

# The Limits of Child Pornography

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*Although the First Amendment ordinarily protects the creation, distribution, and possession of visual images, the Supreme Court has declared that those protections do not apply to child pornography. But the Court has failed to clearly define child pornography as a category of speech. Providing a precise definition of the child pornography exception to the First Amendment has become increasingly important because recent years have seen a dramatic increase in the penalties associated with the creation, distribution, and possession of child pornography.*

*This Article proposes a clear definition of the child pornography exception. It argues that an image ought to fall within the exception only if a child was sexually exploited or abused in the creation of the image. That the circulation of an image might inflict privacy or reputational harm on the minor depicted should be insufficient to categorize that image as child pornography for constitutional purposes. This proposed definition would place concrete limits on child pornography prosecutions; it would also prevent prosecution in many cases in which the minor depicted is above the age of consent, the image was created through computer morphing, or the image is the result of surreptitious filming or photographing of a minor.*

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#### INTRODUCTION

In 2009, a fourteen-year-old New Jersey girl posted pictures of herself on MySpace.com. She did so because she wanted her boyfriend to see them. But these were not ordinary pictures: the girl posted nude photographs of herself, which were later described as “very explicit.”<sup>1</sup>

John Hotaling altered a pornographic image of an adult couple engaging in sexual intercourse. He altered the image by digitally “cutting” the head and neck of an underage girl from a photograph that his daughter had taken and “pasting” the head and neck onto the image of the adult female engaged in intercourse. Hotaling never shared this image with anyone else, nor is there any evidence that he ever engaged in any inappropriate conduct with the girl depicted.<sup>2</sup>

Donna Zauner took sexually explicit pictures of her two-year-old and six-year-old daughters. Then she sent them to a man she knew had sexually molested children in the past.<sup>3</sup>

Although most people would perceive a real difference in the harm caused and the individual blameworthiness displayed in these three stories, current constitutional law and prosecutorial practice do not distinguish between the images that these three individuals created. All three of these defendants were charged with violating child pornography laws.<sup>4</sup>

States and the federal government have steadily increased the penalties associated with child pornography. The punishment for the possession of child pornography now equals or exceeds the penalties for many other serious crimes.<sup>5</sup> For example, a federal defendant found guilty of possessing twenty images of child pornography will receive a longer prison sentence than federal defendants who committed arson, burglary, robbery, or sexual abuse of a minor.<sup>6</sup> The states have also steadily increased criminal sentences for possession of child pornography;

1. *Girl Posts Nude Pics, Is Charged with Kid Porn*, NBCNEWS.COM, Mar. 27, 2009, <http://www.msnbc.msn.com/id/29912729>.

2. *United States v. Hotaling*, 634 F.3d 725, 727 (2d Cir. 2011).

3. *United States v. Zauner*, 688 F.3d 426, 428 (8th Cir. 2012).

4. Each defendant could have been charged with and convicted of producing child pornography. The decisions not to seek a conviction for *production* of child pornography but to instead bring charges for possession and/or distribution in some of the cases appear to have been driven by plea-bargaining considerations.

5. Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853, 856–64 (2011).

6. This comparison assumes a base offense level of eighteen for possession of child pornography, plus a two-level increase for use of a computer and a two-level increase for the number of images. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2013). It does not assume any adjustments to the base levels for the other offenses. *Id.* § 2A3.2 (sexual abuse of a minor, base offense level eighteen); *id.* § 2B2.1(a)(1) (burglary of a residence, base offense level seventeen); *id.* § 2B3.1 (robbery, base offense level twenty); *id.* § 2K1.4(a)(2) (arson, base offense level twenty).

those increases have sometimes resulted in the imposition of sentences that are longer than those imposed on defendants who sexually assaulted children.<sup>7</sup>

Perhaps because of the lengthy sentences at their disposal, prosecutors across the country have used child pornography laws to reach behavior that falls well outside the boundaries of what is ordinarily perceived as child pornography.<sup>8</sup> The most visible of these cases involve arrests and prosecutions of teenagers for creating and sharing pornographic images of themselves, a practice often referred to as “sexting.”<sup>9</sup>

A number of commentators have criticized aggressive law enforcement practices in sexting cases. They have argued that these practices are contrary to legislative intent because minors are being prosecuted under laws meant to protect them,<sup>10</sup> that sexting is a matter best handled by parents or schools rather than the justice system,<sup>11</sup> that child pornography penalties are disproportionate to the wrongdoing of sexting,<sup>12</sup> and that minors cannot appreciate the consequences of their actions.<sup>13</sup>

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7. Hessick, *supra* note 5, at 857–62.

8. See, e.g., Erica Goode, *Michigan Town Is Divided over Charges of Child Pornography*, N.Y. TIMES, Mar. 8, 2011, at A12 (recounting how an individual was arrested and charged with manufacturing and distributing child pornography based on his editing of a video to make it appear as though children were listening to him sing a song with graphic sexual lyrics).

9. See, e.g., Emily Shaaya, *States Address the Disconnect: Teens in a Sext-Crazed Culture*, CRIM. JUST., Summer 2012, at 19–21 (collecting cases); Editorial, ‘Sexting’ Overreach, CHRISTIAN SCI. MONITOR (Apr. 28, 2009), <http://www.csmonitor.com/layout/set/r14/Commentary/the-monitors-view/2009/0428/p08s03-comv.html> (“At least 20 prosecutions have been undertaken or threatened in recent months—some involving criminal child-pornography laws that could list convicted teens as sex offenders.”).

10. E.g., Julia Halloran McLaughlin, *Exploring the First Amendment Rights of Teens in Relationship to Sexting and Censorship*, 45 U. MICH. J.L. REFORM 315, 324–25 (2012) (discussing sexting and legislative intent); Julia Saladino, *Hold the Phone: The Incongruity of Prosecuting Sexting Teenagers Under the Prosecutorial Remedies and Other Tools to End Exploitation of Children Act of 2003*, 10 WHITTIER J. CHILD & FAM. ADVOC. 317, 328 (2011) (arguing that prosecuting teen sexting as child pornography is inconsistent with congressional intent).

11. E.g., Bethany L. Arliss, Comment, *Sext Me L8ter: The Legal Conundrum of Sexting in Schools and a Plan for Schools to Stop It*, 20 BUFF. J. GENDER L. & SOC. POL’Y 69, 86 (2012) (discussing sexting as a policy issue for schools); Jamie L. Williams, Note, *Teens, Sexts, & Cyberspace: The Constitutional Implications of Current Sexting & Cyberbullying Laws*, 20 WM. & MARY BILL RTS. J. 1017, 1045–49 (2012) (discussing sexting as a policy issue best addressed by cooperation between schools and parents).

12. E.g., David A. Bosak, Note, *The Blurring Line Between Victim and Offender: Self-Produced Child Pornography and the Need for Sentencing Reform*, 73 OHIO ST. L.J. 141, 156–57 (2012); Andrea Erwin Potter, Schwab Essay, *Sexting and Louisiana’s Punishment for the Children the Law Intends to Protect from Prosecution Under Child Pornography Statutes*, 45 FAM. L.Q. 419, 426–27 (2011).

13. See, e.g., Maryam F. Mujahid, Note, *Romeo and Juliet—A Tragedy of Love by Text: Why Targeted Penalties That Offer Front-End Severity and Back-End Leniency Are Necessary to Remedy the Teenage Mass-Sexting Dilemma*, 55 HOW. L.J. 173, 196–202 (2011) (discussing the teenage brain and the immaturity of sexters); Potter, *supra* note 12, at 427–29 (arguing that children lack the capacity to understand the implications of sexting).

Some commentators have argued that criminal prosecutions for teen sexting raise First Amendment issues.<sup>14</sup>

This Article addresses the expansive scope and enforcement of child pornography laws, not only in the limited context of sexting but also in a number of other factual scenarios where the pornographic image is not the product of child sex abuse or exploitation. It argues that, by enacting expansive child pornography prohibitions and prosecuting cases in which there is no abuse or exploitation, legislators and prosecutors have impermissibly expanded the category of child pornography beyond its constitutional limits.<sup>15</sup>

While states are generally free to criminalize and punish most behavior, state actors seeking to punish individuals for the creation, distribution, or possession of images must do so in a way that is consistent with the First Amendment right to free speech. An individual's free speech right is far from absolute. The Supreme Court has recognized several categorical exceptions to the First Amendment's coverage,<sup>16</sup> including exceptions for obscenity and for child pornography. If an image constitutes child pornography, its creation, distribution, and possession may be outlawed. If an image is not child pornography, then those who create, distribute, or possess it may be entitled to First Amendment protection. Put differently, how the courts choose to define child pornography is also how the courts define the boundaries of the child pornography exception to the First Amendment.<sup>17</sup> Because it is the status of the image—that is, whether an image is or is not child pornography—that determines constitutional protection,<sup>18</sup> how to define the category of child pornography is of surpassing importance.

Unfortunately, the Court has not placed clear limits on what constitutes child pornography,<sup>19</sup> and legal scholars have largely failed to fill the gap.<sup>20</sup> This Article

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14. *E.g.*, John A. Humbach, 'Sexting' and the First Amendment, 37 HASTINGS CONST. L.Q. 433, 454–56 (2010); Antonio M. Haynes, Note, *The Age of Consent: When Is Sexting No Longer "Speech Integral to Criminal Conduct"?*, 97 CORNELL L. REV. 369, 388–90 (2012); Joseph Paravecchia, Note, *Sexting and Subsidiarity: How Increased Participation and Education from Private Entities May Deter the Production, Distribution, and Possession of Child Pornography Among Minors*, 10 AVE MARIA L. REV. 235, 242–48 (2011); Williams, *supra* note 11, at 1042–43.

15. *Cf.* Rosalind E. Bell, Note, *Reconciling the PROTECT Act with the First Amendment*, 87 N.Y.U. L. REV. 1878, 1883–84 (2012) (“[P]ost-Ferber child pornography regulation and court decisions interpreting this regulation have become untethered from the Supreme Court’s crucial limiting interest in protecting children from physical and emotional harm.”).

16. *See* *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010).

17. Because the limits of the child pornography definition are coterminous with the limits of the First Amendment exception for child pornography, this Article uses the terms “child pornography” and “child pornography exception” interchangeably.

18. *Cf.* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1774–75 (2004) (making a similar observation about obscenity).

19. *See infra* note 87.

20. *See* Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 210 n.5 (2001) [hereinafter Adler, *Perverse Law*] (“Compared to other areas of First Amendment law, child pornography has been largely unexamined.”). Amy Adler is a notable exception to the general failure of legal commentators to address the definitional limits of

aims to fill that void by articulating a clear definition of what constitutes child pornography that would place firm limits on prosecutorial power to charge individuals with child pornography offenses. This Article proposes that child pornography ought to be defined to include only those images created through the sexual exploitation or abuse of a child. If an image was not the product of exploitation or abuse, that image should not be characterized as child pornography, and First Amendment protections may apply.<sup>21</sup> Sexual exploitation and abuse include forcible sexual contact and any other sexual activity that is the product of either coercion or a lack of consent.

Limiting child pornography to those images which are the product of exploitation and abuse which occurs during creation is consistent with the rationales underlying the exception. The child pornography exception is a unique First Amendment doctrine in that it criminalizes purely private speech—that is, it permits the criminalization of private possession of images in the home, without more.<sup>22</sup> Such a restrictive speech policy ought to be permitted only when necessary to avoid a significant and serious harm. The protection of children from sexual abuse and exploitation fits that bill. What is more, because the proposed definition incorporates the concept of exploitation—a concept that often distinguishes between children and adults—it provides support for the different treatment of sexually explicit images based on the age of the person depicted: images of adults

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child pornography. See Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921 (2001) [hereinafter Adler, *Inverting*]; Adler, *Perverse Law*, *supra*.

21. That an image is not the product of sexual exploitation or abuse does not mean the state lacks all authority to regulate its production, distribution, or possession. It does mean that such an image should not be classified as child pornography—a category that is fully exempt from First Amendment coverage. But such an image may fall within other First Amendment exceptions.

22. This is not the case with obscenity. Private possession of obscenity is protected. See *Stanley v. Georgia*, 394 U.S. 557 (1969). Nor do other First Amendment doctrines appear to permit the regulation of truly private speech; the Court's other First Amendment exceptions all seem to contemplate a speaker and a listener. Those exceptions include defamation, fraud, incitement, speech integral to criminal conduct, "fighting words," "true threats," disclosure of state secrets, and offers or solicitations to engage in illegal activity. See *United States v. Stevens*, 130 S. Ct. 1577, 1584–85 (2010); *United States v. Williams*, 553 U.S. 285, 297 (2008); *Virginia v. Black*, 538 U.S. 343, 359 (2003); *N.Y. Times Co. v. United States*, 403 U.S. 713, 737–40 (1971) (White, J., concurring); *Cohen v. California*, 403 U.S. 15, 20 (1971). In other words, speech by a single person in a private setting with no audience is, outside of the child pornography context, protected.

To be clear, the Court in *Stanley* expressly declined to express "any opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials," and it cited a federal statute, 18 U.S.C. § 793(d), "which makes criminal the otherwise lawful possession of materials which 'the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation.'" 394 U.S. at 568 n.11. The Court noted that "compelling reasons may exist for overriding the right of the individual to possess those materials." *Id.* Criminal prohibitions for possessing materials, where that possession poses "a clear and present danger to national security," Claudia Tuchman, Note, *Does Privacy Have Four Walls? Salvaging Stanley v. Georgia*, 94 COLUM. L. REV. 2267, 2289 n.149 (1994), are consistent with First Amendment doctrine. See, e.g., *Schenck v. United States*, 249 U.S. 47, 52 (1919).

are subject to the rules for obscenity, while images of children are subject to the rules for child pornography.

The Article proceeds in three parts. Part I examines current doctrine. It describes the Supreme Court's child pornography cases and identifies what guidance those cases provide in limiting the category of child pornography. Those cases indicate that the child pornography exception is based on the state interest in protecting the physical and emotional well-being of minors. As Part I explains, that well-being is harmed by the manner in which child pornography is produced—that is, the sexual exploitation and abuse of the child that occurs when the image is created. Children also suffer reputational and privacy harms in the subsequent circulation of the images. The state protects children by criminalizing the creation, distribution, and possession of child pornography, which shuts down the distribution network of and dries up the market for such images.

Part II proposes a definition of child pornography—namely, that the defining characteristic of child pornography is the existence of sexual exploitation or abuse in the creation of an image. This limited definition is appropriate because (1) it reflects the fact that sexual exploitation and abuse are the principal harms associated with child pornography, (2) it best justifies the special doctrines associated with child pornography, and (3) it does not conflict with other First Amendment doctrines. After setting forth the proposed definition, Part II then demonstrates why it is superior to several alternative definitions.

Part III applies the proposed definition to a series of factual scenarios. In particular, it applies the proposed definition to situations in which the minor depicted is above the age of consent, the image was created through the process of computer morphing, or the image was the product of surreptitious filming or photographing. In each of these situations, the image is not the product of sexual exploitation or abuse; thus, the image falls outside the constitutional limits of child pornography. These factual scenarios illustrate the significant differences between my proposed definition and the alternative definitions proposed in the academic literature and employed by lower courts. The scenarios also demonstrate that, although the proposed definition results in some outcomes that seem intuitively correct, other outcomes likely conflict with our intuitions. In other words, this Part argues that principles should trump intuition in order to provide clear limits for the category of child pornography.

As Part III notes, the mere fact that images do not fall within the limits of child pornography does not mean the images are protected First Amendment speech. Someone who, for example, surreptitiously films a child in the shower could be prosecuted under statutes aimed at video voyeurism, or he could be subject to civil liability for invasion of privacy. And teen sexting photographs might be regulable as obscenity. In other words, the child pornography exception may not be the only First Amendment doctrine that would allow the state to regulate the creation and distribution of these images.

