess. (Okla. 2010).

²⁰³ *Id.*

²⁰⁴ *Id.*

possibility of a \$2000 fine and/or eighteen months in jail.²⁰⁵ Offenders are not required to register pursuant to the requirements of the Sex Offenders Registration Act.²⁰⁶ Although this bill exempts an individual from registration as a sex offender, the jail time associated with the various offenses, if treated as misdemeanors, seems particularly harsh.

2. *Make Self-Produced Child Pornography a Summary Offense*

Another proposed bill in Pennsylvania—this one in the Senate—would treat self-produced child pornography activities as summary offenses.²⁰⁷ Any minor found guilty of such an offense would be eligible for a diversionary program, which would include an educational component attempting to educate the offender about the harms associated with self-producing child pornography.²⁰⁸ This bill is much more detailed than the one proposed in the House.²⁰⁹ Like the New York law, the bill focuses on persons of about the same age. However, unlike New York’s law, Pennsylvania’s law defines people about the same age to include persons four years *younger* or older than the defendant.²¹⁰ The bill seeks to incorporate several procedural mechanisms generally associated with juvenile court, including keeping the records private and allowing for expungement of the summary offense.²¹¹

3. *Make Self-Produced Child Pornography a Status Offense*

A proposed bill in Rhode Island makes “knowingly and voluntarily and without threat or coercion” transmitting a self-produced child pornography image a status offense that would be referred to family court.²¹² The bill exempts a person charged under the offense from having to register on the sex offender list.²¹³ The bill, however, only applies to the transmission of the image and not the possession of the

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ S. 1121, Gen. Assemb., 2009 Sess. (Pa. 2009).

²⁰⁸ *Id.*

²⁰⁹ See H.R. 2189, Gen. Assemb., 2010 Sess. (Pa. 2010).

²¹⁰ See S. 1121.

²¹¹ *Id.*

²¹² H.R. 7778, Gen. Assemb., Jan. Sess. (R.I. 2010).

²¹³ *Id.*

image,²¹⁴ which is problematic because the receiver of the image could be prosecuted under the existing child pornography laws.

Likewise, Illinois would subject a minor to a petition for adjudication and adjudge a minor in need of supervision if the minor distributes an “indecent visual depiction of another minor.”²¹⁵ The court may order counseling or community service.²¹⁶ The bill, however, specifically states that it does not prohibit “a prosecution for disorderly conduct, public indecency, child pornography, a violation of the Harassing and Obscene Communications Act, or any other applicable provision of law.”²¹⁷ This bill provides more options to prosecutors for minors who disseminate the images, but it contains a major flaw because it does not address the possessors of these images, who still would arguably fit under existing child pornography statutes. Moreover, it gives broad discretion to prosecutors concerning whether to charge under this new offense or existing statutes. This may be particularly helpful to prosecutors because it would allow them to take into account the individual circumstances involved in each case.²¹⁸

Ohio also is attempting to create a new crime, which makes offenders guilty of “a delinquent act that would be a misdemeanor of the first degree if it could be committed as an adult.”²¹⁹ The Ohio statute covers all acts associated with self-produced child pornography, but like the Utah statute, it leaves open the possibility of prosecution under child pornography statutes, even for the first offense.²²⁰ It would give more choices to prosecutors than what currently exists but would be improved if it treated first offenses differently.

²¹⁴ *See id.*

²¹⁵ H.R. 4583, 96th Gen. Assemb. (Ill. 2010).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ This is desirable, assuming one trusts the discretion of prosecutors. Mary Leary discusses this in detail. *See Leary, Self-Produced Child Pornography*, *supra* note 2, at 26–28.

²¹⁹ H.R. 132, 128th Gen. Assemb., Reg. Sess. (Ohio 2009).

²²⁰ *See id.*

4. *Punish Self-Produced Child Pornography Differently Depending on the Number of Offenses*

A Florida proposed bill varies the punishment depending on whether it is the person's first offense or a subsequent offense.²²¹ The first offense is a noncriminal violation punishable by eight hours of community service and a twenty-five-dollar fine.²²² A court may order a training program in lieu of the service.²²³ A second offense is considered a misdemeanor of the second degree, and a third offense is a misdemeanor in the first degree.²²⁴ Fourth and subsequent offenses are treated as felonies in the third degree.²²⁵ The new section does not prohibit prosecution for images depicting sexual conduct or sexual excitement.²²⁶