But the mere fact that an image could be regulated under another First Amendment exception does not transform the question of child pornography's limits into an academic exercise. Whether an image is appropriately classified as child pornography is not simply a matter of labels. Whether an image falls within the constitutional category of child pornography has important, real-world effects. That is because the Supreme Court's child pornography doctrines allow states to

prohibit and regulate child pornography to a greater extent than other speech. For example, while the state may criminalize the private possession of child pornography, it may not do so for materials that are merely obscene. Put simply, identifying the limits of the child pornography exception is necessary to ensure that First Amendment rights are fully protected.

#### I. THE SUPREME COURT'S GUIDANCE ON CHILD PORNOGRAPHY

Ordinarily, the First Amendment protects sexually explicit speech and images unless they are “obscene,”<sup>23</sup> and the private possession of pornographic images, even if obscene, is also protected.<sup>24</sup> But beginning with its 1982 decision in *New York v. Ferber*,<sup>25</sup> the Supreme Court recognized a new categorical exception to the First Amendment—child pornography. Since that time, the Court has decided a series of cases developing and refining that exception, which provides less protection than the obscenity doctrine. Despite its decision to treat child pornography differently than obscenity, the Supreme Court has never provided a definitive meaning for the term “child pornography.” This Part describes the Supreme Court’s child pornography decisions—*New York v. Ferber*, *Osborne v. Ohio*, and *Ashcroft v. Free Speech Coalition*—highlighting the guidance each of these cases provides regarding the definition of child pornography.

Although failing to provide a clear definition of child pornography, the Court has consistently emphasized the state’s interest in preventing harm to children caused by (1) the creation and (2) the circulation of the images. According to the Court, these state interests in protecting children trump the weak interest of individuals in creating, distributing, and possessing such images. But the Court has not made clear whether the harm of circulation, standing alone, is sufficient to justify the exception for child pornography.<sup>26</sup> Instead, its decisions have offered conflicting analyses.

##### A. *New York v. Ferber*

Much of the Court’s guidance regarding the limits of child pornography can be drawn from the case that first recognized the First Amendment exception for child pornography, *New York v. Ferber*.<sup>27</sup> Paul Ferber, a bookstore owner, had been convicted under a New York statute that prohibited the knowing promotion of a sexual performance by a child under the age of sixteen.<sup>28</sup> Ferber was convicted for

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23. *E.g.*, *Miller v. California*, 413 U.S. 15 (1973); *see also* Adler, *Inverting*, *supra* note 20, at 929.

24. *See Stanley*, 394 U.S. at 568.

25. 458 U.S. 747 (1982).

26. *See* Frederick Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 SUP. CT. REV. 285, 291; *The Supreme Court, 1981 Term—Child Pornography and Unprotected Speech*, 96 HARV. L. REV. 141, 143 n.16 (1982) [hereinafter *The Supreme Court, 1981 Term*].

27. 458 U.S. at 747.

28. *Id.* at 749.

selling two films “depicting two young boys masturbating.”<sup>29</sup> Ferber argued that the films were protected by the First Amendment because a jury had found the films were not obscene.<sup>30</sup> The Court rejected the argument, concluding that child pornography falls outside the First Amendment regardless whether it is obscene.

The Court identified the two major harms to children caused by child pornography: the harm of creation and the harm of circulation.<sup>31</sup> The first harm is the physical and psychological harm that a child experiences in the process of creating child pornography.<sup>32</sup> In discussing this harm of creation, the *Ferber* Court explained that the production of child pornography involves the sexual exploitation and abuse of children. Citing legislative and academic materials,<sup>33</sup> the Court

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29. *Id.* at 752.

30. Because a jury acquitted Ferber on charges under a statute requiring a finding of obscenity and convicted him only of charges under a statute that did not require proof that the films were obscene, the case squarely raised the issue whether child pornography must be obscene in order for a state to criminalize it. *Id.*

31. The *Ferber* Court framed its analysis in terms of five justifications, but those justifications are overlapping and duplicative. The *Ferber* Court’s first justification was framed in terms of the state’s “interest in ‘safeguarding the physical and psychological well-being of a minor,’” which the Court noted was “compelling.” *Id.* at 756–57 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). In discussing this interest, the Court made clear that this interest included the harm to children caused both by creation and by circulation. *See id.* at 757 (“The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.”); *id.* at 758 (“[T]he use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.”); *id.* at 758 n.9 (noting the “[s]exual molestation” of children by adults that is “often involved” in the creation of child pornography, as well as the invasion of “the child’s privacy interests” when sexual performances are recorded and distributed).

The *Ferber* Court’s second justification for classifying all child pornography as not covered by the First Amendment also focused on the particular harm of child sex exploitation; specifically, it focused on the intrinsic relationship between the distribution of child pornography and child sex exploitation and abuse. *Id.* at 759.

The third and fourth justifications rely on analysis from the first two justifications. The third *Ferber* justification is that the distribution of child pornography provides an economic motive for the creation of child pornography, and thus distribution is “an integral part of the production of such materials, an activity illegal throughout the Nation.” *Id.* at 761. This is essentially a restatement of the second justification. The fourth *Ferber* justification is that the value of permitting the creation of images using “live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*.” *Id.* at 762. This is the other half of the balancing test undertaken by the Court in its first justification.

The fifth *Ferber* justification is essentially the explicit balancing of interests, as well as a statement that denying First Amendment coverage to child pornography is “not incompatible” with the Court’s previous decisions. *Id.* at 763–64.

32. *Id.* at 758 (“[T]he use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.”); *id.* at 764 (“When a definable class of material . . . bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.”).

33. *See id.* at 758 n.9 (collecting sources).

stressed that creating child pornography involves “exploitation”<sup>34</sup> and often involves “[s]exual molestation” of children by adults.<sup>35</sup>

The importance of protecting children from the sexual exploitation and abuse during the creation of these images can be seen throughout the opinion. For example, the Court framed the harms of child pornography in terms of an intrinsic relationship between the distribution of child pornography and child sex exploitation and abuse.<sup>36</sup> This relationship led the Court to conclude that the only effective way to end the harm of creation was to shut down the distribution network of child pornography.<sup>37</sup>

The harm of creation also led the Court to reject the argument that the child pornography exception should be limited to images that are obscene. The Court observed that whether an image is obscene does not necessarily indicate “whether a child has been physically or psychologically harmed in the production of the work”—that is, whether an image “required the sexual exploitation of a child for its production.”<sup>38</sup>

Justice O’Connor’s concurring opinion in *Ferber* also focused on the centrality of the harm of creation. She noted that the New York statute at issue targeted “sexual exploitation and abuse.”<sup>39</sup> She distinguished sexual exploitation and abuse from “clinical pictures of adolescent sexuality, such as those that might appear in medical textbooks,” as well as from “pictures of children engaged in rites widely approved by their cultures, such as those that might appear in issues of the National Geographic.”<sup>40</sup>

The second harm identified in *Ferber* is the harm children suffer by the circulation of pornographic images. The Court noted that “the materials produced are a permanent record of the children’s participation [in sexual activity] and the harm to the child is exacerbated by their circulation.”<sup>41</sup> The Court suggested that closing the distribution network was equally as important as preventing sexual abuse and exploitation during creation, if not more so.<sup>42</sup>

According to the *Ferber* Court, the state’s interest in preventing these two harms vastly outweighed the “exceedingly modest, if not *de minimis*” value of permitting the creation and distribution of images using “live performances and photographic reproductions of children engaged in lewd sexual conduct.”<sup>43</sup> But in so holding, *Ferber* indicated that the state’s interest in protecting children would not always

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34. *Id.* at 757 (citing New York legislature).

35. *Id.* at 758 n.9.

36. *Id.* at 759.

37. “[T]he distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.” *Id.*

38. *Id.* at 761.

39. *Id.* at 775 (O’Connor, J., concurring); *see also id.* (“[T]he statute attempts to protect minors from abuse.”).

40. *Id.*

41. *Id.* at 759 (majority opinion).

42. *Id.* at 759 n.10 (“[P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution.” (alteration in original) (quoting David P. Shouvlín, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981))).

43. *Id.* at 762–64 (emphasis in original).

exceed the interest in expression. It explained that the exception for child pornography is limited to *visual* depictions.<sup>44</sup>

B. *Osborne v. Ohio*

Preventing both the harm of creation and the harm of circulation underlay the Court's next child pornography case, *Osborne v. Ohio*.<sup>45</sup> *Osborne* had been convicted under a state statute that prohibited the private possession of child pornography.<sup>46</sup> *Osborne* argued that the statute was unconstitutional because it conflicted with the Supreme Court's decision in *Stanley v. Georgia*.<sup>47</sup> *Stanley* had struck down a state law outlawing the private possession of obscene material.

The Supreme Court rejected *Osborne's* argument. As in *Ferber*, the Court explained that the process of creating child pornography harmed the child. Prohibiting possession would dry up the market, resulting in fewer images created and thus less exploitation and abuse of children.<sup>48</sup> The Court also noted the harm caused by circulation.<sup>49</sup> It explained that prohibiting private possession would "encourage[] the possessors of these materials to destroy them."<sup>50</sup>

In the Court's view, the interest in preventing these harms to children justified different treatment for private possession of child pornography and private possession of obscenity. The Court explained that the State had only "weak interests" in prohibiting the private possession of ordinary obscenity,<sup>51</sup> but that the interests of the State in prohibiting child pornography "far exceed the interests justifying the Georgia law at issue in *Stanley*."<sup>52</sup>

The *Osborne* Court also identified a third harm that was not mentioned in *Ferber*. The *Osborne* Court stated that prohibiting possession of child pornography

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44. *Id.* at 764 ("[T]he nature of the harm to be combated requires that the state offense be limited to works that *visually* depict sexual conduct by children below a certain age." (emphasis in original)); see also *id.* at 764–65 ("We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection.").

45. 495 U.S. 103 (1990).

46. *Id.* at 106–07.

47. 394 U.S. 557 (1969).

48. *Osborne*, 495 U.S. at 109–10. *Osborne* explicitly relied on *Ferber* for this argument and extended the logic from distribution to "all levels in the distribution chain," including possession. *Id.* at 110. Such an extension was necessary, the Court explained, because, according to Ohio, "much of the child pornography market has been driven underground; as a result, it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution." *Id.*

49. *Id.* at 111 ("[T]he materials produced by child pornographers permanently record the victim's abuse [causing] the child victims continuing harm by haunting the children in years to come." (citing *New York v. Ferber*, 458 U.S. 747, 759 (1982))).

50. *Id.*

51. *Id.* at 109–10 (citing *Stanley*, 394 U.S. at 567–68); see also *id.* at 108 (characterizing the interest in "permitting child pornography" as "exceedingly modest, if not *de minimis*" (quoting *Ferber*, 458 U.S. at 762)).

52. *Id.* at 108.

could help to protect *future* victims of child sex abuse, not just those children depicted in child pornography. The Court based this conclusion on sources suggesting that “pedophiles use child pornography to seduce other children into sexual activity.”<sup>53</sup> This new argument in favor of the exemption of child pornography from First Amendment protection is significant because it suggests that the compelling interest in protecting children is not limited to the abuse and exploitation in the *creation* of such images; abuse and exploitation can also arise at a later date from the mere existence of such images.<sup>54</sup> In *Ashcroft v. Free Speech Coalition*, however, the Court clarified that the interest in protecting future victims of child sex abuse, rather than those children victimized by the creation of child pornography, was insufficient to outweigh the individual interests at stake.<sup>55</sup>

### C. Ashcroft v. Free Speech Coalition

Although the Court invoked both the harm of creation and the harm of circulation in *Ferber* and *Osborne*, it did not state in those cases whether either harm, standing alone, justified the child pornography exception. In the 2002 decision *Ashcroft v. Free Speech Coalition*,<sup>56</sup> however, the Court indicated that the harm of creation—that is, the sexual exploitation and abuse of children to produce child pornography—plays a principal, if not the primary, role in its child pornography doctrine.

*Free Speech Coalition* involved a First Amendment challenge to the Child Pornography Prevention Act of 1996, which outlawed virtual child pornography—that is, pornographic images created wholly by technological means—and any other “visual depiction” that “is, or appears to be, of a minor engaging in sexually explicit conduct.”<sup>57</sup> The Court concluded that the statute was unconstitutional, explaining that virtual child pornography fell outside the constitutional category of child pornography.<sup>58</sup>

In so holding, the *Free Speech Coalition* Court explicitly rejected the new harm identified in *Osborne*—protecting *future* victims of child sex abuse, not just those

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53. *Id.* at 111.

54. *See, e.g.,* Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL’Y & L. 1, 39–41 (2007) (stating that “child molesters” use sexting to “groom children to participate in sexual conduct,” that such use may justify prosecution of teen sexting even when teens create the images without exploitation, and that the harm associated with grooming is “not diminished” merely when the image is self-created).

55. *See infra* note 59.

56. 535 U.S. 234 (2002).

57. Child Pornography Prevention Act (CPPA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009, *invalidated by Free Speech Coal.*, 535 U.S. 234.

58. 535 U.S. at 240 (“The principal question to be resolved, then, is whether the CPPA is constitutional where it proscribes a significant universe of speech that is neither obscene under *Miller* nor child pornography under *Ferber*.”); *id.* at 245–46 (“The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children. . . . While these categories may be prohibited without violating the First Amendment, none of them includes the speech prohibited by the CPPA.”).

children victimized by the creation of child pornography—as a government interest sufficient to outweigh the individual interests at stake.<sup>59</sup> The *Free Speech Coalition* Court also left no doubt that the harm of creation—that is, the sexual exploitation and abuse of children to produce child pornography—is the touchstone of its child pornography doctrine. It noted that its analysis in previous cases about the state interests outweighing private interests “was based upon how [an image] was made, not on what it communicated.”<sup>60</sup> Thus, *Free Speech Coalition* leaves no doubt that the harm of creation, standing alone, is sufficient to overcome the individual interests at stake.

At the same time, however, *Free Speech Coalition* did not resolve whether the harm of *circulation*, standing alone, justifies the child pornography exception. The sufficiency of the harm of circulation arose in the Court’s discussion of computer morphing, the process of creating sexually explicit images of children by “alter[ing] innocent pictures of real children so that the children appear to be engaged in sexual activity.”<sup>61</sup> Because the respondents had not challenged the statutory provision prohibiting morphed computer images, the Court explicitly declined to address whether such images fell within the category of child pornography. The Court did, however, note that morphed images “implicate the interests of real children and are in that sense closer to the images in *Ferber*.”<sup>62</sup> A child who is the subject of a morphed computer image cannot demonstrate that he or she suffered the harm of sex abuse or exploitation in the creation of the image. He or she could, however, suffer mental or emotional anguish from the knowledge or fear that such images have been circulated. By declining to address this provision, and by noting that those images were “closer” to the images in *Ferber* than were virtual images, the Court left open the possibility that the harm of circulation, standing alone, might be sufficient to deprive an image of First Amendment protection.

*Free Speech Coalition* thus left open the question whether child pornography includes any sexually explicit depiction of real children or only those sexually explicit images created through exploiting or abusing children. To be sure, parts of the opinion describe child pornography as any sexually explicit images produced using real children.<sup>63</sup> At other times, however, the opinion uses language that

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59. *See id.* at 250 (noting that the *Osborne* opinion had identified a government interest “in preventing child pornography from being used as an aid in the solicitation of minors,” but stating that the *Osborne* Court had “anchored its holding in the concern for the participants” and “did not suggest that, absent this concern, other governmental interests would suffice”). The Court also rejected the government’s argument that “virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct,” observing that “[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.” *Id.* at 253.

60. *Id.* at 250–51.

61. *Id.* at 242.