The Senate's version of the bill is largely the same but adds a time frame for when the subsequent offenses must occur to receive the enhanced penalties.²²⁷ The second offense must occur within twelve months of a prior conviction to be classified as a misdemeanor of the second degree.²²⁸ The third offense must occur within twenty-four months and a fourth offense within thirty-six months of a prior conviction.²²⁹

The Florida bill is a step in the right direction because it distinguishes the levels of punishment based on whether the individual is a repeat offender. This approach helps achieve the purpose of educating teens and changing behavior instead of punishing teens too harshly. The bill also allows for harsher penalties for more egregious behaviors—sexual conduct or excitement.²³⁰ The sexual excitement provision may be too vague, however, to provide teens with notice of which acts qualify under this term.²³¹ Moreover, other situations may arise that also may warrant harsher punishments, but these do not seem to be included in the current wording of the bill.

²²¹ H.R. 1335, 2010 Leg., Reg. Sess. (Fla. 2010).

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ See S. 2560, 2010 Leg., Reg. Sess. (Fla. 2010).

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ See *id.*

For example, prosecutors may want some flexibility in charging an individual with a more serious offense if the image was intended to make a profit or surreptitiously created or if a person willfully possessed a sexually expressive image that was surreptitiously created.

5. *Diversionsary Program*

New Jersey currently has a pending bill that would create a diversionsary program for juveniles charged with posting sexual images.²³² Like the Senate's bill in Pennsylvania, the New Jersey bill would create an education component to provide information to the minor about the dangers of self-produced child pornography.²³³ Instead of punishing the minor, the bill seeks to deter minors from engaging in similar conduct in the future.²³⁴ Juveniles would be eligible for admission if they

- (1) have not previously been adjudicated delinquent for or convicted of a criminal offense;
- (2) were not aware that their actions could constitute . . . a criminal offense;
- (3) may be harmed by the imposition of criminal sanctions; and
- (4) would likely be deterred from engaging in similar conduct in the future by completing the program.²³⁵

South Carolina's bill also requires completion of an education program that describes the legal and nonlegal consequences of sharing self-produced child pornography.²³⁶

Although education programs, whether through school or the court system, are important for solving the problem, some punishment also should be associated with this activity. Although teenagers are short-sighted, many fully understand the risks associated with this behavior but choose to engage in it anyway, and these individuals should be accountable for their actions. Additionally, because society has determined that child pornography serves no legitimate societal purpose, those who produce, distribute, or possess it should not be excused just because they are young. Regardless of derivation or source, these pornographic images represent the type of content that,

²³² Assemb. 1561, 214th Leg., Reg. Sess. (N.J. 2010).

²³³ *Id.*

²³⁴ *See id.*

²³⁵ *Id.*

²³⁶ H.R. 4504, Gen. Assemb., 118th Sess. (S.C. 2010).

as society has determined, does not contribute to, but rather only negatively impacts, society.

6. *Leave the Law Unchanged, with Prosecutors Determining Whether to Press Charges*

Some argue that changing the law to specifically address self-produced child pornography might inadvertently provide an avenue for child molesters.²³⁷ As a result, certain states have been cautious about changing their laws to fashion a remedy that deters teenagers but does not “gut the child-pornography statute which is intended to address pedophiles.”²³⁸ In December 2009, the Virginia State Crime Commission refused to recommend any self-produced child pornography legislation, preferring instead to let prosecutors decide whether to bring charges.²³⁹ This may be a perfectly legitimate option for states that thoroughly study the issue of self-produced child pornography and decide the problem is not sufficient to warrant changing the laws. The only danger with this approach is that prosecutors may be stuck with the choice of charging minors under existing child pornography statutes, which may be too harsh, or allowing minors to avoid any accountability for their actions by not charging them at all. Although some would find the latter acceptable, this is the exact quandary that has driven states to modify their laws.

7. *Exempt Juvenile Self-Produced Child Pornography from Child Pornography Laws*

Unlike Virginia, Vermont recently enacted a law that exempts from child pornography prosecution the voluntary exchange of naked pictures between two people thirteen to eighteen years old, even if this were done for profit.²⁴⁰ Contrary to some media reports, the law does not legalize self-produced child pornography, and prosecutors still can charge teens under statutes prohibiting lewd and lascivious conduct and disseminating indecent materials to a minor.²⁴¹ The law

²³⁷ Olympia Meola, *Legislators Look into How Va. Laws Cover ‘Sexting,’* RICHMOND TIMES-DISPATCH, May 20, 2009, http://www2.timesdispatch.com/rtd/news/state_regional/state_regional_govtpolitics/article/SEXT20_20090519-223511/268765/.

²³⁸ *Id.*

²³⁹ Associated Press, *supra* note 178.

²⁴⁰ S. 125, Gen. Assemb. (Vt. 2009).

²⁴¹ VT. STAT. ANN. tit. 13, § 2802b (West 2009). The statute provides, in part,

does not apply to sending pictures or surreptitiously creating images of another, which would still fall under the child pornography statutes. The better approach would be to use a stepped approach to punishment, which recognizes differing degrees of severity.

IV

A LEGISLATOR'S CHECKLIST FOR DRAFTING SELF-PRODUCED CHILD PORNOGRAPHY LEGISLATION

Although several statutes offer excellent provisions, no existing or proposed statute adequately addresses the multiple facets of the self-produced child pornography problem. Legislators need to familiarize themselves with the various issues surrounding self-produced child pornography and make policy decisions about these issues before drafting their bills' provisions. Certain components may be essential to surviving legal challenges (e.g., a definition of sexually explicit images), and others will be necessary to effectively meet the underlying goals of the legislation. To assist in this endeavor, the final section of this Article develops a checklist of important provisions and proposed language that legislators can incorporate into their bills.

A. Limit the New Provision to Minors

PROPOSED LANGUAGE: No person under eighteen (18) years of age.

NOTE: Some states may want to define "minor" consistently with the age selected by the legislature for consensual sex (e.g., sixteen). The federal child pornography statute defines a minor as anyone

(a)(1) No minor shall knowingly and voluntarily and without threat or coercion use a computer or electronic communication device to transmit an indecent visual depiction of himself or herself to another person.

(2) No person shall possess a visual depiction transmitted to the person in violation of subdivision (1) of this subsection. It shall not be a violation of this subdivision if the person took reasonable steps, whether successful or not, to destroy or eliminate the visual depiction.

Id.; see also Rowland, *supra* note 64; Caleb Johnson, *Vermont Teen Going to the Slammer for 'Sexting,' SWITCHED* (Sept. 4, 2009), <http://www.switched.com/2009/09/04/vermont-teen-going-to-the-slammer-for-sexting/> (stating that, after the Governor signed the bill into law, an eighteen-year-old man was sentenced to two years in jail, pleading guilty to two counts of committing a prohibited act and one count of lewd and lascivious conduct involving sexting).

under the age of eighteen.²⁴² The Nebraska case discussed earlier in this Article makes a good point regarding policy reasons not to treat laws concerning consensual sex the same as laws addressing child pornography.²⁴³ These arguments apply with equal force in self-produced child pornography. Although sixteen- and seventeen-year-old individuals may be able to engage legally in sexual intercourse, recording these intimate encounters should not be allowed because a permanent record of this may cause unanticipated harm to the participants in the future, which they may not fully appreciate.

B. To Avoid Unconstitutionally Restricting Protected Speech, the Images Regulated Must Be Sexually Expressive, Rather than Images Merely Depicting Nudity

PROPOSED LANGUAGE: A sexually expressive image is a photograph, video, digitized image, or any visual representation that shows a minor engaging in sexual conduct. Sexual conduct for purposes of this act is defined as sexual intercourse, deviate sexual conduct, exhibition of the uncovered genitals intended to satisfy or arouse the sexual desires of any person, or any fondling or touching of a child by another person or of another person by a child intended to arouse or satisfy the sexual desires of either the child or another person.

NOTE: The above definition covers a wide range of activities. Some states refuse to apply a new crime to the more serious activities (sexual intercourse and penetration) and specifically exclude them using the following language: This section shall not apply to electronic communications that depict either sexual intercourse or deviate sexual intercourse, as defined in [section relating to definitions], or the penetration, however slight, of the genitals or anus of a minor with any part of a person's body, masturbation, sadism, or masochism. A better approach is to allow the new statute to cover all these activities but to distinguish the acts in the provisions pertaining to punishment. This approach recognizes that a static photograph of the genitals may be less objectionable than a video of a person masturbating and protects teens from automatically being prosecuted for certain behaviors under child pornography statutes.

C. Limit Depictions Covered by This Statute to Ones of Minors at

²⁴² 18 U.S.C. § 2256(1) (2006).

²⁴³ *State v. Senters*, 699 N.W.2d 810 (Neb. 2005).