62. *Id.*

63. *See id.* at 245–46 (“The freedom of speech has its limits; it does not embrace certain categories of speech, including . . . pornography produced with real children.”); *id.* at 241 (“Before 1996, Congress defined child pornography as the type of depictions at issue in *Ferber*, images made using actual minors.”).

appears to restrict child pornography to only those images created by harming (that is, sexually exploiting or abusing) children in the production of the images.<sup>64</sup>

Indeed, the opinion sometimes switches between these alternative descriptions in the same paragraph or even the same sentence.<sup>65</sup>

Finally, although the *Free Speech Coalition* Court did not expressly define child pornography, it rejected the argument that nonexploitative images can be forbidden as child pornography simply because they may be indistinguishable from exploitative images. The government had argued that experts would have “difficulty in saying whether the pictures were made by using real children or by using computer imaging.”<sup>66</sup> The Court was unpersuaded by this argument. The First Amendment, according to the *Free Speech Coalition* Court, does not allow the government to “suppress lawful speech as the means to suppress unlawful speech.” Rather, the First Amendment “requires the reverse. ‘[T]he possible harm to society

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64. See *id.* at 251 (characterizing *Ferber* as “reaffirm[ing] that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.”); *id.* at 249 (“Where the images are themselves the product of child sexual abuse, *Ferber* recognized that the State had an interest in stamping it out without regard to any judgment about its content. The production of the work, not its content, was the target of the statute.” (citations omitted)); *id.* at 250–51 (“*Ferber*’s judgment about child pornography was based upon how it was made, not on what it communicated.”); *id.* at 250 (“In contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production.”); *id.* at 249 (“*Ferber* upheld a prohibition on the distribution and sale of child pornography, as well as its production, because these acts were ‘intrinsically related’ to the sexual abuse of children . . . .”); *id.* at 250 (“Virtual child pornography is not ‘intrinsically related’ to the sexual abuse of children, as were the materials in *Ferber*. While the Government asserts that the images can lead to actual instances of child abuse, the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.” (citations omitted)); *id.* at 254 (“In the case of the material covered by *Ferber*, the creation of the speech is itself the crime of child abuse; the prohibition deters the crime by removing the profit motive.”); see also *id.* at 244 (“The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people.”).

65. See, e.g., *id.* at 240 (“By prohibiting child pornography that does not depict an actual child, the statute goes beyond *New York v. Ferber*, which distinguished child pornography from other sexually explicit speech because of the State’s interest in protecting the children exploited by the production process.” (citation omitted)).

Another example can be found in *Free Speech Coalition*’s discussion of the CPPA’s affirmative defense. That defense allowed “a defendant to avoid conviction for nonpossession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children.” *Id.* at 255. The Court stated that the affirmative defense was “incomplete and insufficient” because it allowed “persons to be convicted in some instances where they can prove children were not exploited in the production” of an image. *Id.* at 256. But the Court further criticized the affirmative defense, saying it “cannot save the statute, for it leaves unprotected a substantial amount of speech not tied to *the Government’s interest in distinguishing images produced using real children from virtual ones.*” *Id.* (emphasis added).

66. *Id.* at 254.

in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . . .”<sup>67</sup>

#### D. Other Recent Decisions

The Supreme Court has offered some further guidance on the definition of child pornography in two recent cases, though neither directly implicated the scope of the child pornography exception. The first, *United States v. Williams*,<sup>68</sup> addressed limitations on “the pandering or solicitation of child pornography.”<sup>69</sup> While the holding in *Williams* did not turn on the limits of child pornography,<sup>70</sup> language in the opinion supports a definition based on the depiction of real children rather than a definition limited to images created through exploitation or abuse.<sup>71</sup> First, *Williams* stated that the category of child pornography “consists of sexually explicit visual portrayals that feature children.”<sup>72</sup> Second, the *Williams* Court characterized the decision in *Free Speech Coalition* as invalidating the prohibition on virtual child pornography “because the child-protection rationale for speech restriction does not apply to materials produced without children.”<sup>73</sup>

Another case that provides some insight into the definition of child pornography is *United States v. Stevens*.<sup>74</sup> There, the Supreme Court struck down a federal law prohibiting the creation, sale, and possession of videos depicting animal cruelty. The Court rejected the government’s argument that categorical exceptions to the First Amendment are appropriate when, as a category, “the First Amendment value of the speech is ‘clearly outweighed’ by its societal costs.”<sup>75</sup> In doing so, the Court recharacterized its analysis in *Ferber*. According to the *Stevens* Court, *Ferber* did not turn on a “balance of competing interests.”<sup>76</sup> Instead, the Court explained, *Ferber* recognized the exception for child pornography because “[t]he market for child pornography was ‘intrinsically related’ to the underlying abuse, and was therefore ‘an integral part of the production of such materials, an activity illegal throughout the Nation.’”<sup>77</sup>

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67. *Id.* at 255 (alteration and omission in original) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).

68. 553 U.S. 285 (2008).

69. *Id.* at 288.

70. *See id.* at 297–99.

71. *See, e.g.*, 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, 529–30 (2010); Haynes, *supra* note 14, at 392 n.181.

72. 553 U.S. at 288.

73. *Id.* at 289; *see also id.* at 293 (characterizing *Free Speech Coalition* as “stating that the First Amendment does not protect obscenity or pornography produced with actual children”).

74. 130 S. Ct. 1577 (2010).

75. Brief for the United States at 12, *United States v. Stevens*, 130 S. Ct. 1577 (2010) (No. 08-769).

76. 130 S. Ct. at 1586 (internal quotation marks omitted).

77. *Id.*

Because *Stevens* focuses on the underlying abuse in production, the case suggests that the harm in creation is the key feature of child pornography. But it is difficult to know whether the *Stevens* Court meant to limit child pornography to those images whose production involved illegal sexual exploitation or abuse. After all, *Ferber*, *Osborne*, and *Free Speech Coalition* are all written in terms of a balancing of interests, and much of the analysis in those opinions is devoted to describing and evaluating the government interests at stake. *Stevens*'s claim that balancing did not play a key role in defining child pornography is inconsistent with those decisions, and it is unlikely that the Court meant to disavow that line of cases so cavalierly in dicta in a case not about child pornography.

Moreover, the alternative analysis in *Stevens* is not unambiguous. It characterizes the child pornography exception as a subset of the broader "integral part" exception, first recognized in *Giboney v. Empire Storage & Ice Co.*<sup>78</sup> *Giboney* itself did not clearly define the reach of the exception, nor have subsequent cases applying *Giboney*.<sup>79</sup> Thus, even if *Stevens* did intend to limit child pornography to those images for which sexual exploitation or abuse played an "integral part" in their production, it would not be clear how to apply such a definition.

## II. PROPOSING A NEW DEFINITION OF CHILD PORNOGRAPHY

This Part proposes limiting the definition of child pornography to those images created through the sexual exploitation or abuse of children. Sexual exploitation and abuse includes forcible sexual contact and any other sexual activity that is the product of either coercion or lack of consent. This limited definition is appropriate because it isolates the principal harm of child pornography, because it best justifies the special doctrines associated with child pornography, and because it is compatible with other First Amendment doctrines. The definition is also superior to a number of alternative definitions that have been proposed in judicial decisions and the academic literature.

This Part begins by explaining why child pornography is best defined as images created through sexual exploitation or abuse. It then considers a number of other definitions—including a definition based on whether the circulation of an image causes harm, a definition based on whether an image is "an integral part" of a course of criminal conduct, and a common lower court definition called the *Dost* test—and it explains why the proposed definition based on exploitation or abuse in creation is superior to these alternatives.

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78. 336 U.S. 490 (1949).

79. Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1326 (2005).

*A. Defining Child Pornography Based on Harm at Creation*

## 1. The Centrality of Exploitation or Abuse

Limiting the definition of child pornography to those images created through the sexual exploitation or abuse of children is appropriate because exploitation and abuse represent the principal harm of child pornography. That exploitation or abuse is the principal harm of child pornography is supported not only by the Court's child pornography cases but also by logic and comparison to other harms.

As Part I indicated, the Supreme Court's child pornography cases often discuss the state's interest in preventing the harm to children caused by sexual exploitation and abuse in the creation of the image.<sup>80</sup> For example, in explaining why the test for obscenity from *Miller v. California* was not the correct test for child pornography, the *Ferber* Court observed that whether an image is obscene does not necessarily indicate "whether a child has been physically or psychologically harmed in the production of the work"—that is, whether an image "required the sexual exploitation of a child for its production."<sup>81</sup>

The strongest indication that sexual exploitation or abuse is the touchstone of the Court's child pornography doctrine can be found in *Free Speech Coalition*. In striking down a statute that prohibited images whose content appeared identical to child pornography, the *Free Speech Coalition* Court stated that it is the harm of production, not the content of an image, that defines the category of child pornography<sup>82</sup>: "*Ferber's* judgment about child pornography was based upon how it was made, not on what it communicated. The case reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment."<sup>83</sup>

Even though there is much language in the Court's opinions supporting a limitation of child pornography to those images created through the sexual

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80. "The Court's child pornography jurisprudence depends on this idea: Child pornography is child sexual abuse." Adler, *Perverse Law*, *supra* note 20, at 215 (emphasis in original).

81. *New York v. Ferber*, 458 U.S. 747, 761 (1982).

82. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 241 (2002) ("These images do not involve, let alone harm, any children in the production process . . ."); *id.* at 242 ("Under [congressional] rationales, harm flows from the content of the images, not from the means of their production."); *id.* at 249 ("Where the images are themselves the product of child sexual abuse, *Ferber* recognized that the State had an interest in stamping it out without regard to any judgment about its content. The production of the work, not its content, was the target of the statute." (citation omitted)).

83. *Id.* at 250–51 (citing *Ferber*, 458 U.S. at 764–65). Another example of the centrality of sexual exploitation and abuse in production can be found in *Free Speech Coalition's* discussion of the CPPA's affirmative defense. That defense allowed "a defendant to avoid conviction for nonpossession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children." *Id.* at 255; *see also* 18 U.S.C. § 2252A(c) (2000) (amended 2003). The Court stated that the affirmative defense was "incomplete and insufficient" because it allowed "persons to be convicted in some instances where they can prove children were not exploited in the production" of an image. *Free Speech Coal.*, 535 U.S. at 256 (emphasis added).

exploitation or abuse of a child, there is ample language from those cases that undercuts such a definition.<sup>84</sup> And despite its language about the harm of production rather than the content of images driving its child pornography exception, the *Free Speech Coalition* opinion expressly declined to decide whether computer morphing could be prohibited as child pornography.<sup>85</sup> As explained more fully below, computer morphing does not involve child sexual exploitation or abuse.<sup>86</sup>

The conflicting language from the Court's decisions and its failure to offer an explicit definition of the child pornography exception<sup>87</sup> leave the limits of child pornography unclear. Thus, any attempt to define the child pornography category may not simply rely on the Court's cases but must provide independent support for a proffered definition. A definition that limits child pornography to images created through sexual exploitation or abuse is sensible because it limits child pornography according to the principal harm of such images.

Sexual exploitation and abuse is the principal harm implicated by child pornography. The other major harm that can arise from child pornography—the harm of circulation—is both lesser than and derivative of the harm of creation.<sup>88</sup> The difference in severity between the harms of creation and circulation is apparent

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84. See *supra* notes 41–42, 49–50, and 61–65. For example, the Court's opinion in *Williams* suggested that the First Amendment permitted the prohibition of visual depictions of “sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred.” *United States v. Williams*, 553 U.S. 285, 296–97 (2008). While it is possible to read this statement so as to include only activity that constitutes exploitation or abuse—after all, exploitation and abuse can occur without sexual intercourse—the Court's ambiguous reference to “camera tricks” leaves open the possibility of the creation of an image without exploitation or abuse of a child.

85. 535 U.S. at 242.

86. See *infra* Part III.B.

87. See Adler, *Perverse Law*, *supra* note 20, at 234–35 (stating that the Court has taken a passive role in defining the limits of child pornography and largely accepted the definition of legislatures, creating a “sense of boundlessness in child pornography law”); see also Schauer, *supra* note 26, at 294 (“Curiously, *Ferber* contains no initial description of the category itself . . . .”); *The Supreme Court, 1981 Term*, *supra* note 26, at 148 (noting the Court's “contradictory definitions of the bounds of speech left unprotected after *Ferber*”).

While the Supreme Court has failed to provide a clear definition of child pornography, the limits of child pornography have been repeatedly addressed by the lower courts. See Adler, *Perverse Law*, *supra* note 20, at 265 (“In order to prohibit speech, you must describe it. Child pornography jurisprudence has thus been largely concerned with articulating the limits of the definition of child pornography, beyond which the government may not reach.”). The lower courts have embraced a six-factor test, which has been the subject of much criticism, and which is discussed *infra* in Section II.D.

88. Indeed, the *Ferber* opinion suggests as much by characterizing its own harm of circulation argument as one way that the distribution of child pornography “is intrinsically related to the sexual abuse of children.” 458 U.S. at 759. Similarly, the *Osborne* Court characterized the harm caused by the circulation of child pornography as “continuing harm” caused by the images that “permanently record the victim's abuse” and that “haunt[] the children in years to come.” *Osborne v. Ohio*, 495 U.S. 103, 111 (1990). Further proof of centrality of the harm from abuse is the argument from *Osborne* that “encouraging the destruction” of child pornography “is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.” *Id.*

from a simple thought experiment: given the choice between suffering a sexual assault or having a convincing but fraudulent pornographic image of oneself circulated (that is, an image created through digital manipulation and thus not a product of sexual exploitation or abuse), it is inconceivable that a person would choose the sexual assault.<sup>89</sup> The reputational and psychological harm caused by the circulation of the image is indisputably less than the physical and psychological harm caused by a sexual assault.<sup>90</sup>

The harm of circulation is not only less severe than the harm of creation, it is also derivative. This is illustrated by the fact that the harm of circulation argument is ordinarily framed as a concern that victims are aware that there is a permanent record of the abuse that they suffered,<sup>91</sup> not the possibility that a person might be mistakenly identified as a child abuse victim.<sup>92</sup>

Confirming the primacy of the harm of sexual abuse and exploitation is the fact that much of the rhetoric regarding the harmfulness of child pornography consists essentially of second-order arguments about the harm of child sex abuse—that is, punishment is necessary either to stop the production of the pornographic materials<sup>93</sup> or it is necessary to prevent the consumers of child pornography (who

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89. Hessick, *supra* note 5, at 869.

90. See Audrey Rogers, *From Peer-to-Peer Networks to Cloud Computing: How Technology Is Redefining Child Pornography Laws*, 88 ST. JOHN'S L. REV. (forthcoming 2014) (manuscript at 38), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2006664](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2006664) (stating that, as compared with producers, distributors of child pornography “also harm the child, but typically to a lesser degree because they are not involved in any direct sexual abuse of a child”).

91. See *Ferber*, 458 U.S. at 759; see also Bell, *supra* note 15, at 1887 (“Pornographic materials comprise permanent records of sexual exploitation, exacerbating a child’s original injury through their circulation.”).

92. But see Annemarie J. Mazzone, Comment, *United States v. Knox: Protecting Children from Sexual Exploitation Through the Federal Child Pornography Laws*, 5 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 167, 184–85 (1994) (reprinting statement by Senator David D. Marriott).

Even when the circulation of images publicizes past abuse, there is reason to be concerned about overemphasizing the harm of circulation. That is because the harm is premised on “the perpetuation of secrecy associated with child sex abuse.” Hessick, *supra* note 5, at 870. Many child sex offenders are able to manipulate their victims into keeping the abuse secret by convincing the victims that there will be bad consequences for them if anyone finds out about the abuse. The harm of circulation argument taps into this pernicious culture of secrecy by perpetuating the idea that allowing others to see pictures of the abuse—that is revealing the secret of the abuse—is as bad as or worse than the abuse itself. *Id.*

93. See, e.g., *Osborne*, 495 U.S. at 108–10; *Ferber*, 458 U.S. at 759–61; Cheryl Hanna & Pamela Vesilind, *Preview of United States v. Stevens: Animal Law, Obscenity, and the Limits of Government Censorship*, 4 CHARLESTON L. REV. 59, 66 (2009) (referencing government contention that “outlawing the possession and distribution of child pornography decreases actual child exploitation and abuse” (citing Brief for the United States, *supra* note 75, at 36–37)).

are assumed to be sexually attracted to children) from sexually assaulting children later in time.<sup>94</sup>

## 2. Building a Definition

Having identified sexual exploitation or abuse as the principal harm of child pornography, we must now turn to the question of how to incorporate that conclusion into a definition of child pornography. Of course, defining child pornography as images created through the sexual exploitation or abuse of a child is of limited usefulness unless we also define sexual exploitation and sexual abuse. Unfortunately, there is no singular definition of those terms. Statutes, dictionaries, and academic literature define these terms differently.<sup>95</sup> We cannot rely on

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94. See *Osborne*, 495 U.S. at 111; YAMAN AKDENIZ, INTERNET CHILD PORNOGRAPHY AND THE LAW: NATIONAL AND INTERNATIONAL RESPONSES 4–5 (2008); see also Hessick, *supra* note 5, at 871–72 (collecting sources).

95. See Adler, *Perverse Law*, *supra* note 20, at 219 n.47 (“A consistent definition of sexual abuse has yet to arise.”). For example, some authorities have defined sexual exploitation of a child as a form of sexual abuse. *E.g.*, 18 U.S.C. § 3509(a)(8) (2012) (defining “sexual abuse” as including “the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in . . . sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children”); Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106g(4) (2006) (defining “sexual abuse” as, *inter alia*, “statutory rape, molestation, prostitution, or other form of sexual exploitation of children”); ROBIN E. CLARK & JUDITH FREEMAN CLARK WITH CHRISTINE ADAMEC, THE ENCYCLOPEDIA OF CHILD ABUSE 329–38 (3d ed. 2007) (identifying Arizona, California, Colorado, Connecticut, and Kansas). Others have defined the two terms separately, identifying sexual abuse of a child in terms of sexual assault or molestation and identifying sexual exploitation in terms of facilitating or forcing a child to engage in prostitution or other sexually explicit conduct. *E.g.*, *id.* at 329–38 (identifying Arkansas, District of Columbia, and Georgia).

Many define sexual exploitation as, *inter alia*, using children in child pornography. *E.g.*, BLACK’S LAW DICTIONARY 1407 (8th ed. 2004) (defining “sexual exploitation” as “[t]he use of a person, esp. a child, in prostitution, pornography, or other sexually manipulative activity that has caused or could cause serious emotional injury”); SETH L. GOLDSTEIN, THE SEXUAL EXPLOITATION OF CHILDREN: A PRACTICAL GUIDE TO ASSESSMENT, INVESTIGATION, AND INTERVENTION 33 (2d ed. 1999) (identifying child pornography as one of the three categories of sexual exploitation); *Child Sexual Exploitation*, WYO. DIVISION CRIM. INVESTIGATION, <http://wyomingdci.wyo.gov/dci-operations-section/child-sexual-exploitation> (“What is child sexual exploitation? Child sexual exploitation can involve the following: Possession, manufacture and distribution of child pornography; online enticement of children for sexual acts; child prostitution; child sex tourism and; child sexual molestation.”); Nat’l Ctr. for Missing & Exploited Children, *FAQ: Child Sexual Exploitation*, MISSINGKIDS.COM, <http://www.missingkids.com/Exploitation/FAQ> (stating that child sexual exploitation includes possession, manufacture, and distribution of child pornography). Such definitions are obviously of no use for our purposes—to define child pornography in terms of sexual exploitation and then to define sexual exploitation in terms of child pornography is hopelessly circular.

legislative definitions because child pornography is a constitutional category, which makes it necessarily independent from legislative policy preferences.<sup>96</sup>

The proposed definition contemplates two components of sexual exploitation or abuse: (1) sexual activity and (2) the circumstance that renders that activity exploitative or abusive. The sexual activity component obviously includes sexual molestation—that is, so-called “contact offenses” where there is physical contact between a minor and an adult of a sexual nature. Contact offenses include both involuntary contact (that is, sexual assaults) and contact for which a minor cannot legally consent.

The sexual activity component also includes sexual activity where there is no contact between the victim and another individual.<sup>97</sup> Many child pornography statutes prohibit depictions of sexual intercourse, bestiality, masturbation, sado-masochistic abuse, or lewd or lascivious exhibition of the genitals.<sup>98</sup> Sexual intercourse and sado-masochistic abuse are necessarily contact offenses, while bestiality and masturbation may be noncontact offenses. Lewd or lascivious exhibition of the genitals is often a noncontact offense.<sup>99</sup>

The circumstance that renders an activity exploitative or abusive is more difficult to define than sexual activity. I propose that abuse and exploitation include only force, coercion, or lack of consent.<sup>100</sup> Some have suggested that the category

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96. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”). Indeed, legislatures have, at times, deliberately failed to provide clear definitions in child pornography statutes in an attempt to keep defendants from exploiting “loopholes” in such definitions. See *Mazzone*, *supra* note 92, at 185.

97. *New York v. Ferber*, 458 U.S. 747, 758 n.9 (stating that “[s]exual molestation by adults is often involved in the production of” child pornography and thus implying that some child pornography is produced in the absence of sexual molestation).

98. This is the definition from both the statute at issue in *Ferber* and the current federal statute. N.Y. PENAL LAW § 263.00(1), (3), (4) (McKinney 1980); 18 U.S.C. § 2256(2)(A)–(B) (2012). The Court appears to have affirmed the constitutionality of this definition *sub silentio* in *Ferber*.

99. Lewd or lascivious exhibition of the genitals is difficult to define because, unlike the other commonly identified sexual activities, the terms “lewd” and “lascivious” do not have a commonly accepted meaning. See Adler, *Perverse Law*, *supra* note 20, at 238–41 (discussing the problems in defining the terms and noting that their meaning has expanded steadily). Providing a definition of lewd or lascivious exhibition of the genitals is beyond the scope of this Article, which assumes *arguendo* that some depictions of child nudity constitute sexual activity, that some depictions do not, and that courts are competent to distinguish between those two categories.

I recognize that it may, in fact, be impossible to make such distinctions. As Amy Adler has noted, the courts’ willingness to accept lewd or lascivious exhibition of the genitals as a category of sexual activity for child pornography purposes “seems to threaten all pictures of unclothed children, whether ‘lewd’ or not, and even pictures of clothed children, if they meet the increasingly hazy definition of ‘lascivious’ or ‘lewd.’” Adler, *Inverting*, *supra* note 20, at 947.

100. See Weronika Kowalczyk, Note, *Abridging Constitutional Rights: Sexting Legislation in Ohio*, 58 CLEV. ST. L. REV. 685, 703–04 (2010) (noting that “[a]lthough there are variations” of the definition of child sex abuse, all the definitions “encompass at least two factors: (1) sexual activities involving minors, and (2) ‘an abusive condition, such as

ought to include any situation in which a child could suffer emotional injury<sup>101</sup> or in which the audience derives sexual gratification.<sup>102</sup> These two suggestions assess the abusive or exploitative circumstances after the fact—that is, after the image has already been created and is being viewed. The exploitation or abuse contemplated by my proposed definition must occur at the same time the image is created. If the sexual gratification of the viewer were our only criterion, then child pornography could include wholly innocent images—such as pictures from a Sears catalogue—which are apparently considered sexually titillating by some individuals.<sup>103</sup> And if emotional injury were the only criterion, then child pornography could include, for example, written descriptions rather than visual depictions.<sup>104</sup>

What is more, the exploitation or abuse must exist independently of the actual filming or photographing itself. That is to say, the mere fact that an image was created is insufficient to demonstrate that the child depicted was abused or exploited. One must demonstrate that the child would have been abused or exploited even if no image had been captured—for example, because he or she was subject to sexual contact or because he or she engaged in noncontact sexual activity that was not the product of his or her own free will.

In sum, sexual exploitation or abuse encompasses (a) sexual contact or noncontact sexual activity that is (b) the result of force, coercion, or lack of consent. This definition of abuse or exploitation is superior to a definition based on whether a child could suffer emotional injury or whether the audience derives sexual gratification from the image because those definitions would sweep in significant amounts of material that is not pornographic. Thus, it is appropriate to limit the definition to some sort of abusive condition—such as force, coercion, or lack of consent—at the time the image was created.

Of course, because children are legally incapable of consenting to sexual activity, one might argue that lack of consent does not place any meaningful limits on the term sexual exploitation or abuse. That is not accurate. Lack of consent contemplates at least two limitations. First, it limits abuse or exploitation to situations involving another participant in addition to the minor depicted. The concept of consent assumes two actors—the person seeking consent and the person giving consent. Thus, a noncontact instance of sexual exploitation or abuse is best

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coercion or lack of consent” (quoting ROGER J.R. LEVESQUE, *SEXUAL ABUSE OF CHILDREN: A HUMAN RIGHTS PERSPECTIVE* 151–52 (1999)).

101. *See, e.g.*, COLO. REV. STAT. ANN. § 18-6-403(1) (West 2013) (justifying the prohibition on child pornography based on, inter alia, the fact that “the sexual exploitation of children constitutes a wrongful invasion of the child’s right of privacy and results in social, developmental, and emotional injury to the child”); BLACK’S LAW DICTIONARY, *supra* note 95, at 1407 (defining “sexual exploitation” as “[t]he use of a person, esp. a child, in prostitution, pornography, or other sexually manipulative activity that has caused or could cause serious emotional injury”).

102. *See, e.g.*, *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff’d*, 813 F.2d 1231 (9th Cir. 1987).

103. *See infra* notes 199–200.

104. *See infra* text accompanying notes 129–30.

conceptualized as a minor engaging in sexual activity at the prompting of another individual (for example, based on a request or a threat).<sup>105</sup>

Second, framing exploitation as a question of consent excludes a number of contact and noncontact activities by minors above the age of consent. Although child pornography laws prohibit images of minors below the age of eighteen, most American jurisdictions set the age of consent for sexual activity below that age.<sup>106</sup> Images that depict sexual activity of minors above the age of consent do not depict exploitation or abuse, as defined in this Article, unless the images depict forcible sexual contact (that is, a sexual assault) or resulted from coercion. Absent physical force or coercion, images depicting minors above the age of consent are not the product of exploitation or abuse and thus ought not be deemed child pornography.

It is important to note that this Article defines the term “exploitation” more narrowly than its common usage. Exploitation is a broad term, generally defined as “taking advantage of something” or “taking unjust advantage of another for one’s own benefit.”<sup>107</sup> This broad common understanding of the term has doubtless led many to define sexual exploitation to include any sexual depiction of a child.<sup>108</sup> In adopting a narrower definition of exploitation—the presence of an abusive condition, such as force, coercion, or lack of consent—this Article attempts to define exploitation in a manner that meaningfully distinguishes between adults and children.<sup>109</sup> A definition that distinguishes between adults and children seems warranted for a doctrine such as child pornography, given that the legal ramifications are dramatically different depending on whether the person depicted is a child or an adult.

Finally, some will undoubtedly object to the proposed definition because it will interfere with enforcement. That is correct. Most obviously, it will prevent the conviction of defendants who possess images that were not created through sexual exploitation or abuse of a child. Part III explains how some images—namely, many images that depict minors above the age of consent, images that were created through computer morphing, and images resulting from surreptitious filming or photographing—are not punishable as child pornography under the proposed definition.

In addition to excluding some images from the category of child pornography, the proposed definition may make it more difficult to prosecute in cases involving images that are the product of abuse or exploitation—namely, images that are properly categorized as child pornography, even under the proposed definition. That is because defendants will be able to demand that prosecutors prove beyond a reasonable doubt that the images in their case are the product of exploitation or abuse. Because the circumstances under which an image is created will not always

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105. See Shouplin, *supra* note 42, at 537 (defining “sexual exploitation” as “sexual activity by a child that is encouraged, promoted, or paid for by an adult”).

106. See WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 1021–22 (1st ed. 1997) (noting that thirty-nine states and the District of Columbia set the age of consent at or below sixteen).

107. BLACK’S LAW DICTIONARY, *supra* note 95, at 619.

108. See *infra* note 128 and accompanying text.

109. See *infra* text accompanying notes 135–39.

be clear from an inspection of the image itself, the proposed definition may result in fewer convictions than under the present system.<sup>110</sup>

Concerns about enforcement problems are not unique to the proposed definition. Similar concerns prompted Congress to raise the age for its child pornography statutes from sixteen to eighteen in 1984.<sup>111</sup> Enforcement concerns also led Congress to prohibit virtual child pornography in 1996,<sup>112</sup> the prohibition that was struck down by the Supreme Court in *Ashcroft v. Free Speech Coalition*.<sup>113</sup>

While enforcement concerns are certainly important, there are at least two reasons why such concerns do not undermine the proposed definition. First, as the *Free Speech Coalition* decision explains, enforcement concerns ought not drive First Amendment definitions.<sup>114</sup> Second, the proposed definition is not the last

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110. The magnitude of this impact is, of course, unknown. It may, however, prove not to be particularly great. In the wake of the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, one might have expected to see a decrease in child pornography convictions because prosecutors had to prove, beyond a reasonable doubt, that an image was not virtual child pornography. A recent study suggests that the effect of *Free Speech Coalition* on the ability of prosecutors to obtain child pornography convictions has been negligible. See JANIS WOLAK, DAVID FINKELHOR & KIMBERLY J. MITCHELL, CHILD PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES: FINDINGS FROM THE NATIONAL JUVENILE ONLINE VICTIMIZATION STUDY 21–25 (2005).

111. See H.R. REP. NO. 98-536, at 7–8 (1983), reprinted in 1984 U.S.C.C.A.N. 492, 498–99. Prior to that, prosecutors had difficulties obtaining child pornography convictions when they could not secure the testimony of the minor depicted in the image unless the age of the minor was patently obvious from the image itself, such as those minors who had obviously not yet entered puberty. As one court explained, “[r]aising the age to eighteen enables enforcement . . . whenever the child depicted does not appear to be an adult.” *United States v. Freeman*, 808 F.2d 1290, 1293 (8th Cir. 1987).

112. See Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-26 (codified at 18 U.S.C. §§ 2251–52, 2256 (2012)). Congress was worried that technological advancement would make it difficult for prosecutors to prove whether a particular image was an image of an actual child or whether it was a virtual creation. That worry appears to be well founded. See Timothy J. Perla, Note, *Attempting to End the Cycle of Virtual Pornography Prohibitions*, 83 B.U.L. REV. 1209, 1215 (2003).

113. 535 U.S. 234 (2002). The year after the Court's decision in *Free Speech Coalition*, enforcement concerns led Congress to enact a narrower prohibition on the production, distribution, and possession of virtual child pornography. See Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified at 18 U.S.C. § 2256(8)(B)) (providing for a new prohibition on the production, distribution, and possession of virtual child pornography that is “indistinguishable from” real pornography); see also Bell, *supra* note 15, at 1897–99; Perla, *supra* note 112, at 1214. While a few defendants have attempted to argue that this provision makes federal child pornography law overbroad, see, e.g., *United States v. Payne*, 519 F. Supp. 2d 466, 480–81 (D.N.J. 2007), *aff'd*, 394 F. App'x 891 (3d Cir. 2010); *United States v. Sherr*, 400 F. Supp. 2d 843, 848–49 (D. Md. 2005), as of December 1, 2013, I have not been able to locate a reported case in which a federal court has addressed the constitutionality of this new prohibition on virtual child pornography.

114. In response to the enforcement concerns that had been raised about virtual child pornography, the *Free Speech Coalition* Court stated:

word on prohibitions and enforcement. For example, as noted below, victims of morphed computer images could seek recourse through various tort doctrines,<sup>115</sup> and victims of surreptitious filming and photographs could be protected by criminal statutes prohibiting video voyeurism.<sup>116</sup> In criminal trials, prosecutors may be able to rely on the obscenity exception to the First Amendment in cases if the circumstances of creation are unknown. The proposed definition affects only the categorical First Amendment exception for child pornography. It does not limit the exception for obscenity, and there is little doubt that many pornographic images that depict children are obscene.<sup>117</sup>

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[T]he Government says that the possibility of producing images by using computer imaging makes it very difficult for it to prosecute those who produce pornography by using real children. Experts, we are told, may have difficulty in saying whether the pictures were made by using real children or by using computer imaging. The necessary solution, the argument runs, is to prohibit both kinds of images. The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down.