Least Thirteen Years of Age

PROPOSED LANGUAGE: A visual depiction of a minor who is at least thirteen (13) years of age.

NOTE: Taking or sending pictures of a young child (under the age of thirteen) should not be covered by this statute because of the seriousness of the action. Other than this qualification regarding age, legislatures should not differentiate punishment by age unless a valid reason exists for doing so.

D. The Statute Needs to Cover All Activities Associated with Self-Produced Child Pornography

PROPOSED LANGUAGE: A child commits a [insert type of offense] if the child creates, transmits, or possesses

NOTE: Legislators need to address not just dissemination, as some existing statutes do, but possession, too. Legislators may also want to consider whether they want to qualify liability for transmitting only to those who transmit voluntarily and without threat or coercion. Including language to that effect in the statute helps protect from liability individuals who may transmit under duress. As mentioned earlier in this Article, it is important that the statute apply to all participants of self-produced child pornography because otherwise there would be an issue of fairness and inconsistency of message.

E. The Statute Should Apply Even to People Who Take Visual Images of Themselves

PROPOSED LANGUAGE: It is no defense to a charge under this section that the minor creates, transmits, or possesses a photograph, video, digitized image, or other visual representation that shows the minor engaged in sexual conduct as defined by this statute.

NOTE: A minor would not be covered by this statute if that minor was only the subject of a photograph, video, digitized image, or other visual representation, as long as that minor did not create it. This would address situations that involve subjects taped surreptitiously.

F. Diversionary Programs for Eligible Minors, Including Mandatory Service Hours, Should Be an Option for Prosecutors

Eligible minors should include first time offenders. Educational programs should include an educational component detailing the legal ramifications for producing child pornography, its effects on victims,

age-appropriate sexual boundaries, and responsible use of the Internet.

PROPOSED LANGUAGE: First time offenders of this offense, which do not involve any of the aggravating circumstances that would require enhancing the punishment, should be eligible for diversionary programs, which may include community service hours, an educational component, or both. The educational program shall provide information concerning:

(1) the legal consequences of sharing sexually suggestive or explicit materials, including applicable federal and state statutes;

(2) the enhanced penalties for subsequent offenses;

(3) the nonlegal 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;

(4) how the unique characteristics of cyberspace and the Internet (the ease of searching and replication) and an infinite audience can produce long-term and unforeseen consequences for sharing sexually suggestive or explicit materials; and

(5) the connection between bullying and cyberbullying and juveniles sharing sexually suggestive or explicit materials.

NOTE: Not all first-time offenders will be appropriate candidates for diversion, but the vast majority probably will. Allowing prosecutors this option will enable them to educate and change the behavior of offenders. Legislators may not need to include this level of detail in the statute for the educational component if their states' diversionary programs are already well developed and if legislators are confident that administrators are capable of designing useful programs with these topics.

G. This New Offense Needs to Specifically Exempt Minors, for Their First Offense, from the Child Pornography and Exploitation Statutes

PROPOSED LANGUAGE: The provisions of [insert statutory provisions concerning child pornography and exploitation] shall not apply to a person who commits this offense for the first time.

NOTE: This provision corresponds to Vermont's law, which exempts an offender from child pornography prosecution for a first

offense.²⁴⁴ This is in contrast to Virginia's law, which creates no new offense and gives prosecutors few choices except traditional child pornography statutes. Vermont incorporates the better approach, which recognizes that minors might make a mistake but does not undermine the policy reasons discussed throughout this Article supporting eliminating and regulating child pornography no matter how created. In egregious circumstances, the prosecutor will still be able to charge a person under the child pornography statutes after the first offense. This flexibility needs to be available to the prosecutor to address the specific circumstances involved with each case. Anticipating all the different factual situations possible with teenagers and this technology would be impossible and thus requires some measure of flexibility. However, later provisions detailed below give the prosecutor less draconian options for repeat offenders. The point here is not to entirely remove the possibility of prosecuting under traditional child pornography statutes in the rare instances that may justify their use.

H. The New Offense Should Be Structured to Vary the Punishment Depending on Various Factors to Recognize Gradations in the Severity of the Behavior

The grading of the offense must reflect the various circumstances that may make an offense more egregious. The language below proposes a graduated approach to punishment that is similar to Florida's proposed bill. The first offense is treated as noncriminal, assuming no other factors listed below are present. Like Florida's bill, the proposed language increases the punishment for subsequent offenses. The language below, however, outlines more factors that would increase the punishment than are present in Florida's bill. These additional factors include but need not be limited to engaging in sexual intercourse or penetration, engaging in self-produced child pornography for profit, or committing the offense surreptitiously. Legislators need to consider which factors make the offense more serious in addition to the ones outlined below. For example, some legislators may also want to include a more severe punishment for a person who redistributes to many people instead of just a few people.

PROPOSED LANGUAGE: A first offense under this provision is a noncriminal offense. The first offense is a noncriminal violation punishable by a \$25 fine and ten (10) hours of community service, a

²⁴⁴ S. 125, Gen. Assemb. (Vt. 2009).

required educational program, or both. The underlying offense is increased to a [some level of a misdemeanor would be the most appropriate offense level] if the individual:

(1) Commits a second offense after being previously found to violate this offense. For any additional offenses, the degree of liability should be at least one degree more serious than that imposed for the commission of the second offense; or

(2) Creates, transmits, or possesses electronic communications that depict either sexual intercourse or deviate sexual intercourse, as defined in [section relating to definitions], or the penetration, however slight, of the genitals or anus of a minor with any part of a person's body, masturbation, sadism, or masochism; or

(3) Distributes or publishes, electronically or otherwise, a sexually expressive image with the intent to make a profit; or

(4) Surreptitiously creates or willfully possesses a sexually expressive image that was surreptitiously created.

NOTE: Making the first offense a noncriminal offense recognizes that self-produced child pornography may be the result of impulsive teenage conduct that is best addressed by education or service hours or both. Failing to attach any legal consequences to this behavior sends the wrong message to teenagers.

I. Provide Specifically That Violation of This Offense Does Not Require a Person to Be Included on the Sexual Offender Registry

PROPOSED LANGUAGE: A person convicted of an offense under this provision is not considered a sex offender and is not required to register as a sex offender pursuant to the provisions of [insert the child pornography statutory provisions].

J. Provide an Affirmative Defense to Liability for Possession if the Minor Did Not Request, Keep, or Transmit the Visual Depiction

PROPOSED LANGUAGE: It shall not be a violation of this section if (1) the juvenile did not solicit the visual depiction; (2) the juvenile took reasonable steps to destroy or eliminate the visual depiction, whether successful or not; and (3) the juvenile did not transmit the visual depiction to another person.

NOTE: Combining Kentucky's²⁴⁵ and Arizona's²⁴⁶ affirmative defense language works best because it protects unknowing recipients

²⁴⁵ H.R. 57, 10 Reg. Sess. (Ky. 2010).

from prosecution for material they did not request, as long as they try to destroy and do not transfer the material.

K. Provide for Expunging Records

PROPOSED LANGUAGE: Notwithstanding any other provision of law, for a first offense, only the records of a person under the age of eighteen (18) years at the time of commission of this offense who is found to violate this section shall be automatically expunged when the defendant reaches eighteen (18) years of age.

NOTE: This proposed language distinguishes between the first offense and subsequent offenses. Expunging the records for the first offense recognizes that minors may make a mistake; however, after the first offense little justification exists that this could be a mistake. Part of the education program involved with the first offense should include educating offenders about the harsher consequences for future offenses and their inability to remove these offenses from their permanent records.

CONCLUSION

Self-produced child pornography requires a legal response in combination with the other societal tools available to address it. The harm that results from the production, distribution, and possession of self-produced child pornography, much like that of traditional child pornography, is real and can be very severe. Self-produced child pornography is not protected speech and deserves no special treatment just because it involves teens instead of sexual predators. However, this difference in who participates and why it is created and possessed does justify an alternative framework for handling offenders. Although traditional child pornography statutes, as discussed in this Article, technically cover even self-produced child pornography, the punishments, including felony convictions and obligations to register as a sex offender, are draconian when applied to teens.

A more sensible approach involves creating a new offense specific to self-produced child pornography occurring among minors. Creating such an offense involves making policy decisions about a myriad of issues including whom to punish, what material should be prohibited, and the appropriate consequences. The complexity of this problem makes it easy for legislators to draft laws that fail to

²⁴⁶ S. 1266, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

effectively address the many dimensions of this problem. Because self-produced child pornography can involve very different contexts, any legal solution should recognize the uniqueness of each situation by utilizing a base-level offense with enhanced punishment for more egregious behavior to provide a flexible response. The ideas presented in this Article give legislators an excellent start on drafting legislation that will help protect our children and our society.