The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse.

535 U.S. at 254–55. That analysis applies equally to the proposed definition. If the main harm to be avoided through child pornography laws is the abuse and exploitation in creation, and if (as this Article argues) images created without such exploitation or abuse ought not be prohibited, then enforcement concerns ought not drive decisions about the scope of the constitutional category.

115. See *infra* text accompanying notes 241–44.

116. See *infra* note 263.

117. See, e.g., *New York v. Ferber*, 458 U.S. 747, 779 n.4 (1982) (Stevens, J., concurring in the judgment) (“The Senate Committee on the Judiciary concluded that ‘virtually all of the materials that are normally considered child pornography are obscene under the current standards,’ and that ‘[i]n comparison with this blatant pornography, non-obscene materials that depict children are very few and very inconsequential.’” (quoting S. REP. NO. 95-438, at 13 (1977), reprinted in 1978 U.S.C.C.A.N. 40, 50)). Indeed, counsel for Ferber appears to have conceded at Supreme Court oral argument that the images at issue in that case were obscene. Schauer, *supra* note 26, at 290.

For an example of an obscenity prosecution for images created without the exploitation or abuse of children, see David Kravets, ‘Obscene’ U.S. Manga Collector Jailed 6 Months, WIRE (Feb. 2, 2010, 5:14 PM), <http://www.wired.com/threatlevel/2010/02/obscene-us-manga-collector-jailed-6-months/>.

Some prosecutors might hesitate to use the obscenity exception rather than the child pornography exception because the latter category has fewer limitations. For example, to prevail on an obscenity prosecution, a prosecutor will have to demonstrate that the image (a) when taken as a whole and applying contemporary community standards, appeals to the prurient interest; (b) depicts sexual conduct in a patently offensive way, as determined by community standards; and (c) when taken as a whole, lacks serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 24 (1973). But these standards are likely met for many child pornography images. Indeed, images of children engaged in sexual activities may be more likely to be obscene than images of adults engaging in those same acts.

Prosecutors might also be concerned that they will be unable to prosecute possession cases. And as noted above, private possession of obscenity is protected under *Stanley v. Georgia*, 394 U.S. 557 (1969), while private possession of child pornography is not.

In short, although the proposed definition may make enforcement or prosecution more difficult, limiting the child pornography definition to images that are the product of exploitation or abuse appears to be the most defensible approach, and the costs such a definition may impose on criminal prosecutions are smaller than they first appear.

### B. The Harm of Circulation

In addition to the harm of sexual exploitation and abuse in the creation of images, the harm most often discussed in the child pornography cases and academic literature is the harm of circulation.<sup>118</sup> The harm of circulation is often characterized as a “continuing harm,” because the images “permanently record the victim’s abuse” and “haunt[] the children in years to come.”<sup>119</sup>

The harm of circulation is distinct from the harm of creation.<sup>120</sup> The harm of creation is the harm suffered by the child depicted at the time the image is created. The child suffers that harm because she is exploited or abused, and she suffers that harm independently from the creation of the image. Put differently, a child who is sexually assaulted or a child who is seduced into removing her clothes and posing in a sexually explicit manner is harmed regardless whether the moment is captured by a photograph (or on film).

In contrast, the harm of circulation is the reputational and privacy harm suffered by the child when the image is viewed at a later time.<sup>121</sup> As the *Ferber* Court tells

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However, the protection afforded by *Stanley* is unlikely to be very robust in the internet age. *Stanley* protects only the private possession of obscenity; it does not protect against charges of distribution or receipt. *See* United States v. Reidel, 402 U.S. 351, 354–55 (1971); *see also* United States v. Whorley, 550 F.3d 326, 332 (4th Cir. 2008) (“*Stanley*’s holding was a narrow one, focusing only on the *possession* of obscene materials in the privacy of one’s home. The Court’s holding did not prohibit the government from regulating the channels of commerce. In an unbroken line of Supreme Court decisions since *Stanley*, the Court has repeatedly rejected the notion, urged by Whorley, that as a matter of logic, because the First Amendment prohibits the criminalization of private possession of obscene materials within the home, there exists a correlative ‘right to receive’ obscene materials.” (emphasis in original)).

That *Stanley* does not protect against distribution or receipt is of particular relevance after the advent of the internet because a person who possesses an image on his or her computer will in most circumstances have provided the government with sufficient evidence to charge that individual not only with possession but also with receipt. Specifically, the government can charge an individual who downloads a child pornography image from the internet with receiving that image—that is, taking possession of an object from another person—and with possessing that image on his or her computer. Indeed, a number of courts have recognized the overlap (and in some instances complete identity) of possession and receipt by dismissing child pornography charges under double jeopardy analysis. *See, e.g.*, United States v. Miller, 527 F.3d 54, 71 n.15 (3d Cir. 2008). What is more, the same evidence that the government requires to prove possession—that is, the computer—will likely provide evidence of receipt via automatically stored electronic data.

118. *See, e.g.*, *Ferber*, 458 U.S. at 759 n.10 (quoting Shoumlin, *supra* note 42, at 545); Leary, *supra* note 71, at 528; Audrey Rogers, *Child Pornography’s Forgotten Victims*, 28 PACE L. REV. 847, 853–54 (2008).

119. *Osborne v. Ohio*, 495 U.S. 103, 111 (1990).

120. Rogers, *supra* note 90, at 37.

121. *E.g.*, Child Pornography Prevention Act of 1996, Pub. L. 104-208, § 121(1)(7), 110

us, the distribution of child pornography “violates ‘the individual interest in avoiding disclosure of personal matters.’”<sup>122</sup> The fact that a child was sexually assaulted is a highly private matter. What a child looks like without her clothes is also highly personal. A child whose sexual exploitation or abuse was captured on film or in a photograph has her privacy violated each time that image is viewed by another individual, much as the publication of a defamatory statement causes harm each time it is published.<sup>123</sup>

This concept of the harm of circulation suggests not only that the harm to a child depicted in child pornography is exacerbated by the existence of the image,<sup>124</sup> but also that a child could suffer such harm *even if* the child suffered no abuse or exploitation in the creation of the image.<sup>125</sup> For example, a minor who creates a sexually suggestive image of herself, without any prompting or suggestion by a third party, could nonetheless suffer harm if that image were subsequently distributed to others.<sup>126</sup> Although the image was created without exploitation or abuse,<sup>127</sup> some maintain that the image nonetheless constitutes child pornography because it is a depiction of sexual activity that involves a real child.<sup>128</sup>

The harm of circulation, standing alone, should be insufficient to classify an image as child pornography. One reason to reject a circulation of harm definition for child pornography is that it would sweep far broader than what is permitted under *Ferber* and its progeny. For example, a definition based only on reputational harm need not be limited to visual depictions of minors engaged in sexual activity. If a written account of child sex abuse identified an actual minor—by name or physical description—that account would also cause reputational or emotional harm. Yet *Ferber* specifically stated that nonvisual depictions “retain[] First Amendment protection.”<sup>129</sup> Reputational and emotional harm also occur upon the disclosure of facts surrounding all sexual activity, not simply those activities that are abusive or exploitative.<sup>130</sup>

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Stat. 3009–26 (codified at 18 U.S.C. § 2251 note (2012)) (noting congressional finding that “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”); Rogers, *supra* note 118, at 853 (“When the pornographic images are viewed by others, the children depicted are victimized once again.”).

122. 458 U.S. at 759 n.10 (quoting *Whalen v. Roe*, 429 U.S. 589, 599 (1977)).

123. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249 (2002) (“Like a defamatory statement, each new publication of the speech would cause new injury to the child’s reputation and emotional well-being.”); *see also* Rogers, *supra* note 118, at 862 (“[T]he possessor causes actual harm because re-publication inflicts shame and humiliation upon the child depicted.”).

124. *See supra* text accompanying note 41.

125. *See, e.g.*, *United States v. Hotaling*, 634 F.3d 725, 728–29 (2d Cir. 2011); Rogers, *supra* note 90, at 16; Mazzone, *supra* note 92, at 173 n.32.

126. Leary, *supra* note 71, at 539–42.

127. This assumes, of course, that an individual cannot exploit herself. *But see* Leary, *supra* note 54 (advancing a theory of “self-exploitation”).

128. *See, e.g.*, *A.H. v. State*, 949 So. 2d 234 (Fla. Dist. Ct. App. 2007); Leary, *supra* note 71.

129. *New York v. Ferber*, 458 U.S. 747, 765 (1982).

130. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977) (“Sexual relations . . . are normally entirely private matters . . .”).

Another reason to reject a harm of circulation definition for child pornography is that it is, in some respects, too narrow, and thus many child pornography prosecutions could not be justified on the basis of that harm. Children who are depicted but not identifiable—for example, because their faces are not included in the image—do not suffer the reputational or privacy harm associated with circulation. Yet there is little doubt that such pictures fall within the core of what has traditionally been considered child pornography.

Prosecutions for private possession also cannot be justified based on the harm of circulation. The harm of circulation supports the prohibition of the production and distribution of child pornography because, as with defamatory statements, every distribution of child pornography causes new emotional and reputational harm to the child depicted.<sup>131</sup> But the harm of circulation is absent in cases involving only private possession. The private possession of child pornography causes no new privacy or reputational harm to the victim,<sup>132</sup> just as a person repeating a defamatory statement in an empty room causes no new reputational harm.<sup>133</sup>

Of course, one could respond to the objection that this definition is too narrow by noting that a child pornography definition need not be based *exclusively* on the harm in circulation. Child pornography could be defined as an image that causes harm in creation or in circulation. Indeed, the Supreme Court's repeated references to both the harm of creation and the harm of circulation could be read as endorsing such an alternative definition.<sup>134</sup> But such a dual definition sweeps too broadly, extending the definition of child pornography beyond any salient differences between adults and children. First Amendment doctrine treats pornographic images very differently depending on whether those images depict adults or children.<sup>135</sup> Adults and children do not have significantly different privacy or reputational interests; they do, however, have meaningfully different concerns in the context of sexual activity.

Imagine, for example, a thirteen-year-old girl and a thirty-year-old woman who live in the same house across the street from a peeping Tom. The peeping Tom surreptitiously watches the thirteen-year-old and the thirty-year-old through binoculars while they shower. Both the thirteen-year-old and the thirty-year-old have suffered a privacy invasion by being watched in the shower, and that harm is

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131. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249–50 (2002); *United States v. Klug*, 670 F.3d 797, 800 (7th Cir. 2012).

132. See *infra* text accompanying notes 232–34; cf. *United States v. Laraneta*, 700 F.3d 983, 991 (7th Cir. 2012) (indicating that the harm caused by one person viewing an image of child pornography is significantly less than the harm caused by those who distribute the image), *cert. denied*, 134 S. Ct. 235 (2013).

133. See 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 5:109, at 748 (2d ed. 2012) (noting that a statement must be published to at least one other person in addition to the person defamed in order to establish a prima facie claim for defamation); see also *supra* note 22.

134. See *supra* notes 31–35, 41–42, 48–50 and accompanying text.

135. “*Ferber* involved a statutory scheme designed to protect children. The Court has often expressed its willingness to craft new and more deferential doctrine in approving such government action.” *The Supreme Court, 1981 Term*, *supra* note 26, at 147.

no different based on their age.<sup>136</sup> Now imagine that, instead of simply watching the thirteen-year-old and the thirty-year-old while they are in the shower, the peeping Tom decides to ask the thirteen-year-old and the thirty-year-old to take off their clothes in front of him and pose for him to take photos. If the thirteen-year-old agrees, she has been sexually exploited. If the thirty-year-old agrees, we would not say that she has suffered harm, even if she later regrets that decision. Imagine the same scenario, but without the camera. Again, we would say that the thirteen-year-old suffered harm and the thirty-year-old did not. The distinction here is not the reputational harm; it is the ability to consent to sexual activity.<sup>137</sup>

Some commentators have suggested that possession of child pornography cases are best justified by the harm of circulation.<sup>138</sup> While the harm of circulation may be more apparent in possession cases than is the harm of creation, I do not mean to suggest that the proposed definition would prohibit prosecution in an ordinary possession of child pornography case. So long as the image possessed is the product of child sex exploitation or abuse, that prosecution would be permitted under the proposed definition.<sup>139</sup> But if the image was created without exploitation or abuse, then as Part III explains in more detail, a prosecution for possession of child pornography would be prohibited.

### C. An “Integral Part” of an Illegal Course of Conduct

In addition to a definition based on the harm in creation or the harm in circulation, one could attempt to define child pornography based on whether an image is “an integral part” of criminal conduct. Whether an image is “an integral part of conduct in violation of a valid criminal statute” is the definition of child pornography suggested

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136. One might argue that the peeping Tom has done something more reprehensible by spying on the thirteen-year-old than by spying on the thirty-year-old, or one might be concerned that the peeping Tom poses a risk of sexually assaulting a child based on his viewing of the thirteen-year-old rather than his viewing of the thirty-year-old. But those arguments are distinct from the harm suffered by the victims.

137. This example does not explain all differences between child pornography and obscenity. Imagine, for example, that instead of asking the thirteen-year-old and the thirty-year-old to pose for pictures, the peeping Tom rapes the thirteen-year-old and the thirty-year-old and photographs the rapes. There is no doubt that both the thirteen-year-old and the thirty-year-old suffered harm—they both suffered the harm of a sexual assault—yet only the pictures of the thirteen-year-old constitute illegal child pornography.

Even though both the thirteen-year-old and the thirty-year-old suffered harm, one could argue that the harm suffered by the thirteen-year-old is worse than that suffered by the thirty-year-old. Such an argument is supported by the relatively recent attempt by states to impose the death penalty for child rape. *See Kennedy v. Louisiana*, 554 U.S. 407, 423 (2008). Alternatively, one could argue that even if the thirteen-year-old and the thirty-year-old suffered equal amounts of harm, that similarity does not fully undermine the centrality of victim age in child pornography doctrine; that is because the pictures of the thirteen-year-old are almost certainly illegal obscenity.

138. *E.g.*, Rogers, *supra* note 118, at 853–54.

139. Notably, whether the image was, in fact, a product of exploitation or abuse may be contested as a factual matter. *See supra* text accompanying notes 111–17.

by the Court in *United States v. Stevens*.<sup>140</sup> *Stevens* says that child pornography is but one manifestation of this “previously recognized, long-established category of unprotected speech.”<sup>141</sup> One could read this language as suggesting that the child pornography exception to the First Amendment applies only if “there is specific illegal conduct to which the speech is integral.”<sup>142</sup>

Defining child pornography as images that are “an integral part” of illegal conduct raises the question what constitutes “an integral part.” That question does not have an easy answer. Indeed, the case that first identified the “integral part” exception to the First Amendment, *Giboney v. Empire Storage & Ice Co.*,<sup>143</sup> did not clearly define the reach of the exception, nor have subsequent cases applying *Giboney*.<sup>144</sup>

The “integral part” phrase could be read to define child pornography based on the illegality of the activity depicted.<sup>145</sup> Such a reading would exclude images that depict “completely legal sexual acts.”<sup>146</sup> But such a definition is at odds with the Court’s child pornography cases.<sup>147</sup> Although the Court’s child pornography cases include references to the illegality of sexual exploitation and abuse that occurred during production,<sup>148</sup> conduct need not be illegal in order to qualify as exploitative or abusive. Indeed, limiting the category of child pornography to images whose production involved not only sexual exploitation or abuse but also an independent criminal act is likely at odds with the holdings in *Ferber* and *Osborne*.

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140. 130 S. Ct. 1577, 1586 (2010).

141. *Id.*

142. Haynes, *supra* note 14, at 395.

143. 336 U.S. 490 (1949).

144. Volokh, *supra* note 79, at 1326.

145. *See* Haynes, *supra* note 14, at 373; *see also* Humbach, *supra* note 14, at 484–85 (“*Ashcroft* strongly implies that the categorical exclusion should be limited to materials that are produced by means of criminal child abuse and exploitation.”).

146. Haynes, *supra* note 14, at 373–74.

147. What is more, as Frederick Schauer has noted, “material protected by the First Amendment does not shed that protection merely because it depicts or describes illegal activity.” Schauer, *supra* note 26, at 289.

148. *See* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250 (2002) (“In contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production.”). *Ferber* suggests that the criminalization of child pornography *distribution* is permitted because the *production* of such images is illegal. *New York v. Ferber*, 458 U.S. 747, 761 (1982). It is not clear, however, whether the Court is referring to the illegality of the actions underlying the creation of the image or whether it is simply relying on statutes aimed at the creation of child pornography. *Compare id.* at 761 n.13 (referring to “additional abuse of children” that will occur in “the process involved in developing” child pornography images (quoting H.R. 66-55686, Reg. Sess., at 132 (Tex. 1979); Judianne Densen-Gerber, *Child Prostitution and Child Pornography: Medical, Legal, and Societal Aspects of the Commercial Exploitation of Children*, in *SEXUAL ABUSE OF CHILDREN: SELECTED READINGS* 77, 80 (Barbara McComb Jones et al. eds., 1980)), and *id.* at 761–62 (referring to the general concept that the First Amendment does not protect “speech or writing used as an integral part of conduct in violation of a valid criminal statute” (quoting *Giboney*, 336 U.S. at 498)), with *id.* at 762 n.15 (referring to statutes outlawing the use of minors in the creation of pornographic materials).

Recall that the conviction affirmed in *Ferber* rested on films “depicting young boys masturbating.”<sup>149</sup> There is no indication in the Court’s opinion that either masturbating or requesting that a minor masturbate was illegal in New York or in the jurisdiction where the films were produced.<sup>150</sup> Similarly, the conviction affirmed in *Osborne* rested on “photographs” that depicted “a nude male adolescent posed in a sexually explicit position.”<sup>151</sup> The *Osborne* opinion did not indicate that the photographs depicted activity that was, in the absence of the creation of an image, illegal. There is little doubt that, assuming an adult coerced or otherwise convinced the minors to pose for the films in *Ferber* or the photographs in *Osborne*, those minors were sexually exploited (as that term is defined in this Article).<sup>152</sup> But it is unclear whether that exploitation would have been a crime if the minors had not been photographed or filmed. Indeed, because child pornography is sometimes distributed internationally, limiting the child pornography category to those images that capture activity that was illegal at the time and place of their creation would likely destroy the states’ ability to dry up the market.<sup>153</sup> Thus, it seems safe to say that, references to illegality notwithstanding, the Supreme Court never intended to limit the constitutional category of child pornography based on “whether the production of the pornography involved some independent crime, such as child abuse.”<sup>154</sup>

Looking at how the Court’s child pornography cases reference the “integral part” language underscores the unsuitability of using the phrase as a definition for child pornography. In *Ferber* and *Osborne*, for example, the Court explained that the targeted “conduct in violation of a valid criminal statute” was the production of child pornography.<sup>155</sup> But that cannot serve as the definition for child pornography. Under that approach, the exception has no meaningful limit. The “integral part” exception would apply to the dissemination of speech simply by making it illegal to make a particular statement in the first instance.<sup>156</sup>

In *Stevens* and *Free Speech Coalition*, the Court offered a different explanation—that the targeted “conduct in violation of a valid criminal statute” is

149. 458 U.S. at 752.

150. See Humbach, *supra* note 14, at 468 (making this observation).

151. *Osborne v. Ohio*, 495 U.S. 103, 107 (1990).

152. See *supra* text accompanying notes 100–09.

153. See Humbach, *supra* note 14, at 469 (noting “possible legal status of such production in various foreign countries from which child pornography might be imported”).

154. *Id.* at 468.

155. *Ferber* makes this statement in connection with the following observation:

[W]ere the statutes outlawing the employment of children in these films and photographs fully effective, and the constitutionality of these laws has not been questioned, the First Amendment implications would be no greater than that presented by laws against distribution: enforceable production laws would leave no child pornography to be marketed.

*New York v. Ferber*, 458 U.S. 747, 762 (1982). *Osborne* makes this statement in support of its conclusion that it is “surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand.” 495 U.S. 103, 109–10.

156. Cf. Volokh, *supra* note 79, at 1315.

the abuse or exploitation that occurs in creating child pornography.<sup>157</sup> Because child pornography creates a profit motive for the creation of images, and because images result from abuse or exploitation, child pornography is an “integral part” of the illegal activity that occurs at creation.<sup>158</sup> This is perhaps the best interpretation of child pornography as “an integral part” of illegal conduct—namely that child pornography exists solely because a child was abused or exploited and that the child would not have been abused or exploited but for the desire to create child pornography.<sup>159</sup>

But this definition of child pornography as “an integral part” of illegal conduct is still flawed. For one thing, even though it is framed as analysis about exploitation or abuse, it still suggests that the abuse or exploitation must be illegal independent of the creation of the image. As noted above, that analysis conflicts with the outcomes in *Ferber* and *Osborne*.<sup>160</sup> This definition of child pornography is also at odds with other First Amendment cases.<sup>161</sup> Those cases demonstrate that “not all speech that provides a motive for illegal conduct can be outlawed simply because it is ‘an integral part of conduct in violation of a valid criminal statute.’”<sup>162</sup> Indeed, such reasoning would have prohibited publication in the Pentagon Papers case,<sup>163</sup> as well as other cases in which the Court has found First Amendment protection.<sup>164</sup>

One could interpret the “integral part” language as prohibiting speech that helps or encourages the commission of a *subsequent* sex crime against a child.<sup>165</sup> This approach would be consistent with the Court’s concern in *Osborne* that predators could use child pornography to seduce other children.<sup>166</sup> But such a reading is also problematic. First, this definition was explicitly rejected in *Free Speech Coalition*.<sup>167</sup> Second, such a definition would conflict with the First Amendment principle articulated in *Brandenburg v. Ohio*.<sup>168</sup> *Brandenburg* held that speech helping or encouraging illegal behavior of others is protected unless the speech is

157. *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249–50 (2002).

158. *See The Supreme Court, 1981 Term, supra* note 26, at 147–48.

159. *Cf. Schauer, supra* note 26, at 300 (“Child pornography is an integral part of an illegal act in the sense that an illegal act gives rise to the communication and because the publication exists solely because there is an illegal act to portray.”).

160. *See supra* text accompanying notes 148–54.

161. *See, e.g., Bartnicki v. Vopper*, 532 U.S. 514 (2001); *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829 (1978); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

162. *Volokh, supra* note 79, at 1325.

163. *N.Y. Times Co.*, 403 U.S. 713.

164. *See Schauer, supra* note 26, at 300; *Volokh, supra* note 79, at 1325; *see also Nadine Strossen, United States v. Stevens: Restricting Two Major Rationales for Content-Based Speech Restrictions*, 2010 CATO SUP. CT. REV. 67, 86 (discussing *Bartnicki v. Vopper*).

165. *See Volokh, supra* note 79, at 1312 (noting that the “integral part” language from *Giboney* has been read to restrict speech that informs people how to violate the law when the speaker intends for the speech to help people commit crimes, and it has also been read to restrict speech that encourages the commission of a crime).

166. *See supra* text accompanying notes 53–54.

167. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250 (2002).

168. 395 U.S. 444 (1969); *see also Bell, supra* note 15, at 1895.

both (a) intended to cause and (b) likely to cause imminent lawless conduct.<sup>169</sup> There is significant evidence that viewing child pornography does not cause individuals to engage in sexual contact with children.<sup>170</sup> Thus the “integral part” language (as limited by *Brandenburg*) does not provide a rationale that permits an appropriate definition of child pornography.

#### D. The Dost Test

The definitions discussed in the preceding subparts rely on facts or circumstances surrounding the creation or circulation of an image. There is also a definition commonly employed by lower courts that looks only at the content of the image in question. This popular lower court test—the *Dost* test<sup>171</sup>—provides a standard for determining whether an image falls within the federal prohibition on the lascivious display of a minor’s genitals.<sup>172</sup> The *Dost* test identifies six factors for courts to use in deciding whether an image constitutes a lascivious display of genitalia, that is, whether the content of an image constitutes child pornography:

- 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; 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.<sup>173</sup>

Recall that my proposed definition has two components: (1) the depiction of sexual activity and (2) the circumstance that renders that activity exploitative or abusive.<sup>174</sup> The *Dost* test distinguishes only between those instances of child nudity that satisfy the sexual activity component of sexual exploitation or abuse (that is, those images that depict a “lascivious exhibition” of the genitals) and those that do not.

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169. 395 U.S. at 447–49.

170. See Melissa Hamilton, *The Child Pornography Crusade and Its Net-Widening Effect*, 33 CARDOZO L. REV. 1679, 1694–716 (2012); Hessick, *supra* note 5, at 873–80; see also *Free Speech Coal.*, 535 U.S. at 250 (“While the Government asserts that the images can lead to actual instances of child abuse, the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.” (citation omitted)).

171. The test was first articulated in *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), *aff’d*, 813 F.2d 1231 (9th Cir. 1987) (unpublished table decision).

172. For a very persuasive critique of the *Dost* test, see Adler, *Inverting*, *supra* note 20.

173. *Dost*, 636 F. Supp. at 832. While the *Dost* test has been the subject of criticism, see *United States v. Rivera*, 546 F.3d 245, 250–52 (2d Cir. 2008) (collecting sources), it remains popular with lower courts, see Adler, *Inverting*, *supra* note 20, at 953 (“Virtually all lower courts that have addressed the issue have embraced the so-called ‘*Dost* test.’”).

174. See *supra* Part II.A.

The difference between the *Dost* test and my proposed definition is perhaps best illustrated by the first factor, “whether the focal point of the visual depiction is on the child’s genitalia or pubic area.”<sup>175</sup> Whether the individual creating an image focuses his or her camera on the genitalia of the child depicted does not obviously change the experience of the child. Compare, for example, the films at issue in *United States v. Johnson*<sup>176</sup> and *United States v. Steen*.<sup>177</sup> Both cases involved defendants who filmed nude minors without their knowledge or permission.<sup>178</sup> The minors filmed by both men experienced essentially the same harm—a privacy violation of which they were unaware at the time. Yet the two defendants were treated quite differently based on the content of the pictures that their relatively similar behavior yielded.<sup>179</sup> The *Steen* court held that, because Steen’s camera captured an image that displayed the minor’s “pubic region” for approximately two seconds “on the far side of the image’s frame,” the first *Dost* factor was not satisfied and the image did not constitute child pornography.<sup>180</sup> In contrast, the *Johnson* court remarked on the defendant’s use of the zoom feature on his camera and the “camera angle” when noting that “in many of the video clips . . . the frame encompassed [the minors’] nude bodies from their shoulders to below their knees.”<sup>181</sup> The court apparently concluded that this satisfied the first *Dost* factor.<sup>182</sup>

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175. *Dost*, 636 F. Supp. at 832.

176. 639 F.3d 433 (8th Cir. 2011).

177. 634 F.3d 822 (5th Cir. 2011).

178. *Johnson* placed his camera on a shelf in an office where underage girls removed their clothing, 639 F.3d at 436; *Steen* placed his camera on the top of a partial wall in a tanning salon to film an underage girl in the next room as she removed her clothing, 634 F.3d at 824.

Although *Johnson* involved a conviction for attempted production of child pornography and *Steen* involved a conviction for the completed crime (rather than attempt), that distinction does not appear to have affected the courts’ analysis on the first *Dost* factor.

179. “[A] finding of graphic focus may depend on where a photographer aims his camera, making a determination of constitutional protection depend on what could be an accident of pictorial composition.” Adler, *Perverse Law*, *supra* note 20, at 239. Although these defendants’ actions were similar, it is possible to distinguish these two cases because the minors in the *Johnson* case were acting at the defendant’s direction, while the minor in the *Steen* case was not. *See infra* note 257.

180. *Steen*, 634 F.3d at 827.

181. 639 F.3d at 441.

182. *Id.* at 436–37, 440–41. As noted above, *Johnson* involved a conviction for attempt. The court explained:

Eight video clips of two juvenile victims were shown to the jury. Many of these video clips showed the young women standing on the scale, and their nude bodies from about their shoulders to below their knees clearly appear. Their faces appear on screen only when they bend or stoop over to remove or put back on items of clothing. Other clips are more tightly focused, and in one of the clips, the camera’s focus has been so “zoomed in” that the left half of the female’s body from her left buttock down to her knee fills half of the screen. Had the female been facing the camera instead of away from it, a reasonable jury could have drawn a fair inference that the camera would have recorded a close-up view of her naked pubic area. Some of the clips clearly reveal the pubic areas of the young women not only as they stand on the scale facing the camera, but also as they go through the motions required to remove all of their clothing and put it back on.

*Id.* at 436–37.

The “focal point” factor can also make subsequent editing or manipulation of an image highly relevant to the child pornography inquiry. A number of lower court decisions state that the cropping of images or focusing in on a specific area may be appropriately considered in the question of lasciviousness.<sup>183</sup> For example, in *United States v. Stewart*,<sup>184</sup> the defendant cropped pictures in such a way as to make the children’s genitalia the “focal point of the images.”<sup>185</sup> Although the government conceded that the initial, larger images (photographs of young girls swimming naked at a beach) did not meet the definition of child pornography,<sup>186</sup> the court held that the defendant’s decision to crop the photographs rendered the new photographs lascivious and thus child pornography.<sup>187</sup>

The sixth *Dost* factor—“whether the visual depiction is intended or designed to elicit a sexual response in the viewer”—also departs significantly from my proposed definition. That factor has sometimes been interpreted as speaking only to the content of an image.<sup>188</sup> Other courts have interpreted the sixth factor to encompass an inquiry into the subjective thoughts of the creator or possessor, which can include an inquiry into the circumstances surrounding the creation of the image.<sup>189</sup>

One might argue that, because the sixth factor is framed in terms of the intentions of the person creating the image, this *Dost* factor could provide some information regarding the presence of sexual exploitation or abuse in production. Exploitation is an ambiguous concept, and whether the person who created the image “intended or designed” the image “to elicit a sexual response in the viewer” could help to distinguish between close cases. At the very least, it provides information about whether one person present at the creation of the image understood the circumstances of creation to be sexually charged.

But that is not how many lower courts apply the sixth factor. The factor is phrased in the passive voice rather than explicitly in terms of the creator’s intentions. Perhaps because of this ambiguous phrasing, some courts have relied on the response of individuals who subsequently viewed the image in applying this

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183. *E.g.*, *United States v. Brown*, 579 F.3d 672, 681 (6th Cir. 2009); *United States v. Freeman*, 808 F.2d 1290, 1292 (8th Cir. 1987); *United States v. Dauray*, 76 F. Supp. 2d 191, 196–97 (D. Conn. 1999), *rev’d*, 215 F.3d 257 (2d Cir. 2000).

184. 839 F. Supp. 2d 914 (E.D. Mich. 2012), *aff’d*, 729 F.3d 517 (6th Cir. 2013).

185. *Id.* at 923.

186. *Id.* at 922.

187. *Id.* at 923–24. Interestingly, the court appears to have believed that cropping was relevant to the sixth *Dost* factor. *See id.* at 923 (“The jury properly could infer that the image was intended to elicit a sexual response in the viewer because of how it was cropped and where it was located on the defendant’s computer.”).

188. *See, e.g.*, *United States v. Villard*, 885 F.2d 117, 125 (3d Cir. 1989) (“We must . . . look at the photograph, rather than the viewer. If we were to conclude that the photographs were lascivious merely because [the viewer] found them sexually arousing, we would be engaging in conclusory bootstrapping rather than the task at hand—a legal analysis of the sufficiency of the evidence of lasciviousness.”).

189. *See, e.g.*, *United States v. Brown*, 579 F.3d 672, 683–84 (6th Cir. 2009) (adopting a “‘limited context’ test” that “permits consideration of the context in which the images were taken”); *see also* Adler, *Inverting*, *supra* note 20, at 954 n.149 (“Courts have wavered on the question of whether the focus must be on the audience, the photographer, or both.”).

factor.<sup>190</sup> Whether someone derives sexual pleasure from a photograph does not retroactively create exploitation or abuse during the creation of the image.<sup>191</sup> What is more, whether an individual finds an image arousing gives information about the sexual interests of that individual, not about whether the existence of the image ought to be forbidden.<sup>192</sup>

And even assuming that the factor is evaluated only according to the creator's intentions, whether the creator thought the image might evoke a sexual response in another person is irrelevant to whether the image itself actually does depict sexual activity.<sup>193</sup> Prohibiting speech based on the feelings or thoughts that it provokes in others conflicts with the very core of First Amendment protection.<sup>194</sup> *United States v. Larkin*<sup>195</sup> illustrates this problem. That case involved five photographs that the defendant took of her five-year-old daughter. None of the five photographs focused on the child's genitalia, and the court expressed skepticism that three of the photos could be characterized as depicting sexual activity.<sup>196</sup> In deciding that the two remaining photographs did constitute child pornography, the court relied heavily on the sixth *Dost* factor. Although it questioned whether the first five *Dost* factors were sufficient for a finding of lasciviousness, the *Larkin* court relied on the fact that the defendant had sent the photograph to a known pedophile as evidence that the image was "intended or designed to elicit a sexual response in the viewer" and concluded that the image therefore constituted child pornography.<sup>197</sup>

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190. Adler, *Inverting*, *supra* note 20, at 957–60 (discussing *State v. Dixon*, No. 01C01-9802-CC-00085, 1998 WL 712344 (Tenn. Crim. App. Oct. 13, 1998), and *United States v. Knox*, 32 F.3d 733 (3d Cir. 1994)).

191. *Cf. Villard*, 885 F.2d at 125 ("Child pornography is not created when the pedophile derives sexual enjoyment from an otherwise innocent photo." (quoting *United States v. Villard*, 700 F. Supp. 803, 812 (D.N.J. 1988))).

192. *See United States v. Steen*, 634 F.3d 822, 829 (5th Cir. 2011) (Higginbotham, J., concurring) ("A pedophile may be aroused by photos of children at a bus stop wearing winter coats, but these are not pornographic.").

193. *See Adler, Perverse Law*, *supra* note 20, at 256–65 (critiquing the *Dost* test on similar grounds).

194. The ability to affect the thoughts or feelings of listeners is often referred to as "advocacy," which the First Amendment undoubtedly protects. Even advocacy of the use of force or advocacy of violating the law is protected "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); *cf. Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253–54 (2002) ("The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit speech . . .").

195. 629 F.3d 177 (3d Cir. 2010).

196. "Whether the images contained in the first three photographs depict 'sexually explicit conduct' is questionable. Because we hold that the visual depictions of B.L. contained in photographs four and five satisfy the definition contained in 18 U.S.C. § 2251(2)(B)(iii), it is unnecessary to determine whether the conduct captured in the first three photographs also falls within the statute's ambit." *Id.* at 185 n.7.

197. *Id.* at 182, 185. "We have the same concern with this photograph as we expressed in our analysis of photograph number five; standing alone, none of the identified *Dost* factors sufficiently demonstrate lasciviousness. But 'given the particularities of the case,' the

Undoubtedly, Larkin's decision to send a photograph of her own daughter to an individual whom she knew as a pedophile is outrageous; it deserves strong condemnation, it should certainly result in the removal of the child from her care, and it should possibly result in other criminal charges. But Larkin's subjective knowledge about the sexual preferences of the individual to whom she sent the photograph does not change the content of the picture itself. Yet that seems to be the conclusion that the *Larkin* court reaches. Were it not for Larkin's knowledge of her intended viewer's pedophilia and her decision to send him the photograph, the court signaled that it would not have classified the image as child pornography.<sup>198</sup> There is evidence indicating that some pedophiles prefer pictures of children that are innocent rather than sexual in nature, including images of children "doing gymnastics and twirling batons, playing in swimming pools and on playgrounds, or even pictures of children bundled up in heavy winter coats."<sup>199</sup> Under the reasoning in *Larkin*, application of the *Dost* test could result in a court finding that a picture of a child in a winter coat constitutes child pornography.<sup>200</sup>

### III. APPLYING THE PROPOSED DEFINITION

One can easily see that the first case described in the Introduction falls outside the proposed definition. The fourteen-year-old New Jersey girl's photos appear to have depicted sexual activity,<sup>201</sup> but they do not appear to have been created under circumstances that rendered that activity exploitative or abusive. News accounts indicate that the girl posed for and created the photos without prompting by a third party; thus, the photographs were not the product of coercion.<sup>202</sup> And even if the girl was too young to consent to sexual activity, the concept of consent (like any agreement) assumes two actors—the person seeking consent and the person giving consent. As explained above, a noncontact instance of sexual exploitation or abuse arises only when a minor engages in sexual activity because of a threat, request, or encouragement by another individual.<sup>203</sup> It was the girl's own idea to take these photos; thus, there was no exploitation or abuse.

Although the proposed definition excludes many so-called teen sexting cases, it is probably unnecessary to redefine the child pornography exception in order to

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presence of the sixth factor, which when coupled with the other factors, tips the scale in favor of categorizing the image as lascivious." *Id.* at 185 (quoting *United States v. Knox*, 32 F.3d 733, 747 (3d Cir. 1994)).

198. *See id.*

199. Adler, *Inverting*, *supra* note 20, at 943–44; *see also* Adler, *Perverse Law*, *supra* note 20, at 259–60.

200. *See United States v. Brown*, 579 F.3d 672, 683 (6th Cir. 2009) ("[I]f we frame the inquiry too broadly and place too much emphasis on the subjective intent of the photographer or viewer (in this case, the same person), a seemingly innocuous photograph might be considered lascivious based solely upon the subjective reaction of the person who is taking or viewing it."); *United States v. Amirault*, 173 F.3d 28, 34 (1st Cir. 1999) (recognizing that if the focus of the inquiry is on an individual's "subjective reaction" to a photograph, "a sexual deviant's quirks could turn a Sears catalog into pornography").

201. "Explicit" nude photos fall within the concept of sexual activity if they include a lewd or lascivious display of the genitals. *See supra* note 98 and accompanying text.

202. *See Girl Posts Nude Pics*, *supra* note 1.

203. *See supra* text accompanying notes 100–06.

limit prosecution in only those cases. Teenage defendants have a strong statutory construction argument in sexting cases—namely, that their conduct almost certainly fell outside of what the legislature intended to capture when it criminalized the production, dissemination, and possession of child pornography.<sup>204</sup> Indeed, legislatures in several states have enacted statutes that deal specifically with teen sexting; the penalties associated with these statutes are significantly lower than those associated with child pornography.<sup>205</sup>

Teen sexting, however, is not the only class of cases in which prosecutors have obtained child pornography convictions for images that are the product of neither

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204. See *supra* note 10.

205. See Shaaya, *supra* note 9, at 22–25 (collecting sources). For example, Nevada enacted a statute specifically aimed at sexting, which provides that a juvenile who “knowingly and willfully use[s] an electronic communication device to transmit or distribute a sexual image of himself or herself to another person” shall be classified as “a child in need of supervision” for the first offense and shall be adjudicated delinquent for a “second or a subsequent violation.” NEV. REV. STAT. ANN. § 200.737(1), (4) (LexisNexis 2012). The statute has similar provisions aimed at distribution and possession of sexting images. § 200.737(2)–(3). The Nevada statute has a number of positive features. For one thing, the statute makes clear that sexting is a far less serious offense than the production of child pornography: a violation of the sexting statute results only in a finding that the child is in need of supervision, § 200.737(4), but a violation of the state statute criminalizing the production of child pornography is a category A felony punishable by up to life in prison, NEV. REV. STAT. ANN. §§ 200.710, 200.750 (LexisNexis 2012). Moreover, the statute specifically exempts juveniles from registration and community notification requirements that otherwise apply to sex offenders and those convicted of child pornography offenses. § 200.737(4)(a)(2).

But Nevada’s legislation does not go far enough. In particular, the state did not amend its general child pornography production laws to exempt juveniles from prosecution under the general (and more serious) child pornography statute. § 200.710 (defining the offense in terms of whether it has been committed by “a person” and making no mention of age). Such a statutory scheme permits prosecutors to choose whether to charge teens under the new sexting statute or under the broader child pornography statute. See Jennifer D. Hill, *The Teen Sexting Dilemma: A Look at How Teen Sexting Has Been Treated in the Criminal Justice System and Suggested Responses for Arizona*, 4 PHOENIX L. REV. 561, 593 (2010) (Proposed sexting legislation in Arizona “does not remove the possibility that a prosecutor may use Arizona’s child pornography laws to charge teens who are engaged in sexting. Even though it gives prosecutors and law enforcement officials the option of charging teens with lesser offenses, it does not change or amend the definition of child pornography.”); cf. *Nelson v. State*, 612 S.W.2d 605, 607 (Tex. Crim. App. 1981) (allowing a defendant to be prosecuted for rape instead of incest when he violated both statutes). In contrast, Utah amended its general law on the distribution of pornographic materials to distinguish between offenders based on their age, UTAH CODE ANN. § 76-10-1204 (LexisNexis 2012), and Nebraska created an age-based affirmative defense to child pornography charges, NEB. REV. STAT. ANN. § 28-813.01(3) (LexisNexis 2009).

Of course, if sexting images do not fall within the constitutional category of child pornography, one might ask why states ought to be able to prohibit minors from creating, distributing, and possessing such images. The answer lies in the state’s ability to regulate minors differently than adults. See generally Carissa Byrne Hessick & Judith M. Stinson, *Juveniles, Sex Offenses, and the Scope of Substantive Law*, 46 TEX. TECH L. REV. 5 (2013).

child sex abuse nor child sex exploitation. This Part applies the proposed definition to three additional scenarios: (a) images that depict a minor above the age of consent, (b) images created through computer morphing, and (c) images that result from surreptitious filming or photographing. These applications demonstrate how the proposed definition would change the scope of the child pornography exception. While each of these categories of cases has been classified as child pornography under current doctrine, all are excluded from the child pornography exception under the proposed definition.

Before turning to the applications, it is worth noting the legal implications of excluding these categories of cases from the definition of child pornography. Not only would the proposed definition prohibit the prosecution of the individuals who create the images, it would also prohibit the prosecution of subsequent individuals who distribute or possess the images. Put another way, by limiting the child pornography exception to those images which are the product of exploitation or abuse, the images described below would no longer be child pornography, as a matter of law, and neither the creators nor the downstream consumers of those images could be prosecuted under child pornography laws.<sup>206</sup>

#### A. Age of Consent

Our first application of the proposed definition (and likely the least controversial application) is drawn from *United States v. Bach*.<sup>207</sup> The defendant in that case challenged his conviction for producing child pornography. The images he created depicted a sixteen-year-old boy masturbating and engaging in oral sex with the defendant.<sup>208</sup> Bach argued that these images could not be punished as illegal child pornography because they “portray[ed] noncriminal consensual sexual conduct.”<sup>209</sup> The age of consent in both the state where the images were created (Minnesota) and under federal law is sixteen, and the minor depicted was sixteen.<sup>210</sup>

The Eighth Circuit rejected Bach’s argument. Although federal law (and many state laws) sets the age of consent for sexual activity below eighteen, the court found no problem with a legislative decision to set the age of a minor for child pornography purposes higher than the age of consent for sexual relations.<sup>211</sup> But the

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206. That does not mean the images would necessarily be protected by the First Amendment. Other First Amendment exceptions, such as certain tort doctrines, may permit some amount of regulation or recovery. See *infra* text accompanying notes 241–44, 263–66.

207. 400 F.3d 622 (8th Cir. 2005).

208. *Id.* at 628.

209. *Id.* As the facts from *Bach* indicate, age of consent cases represent a larger category of cases than teen sexting cases. Although teen sexting prosecutions sometimes involve adolescents who are above the age of consent, the images in those cases are self-produced. In contrast, age of consent cases may involve images that are created by the minor depicted *or* by another individual (as was the case in *Bach*).

210. *Id.* (citing MINN. STAT. ANN. § 609.342 et seq. (West 2003); 18 U.S.C. § 2243 (2000)).

211. The *Bach* court reasoned:

The First Amendment does not prevent prosecution for child pornography, and Congress may regulate pornography involving all minors under the age of eighteen if it has a rational basis for doing so. Congress changed the definition

*Bach* Court (and other courts that have confronted this issue<sup>212</sup>) did not grapple with the fact that the Supreme Court's decision to exempt child pornography from First Amendment protection was based largely on the sexual exploitation and abuse suffered by the children depicted. Because the sixteen-year-old depicted in these images was above the age of consent, and because there is no indication that the sexual activity in which he engaged was the product of force or coercion, he did not suffer abuse or exploitation. Criminalizing pornographic images of adolescents who are above the age of consent but below the age of eighteen does not further the state interest in preventing exploitation and abuse. It only furthers the lesser and derivative interest in protecting those adolescents from the harms associated with circulation.<sup>213</sup>

Generally speaking, a law that infringes or coerces speech may be constitutional only if it satisfies strict scrutiny—that is, the law must be narrowly tailored to achieve a compelling government interest.<sup>214</sup> Criminalizing pornographic images of adolescents who are above the age of consent arguably fails both prongs of the strict scrutiny requirement. As explained in more detail above,<sup>215</sup> the harms associated with circulation are not nearly as serious as the harms associated with sexual exploitation or abuse. The disparity between the two types of harms is so

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of minor in the child pornography laws in 1984 to apply to anyone under eighteen. It found that the previous ceiling of sixteen had hampered enforcement of child pornography laws. With that ceiling there was sometimes confusion about whether a subject was a minor since children enter puberty at differing ages. We conclude that the congressional choice to regulate child pornography by defining minor as an individual under eighteen is rationally related to the government's legitimate interest in enforcing child pornography laws . . . .

*Id.* at 629 (citations omitted).

212. See, e.g., *United States v. Freeman*, 808 F.2d 1290, 1292–93 (8th Cir. 1987); *United States v. Crane*, No. 1:07-CR-408-TWT, 2008 WL 5075906, at \*2 (N.D. Ga. Nov. 25, 2008); *United States v. Shreck*, No. 03-CR-0043-CVE, 2006 WL 2945368, at \*2 (N.D. Okla. Oct. 13, 2006); *United States v. Sherr*, 400 F. Supp. 2d 843, 849–50 (D. Md. 2005); *United States v. Ortiz-Graulau*, 397 F. Supp. 2d 345, 347–48 (D.P.R. 2005), *aff'd*, 526 F.3d 16 (1st Cir. 2008); *Cochran v. State*, 111 So. 3d 148, 156–58 (Ala. Crim. App. 2012); *People v. Campbell*, 94 P.3d 1186, 1189–90 (Colo. App. 2004); *People v. Hollins*, 971 N.E.2d 504, 509–11 (Ill. 2012), *cert. denied*, 133 S. Ct. 581 (2012); *State v. Senters*, 699 N.W.2d 810, 816–18 (Neb. 2005); *State v. Hughes*, 261 P.3d 1067, 1070 (Nev. 2011); see also *State v. Parker*, 147 P.3d 690, 697–98 (Alaska 2006) (addressing the issue in the context of an argument for sentencing leniency).

213. At least one court has held that the limited interest is sufficient to prohibit the creation of such images. See *A.H. v. State*, 949 So. 2d 234, 238–39 (Fla. Dist. Ct. App. 2007).

214. See *Wooley v. Maynard*, 430 U.S. 705, 715–17 (1977). But see *Schauer*, *supra* note 18, at 1768 (“[E]ven the briefest glimpse at the vast universe of widely accepted content-based restrictions on communication reveals that the speech with which the First Amendment deals is the exception and the speech that may routinely be regulated is the rule.”); James Weinstein, *A Brief Introduction to Free Speech Doctrine*, 29 ARIZ. ST. L.J. 461, 468 (1997) (“So many people, including some who should know better, seem to think that [First Amendment protection] applies generally to all speech. Manifestly, however, a rule forbidding government from regulating the content of speech cannot—and does not—apply to all human utterances regardless of the setting.”).

215. See *supra* text accompanying notes 88–94.

great that a court might conclude that the government interest in preventing circulation—especially circulation to which the adolescent initially agrees—is not a compelling interest. What is more, most American jurisdictions currently prohibit private creation and possession of such images, even though neither of these activities implicates the harms of circulation or the harms of creation. This seems to run afoul of the narrowly tailored requirement.<sup>216</sup>

Although courts have repeatedly rejected challenges to child pornography convictions based on age of consent arguments,<sup>217</sup> those decisions do not subject the laws as applied to the particular defendants to First Amendment analysis. Instead, courts assess the bare rationality of whether “there are rational, reasonable arguments in support of having a higher age threshold for appearance in pornography than for consent to sexual activity.” Some courts opine that the “dangers of appearing in pornographic photographs or videos are not as readily apparent and can be much more subtle” than the dangers of sexual activity.<sup>218</sup> Others note that classifying all sexually explicit images depicting adolescents under eighteen as child pornography furthers enforcement efforts because of the difficulty associated with determining the age of an adolescent from a picture.<sup>219</sup> While this analysis may be relevant to whether a state may prohibit adolescents under the age of eighteen from participating in the creation of pornographic images,<sup>220</sup> it does not answer the question whether the resulting images are unprotected speech. The prohibition and punishment of speech must be analyzed under the First Amendment.

### B. Morphed Computer Images

Our second application of the proposed definition is drawn from *United States v. Hotaling*.<sup>221</sup> The defendant in that case was convicted of possessing child pornography based on his creation of morphed computer images; in particular, he digitally “cut” the heads of minor females from nonpornographic photographs and superimposed those heads onto images of adult females engaging in sexually explicit conduct.<sup>222</sup>

Under the proposed definition, the images that the *Hotaling* defendant created fall outside the constitutional limits of child pornography. A morphed computer image begins with an innocent image of a minor—that is, an image that no one would claim is child pornography, such as an image of a fully clothed child riding a

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216. See *Senters*, 699 N.W.2d at 817–18 (noting and rejecting the defendant’s argument under a rational basis standard but observing that it might succeed under strict scrutiny).

217. See *supra* note 212.

218. *People v. Hollins*, 971 N.E.2d 504, 511 (Ill. 2012), *cert. denied*, 133 S. Ct. 581 (2012). For similar analysis, see *People v. Campbell*, 94 P.3d 1186, 1189–90 (Colo. App. 2004).

219. *United States v. Bach*, 400 F.3d 622, 629 (8th Cir. 2005); *United States v. Freeman*, 808 F.2d 1290, 1292–93 (8th Cir. 1987).

220. See, e.g., *A.H. v. State*, 949 So. 2d 234, 238 (Fla. Dist. Ct. App. 2007).

221. 634 F.3d 725 (2d Cir. 2011).

222. *Id.* at 727. While the facts indicate that the defendant not only possessed these images but also created them, the government appears to have agreed to charge him with only possession (and not production) in return for a guilty plea.

bicycle.<sup>223</sup> Technology is then used to change the innocent image and make it appear as though the child is naked or engaged in a sex act. While the morphed image makes it appear as though the child is being sexually exploited or abused, the child never actually suffers such abuse.<sup>224</sup> Put simply, morphed computer images involve no sexual exploitation or abuse of children in the production process, and thus they do not fall within the proposed definition of child pornography.

The defendant in *Hotaling* raised an as-applied challenge to the statute under which he was convicted, arguing that because “no actual minor was harmed or exploited by the creation of the photographs,” the images were protected by the First Amendment.<sup>225</sup> The Second Circuit rejected this argument, noting that *Ferber* recognized the harm to minors not only in the creation of child pornography but also in the circulation of the images.<sup>226</sup> “These emotional and reputational harms” associated with circulation of images are, according to the Second Circuit, “severe enough to render laws criminalizing the possession of child pornography constitutional.”<sup>227</sup> Relying on *United States v. Williams* and *Ashcroft v. Free Speech Coalition*, the Second Circuit framed its “underlying inquiry” as “whether an image of child pornography implicates the interests of an actual minor.”<sup>228</sup> In particular, the Second Circuit relied on the passage from *Free Speech Coalition* in which the Supreme Court noted that “[a]lthough morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber*.”<sup>229</sup>

The *Hotaling* court was not alone in deciding that morphed computer images constitute child pornography.<sup>230</sup> But not all lower courts to consider the issue have categorized morphed computer images as child pornography.<sup>231</sup> The Supreme Court

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223. Using terms such as “innocent images” as placeholders for the concept of non-child pornography is commonplace in the literature. Of course, distinguishing between those images that are and are not child pornography is often highly contested. So using the term “innocent images” sidesteps the disagreement over what constitutes child pornography. See Adler, *Perverse Law*, *supra* note 20, at 239 n.168.

224. Of course, if the image was created by “pasting” the head of a minor from an innocent photo onto the body of a child from an existing image of child pornography, e.g., *Bach*, 400 F.3d at 625, then the resulting morphed image ought to be classified as child pornography. That is because the morphed image is still the product of sexual exploitation or abuse—not the exploitation or abuse of the minor from the innocent image but of the minor from the preexisting child pornography image. See *id.* at 632.

225. 634 F.3d at 727.

226. *Id.* at 728 (citing *New York v. Ferber*, 458 U.S. 747, 759 n.10 (1982)).

227. *Id.*

228. *Id.* at 729.

229. *Id.* (alteration in original) (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 242 (2002)) (internal quotation marks omitted); see also *supra* text accompanying notes 61–62.

230. See *United States v. Ramos*, 685 F.3d 120, 134 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 567 (2012); see also *Doe v. Boland*, 630 F.3d 491, 497 (6th Cir. 2011).

231. See *People v. Gerber*, 126 Cal. Rptr. 3d 688, 701 (Ct. App. 2011) (applying doctrine of constitutional avoidance in morphed image case and noting that “the articulated rationales underlying both the *Ferber* and *Free Speech Coalition* decisions compel the conclusion that such altered materials are closer to virtual child pornography than to real child pornography since the use of photo editing software to replace an adult’s head with a child’s head on

of New Hampshire, for example, overturned a child pornography conviction based on morphed computer images “that depict heads and necks of identifiable minor females superimposed upon naked female bodies” but where “the naked bodies do not depict body parts of actual children engaging in sexual activity.”<sup>232</sup> The court rested its decision on the conclusion that “when no part of the image is ‘the product of sexual abuse,’ and a person merely possesses the image, no demonstrable harm results to the child whose face is depicted in the image.”<sup>233</sup> While holding that a conviction based on possession of such images violated the First Amendment because no children were harmed in the production of the images, the court left open the possibility that a conviction involving distribution might not raise the same constitutional concerns because circulation of such images could harm the minor.<sup>234</sup>

Put simply, in holding that morphed computer images constitute child pornography, lower courts have relied on the harm of circulation. Even the harm of circulation, however, has become unmoored from its analytical foundations. As noted above, the harm of circulation is a privacy or reputational harm akin to the harms of defamation, invasion of privacy, or false light invasion of privacy.<sup>235</sup> The conceptual foundation of this harm relies on the distribution of an image to other individuals, just as reputation and privacy torts require publication.<sup>236</sup> But in cases involving morphed computer images, courts have stated that children suffer harm even when there is no subsequent distribution. As one district court put it, “there is also harm to the child in his or her objectification by a single viewer”—in that case, the viewer was also the creator of the image—“of his or her images of unintended

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pornographic images of the adult does not necessarily involve sexual exploitation of an actual child. Although we may find such altered images morally repugnant, we conclude that mere possession of them remains protected by the First Amendment to the United States Constitution.”); *see also* *Parker v. State*, 81 So. 3d 451, 452–53 (Fla. Dist. Ct. App. 2011) (holding that manual cutting and pasting of photographs of children’s heads onto sexually explicit images featuring adults did not meet the state statutory definition of child pornography); *Stelmack v. State*, 58 So. 3d 874, 874–75 (Fla. Dist. Ct. App. 2010) (same).

232. *State v. Zidel*, 940 A.2d 255, 265 (N.H. 2008).

233. *Id.* at 263 (citation omitted) (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249 (2002)).

234. *Id.* at 264–65; *see also Gerber*, 126 Cal. Rptr. 3d at 701 n.5 (“We do not reach the question whether criminal liability may be imposed, consistent with the First and Fourteenth Amendment, upon individuals that knowingly *distribute, publish, or exhibit* depictions of sexual conduct produced by computer editing of adult pornographic images using images of a real child where those actions invade the privacy interests of the minor . . . .” (emphasis in original)).

235. *See supra* text accompanying notes 121–23; *see also* Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121(1)(7), 110 Stat. 3009-26 (codified at 18 U.S.C. § 2251 note (2012)) (“[T]he 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.”).

236. *See* 1 MCCARTHY, *supra* note 133, §§ 5:109, 5:114 (noting that publication is an essential element of defamation and the “false light” tort). *But see id.* § 5:87 (noting that publication is not an essential element of the invasion of privacy by “intrusion” tort).

intimacy.”<sup>237</sup> The *Hotaling* court identified the “psychological harm of knowing that their images were exploited . . . by a trusted adult.”<sup>238</sup> The precise nature of this harm is unclear. Is it the discomfort or revulsion the child feels upon learning of the images?<sup>239</sup> That harm seems much less pressing than and far removed from the mental and emotional harm a child might experience from having a “permanent record” of his or her sexual abuse viewed by countless individuals.<sup>240</sup>

Excluding morphed images from the constitutional category of child pornography does not mean that individuals are always free to create and distribute such images. Nor does it mean that a child depicted in such images will have no legal recourse. For example, if an individual creates morphed sexually explicit images of an actual child and profits from the sale or distribution of those images, the child may be able to recover damages for the misappropriation of her image.<sup>241</sup> Even if the images are distributed without profit, the child may be able to recover

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237. *United States v. Stewart*, 839 F. Supp. 2d 914, 925 (E.D. Mich. 2012), *aff'd*, 729 F.3d 517 (6th Cir. 2013).

238. *United States v. Hotaling*, 634 F.3d 725, 730 (2d Cir. 2011). The *Hotaling* court also identified the harm to the children in the morphed computer images as “risk of reputational harm.” The court based its conclusion about the risk of reputational harm on the fact that the images were labeled and formatted in ways that would have facilitated distribution (though there was no evidence or allegation of distribution). *Id.* at 727, 729–30.

239. This particular harm seems dependent upon children learning about that the images exist. Yet courts have stated that children suffer harm even if they never see or learn about the images. *See Lora v. Boland*, 825 F. Supp. 2d 905, 908 (N.D. Ohio 2011) (stating that the minors in computer-morphed images were harmed by the existence of the pictures even though they had never seen or learned about the images), *aff'd sub nom. Doe v. Boland*, 698 F.3d 877 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 2825 (2013).

240. *See New York v. Ferber*, 458 U.S. 747, 759 (1982) (“[P]hotographs and films depicting sexual activity by juveniles . . . are a permanent record of the children’s [sexual abuse].”). In addition to the harm of circulation, Congress has identified other harms caused by images created without exploitation or abuse—namely, that “child pornography is often used as part of a method of seducing other children into sexual activity”; that “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”; and that “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.” Child Pornography Prevention Act of 1996 § 121(1)(3), (4), (11)(A). Aside from the mention in *Osborne* about protecting future child abuse victims, *see supra* note 53 and accompanying text, the Court has not incorporated these concerns in its child pornography jurisprudence.

241. *See, e.g., Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1138 (7th Cir. 1985) (affirming jury finding of violation of the “commercial-appropriation branch of the right of privacy” against “provocative” magazine that published nude photos of plaintiff without her consent); *Coton v. Televised Visual X-Ography, Inc.*, 740 F. Supp. 2d 1299, 1303, 1313 (M.D. Fla. 2010) (acknowledging a common law misappropriation of image tort in case involving unauthorized use of plaintiff’s image on the packaging of defendant’s pornographic DVD); *Clark v. Celeb Publ’g, Inc.*, 530 F. Supp. 979, 983–84 (S.D.N.Y. 1981) (awarding damages to a model whose photographs were used in a pornographic magazine without her authorization). *See generally* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 401–07 (1960) (discussing appropriation).

for false light invasion of privacy<sup>242</sup> or perhaps for defamation.<sup>243</sup> These tort claims will allow children to recover if their images are distributed but do not appear to provide relief for the mere creation or private possession of such images.<sup>244</sup>

Importantly, the fact that a child depicted in a morphed computer image may have legal recourse does not suggest that the child pornography question is merely one of labeling. Permitting a child to recover damages under a tort theory indicates that First Amendment rights in morphed computer images are not absolute. But a judicial finding that a morphed image was actionable under the false light tort or as defamation would not have the same legal implications as a determination that such an image was child pornography. Private possession of child pornography images can be criminalized, for example, while private possession of defamatory or misleading images cannot.<sup>245</sup>

### C. Surreptitious Photographs and Films

Our third application of the proposed definition involves surreptitious photographs or films. A case involving surreptitious photographing or filming is a case in which an image depicting a minor engaging in sexual activity was created without the minor's knowledge and without the producer's manipulation of the minor's activities. Under the proposed definition, these images do not fall within the child pornography category.

*United States v. Klug*<sup>246</sup> provides an example of a surreptitious filming case. Klug was charged with producing child pornography based on his surreptitious filming of boys he supervised on camping trips and boys he encountered in the locker room of his health club. During the camping trips, Klug "had hidden a camera in his backpack to film boys showering," and once he "used a hidden camera to film a boy changing clothes while in a tent; this filming also happened to record the boy masturbating."<sup>247</sup> There was no evidence that the defendant had influenced or directed the boys he filmed; rather the evidence demonstrated only that Klug had hidden cameras and that those cameras had captured images of the

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242. "Invasion of privacy by 'false light' involves a publication which places plaintiff in a false light highly offensive to a reasonable person." 1 MCCARTHY, *supra* note 133, § 5:112; *see also Douglass*, 769 F.2d at 1138 (affirming false light claim against "provocative" magazine that published nude photos of plaintiff without her consent); *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1085 (5th Cir. 1984) (affirming award of damages for false light invasion of privacy claim where magazine published stolen photograph that depicted plaintiff in the nude); Prosser, *supra* note 241, at 398–401 (discussing false light).

243. *See Douglass*, 769 F.2d at 1134 (citing *Youssouppoff v. Metro-Goldwyn-Mayer Pictures, Ltd.*, (1934) 50 T.L.R. 581 (A.C.) at 584 (Eng.), for the proposition that "a false statement that a woman was raped is actionable as defamation").

244. *See* 1 MCCARTHY, *supra* note 133, § 5:114, at 768 ("[T]he false light tort requires that the matter be disclosed to the 'public.'").

245. *Cf. supra* note 133 and accompanying text.

246. 670 F.3d 797 (7th Cir. 2012).

247. *Id.* at 798.

boys while nude and engaged in sexual activity (namely, masturbation and lascivious exhibition of the genitals).<sup>248</sup>

In support of his argument that he should have received a lower sentence, Klug maintained on appeal that “no harm came to the children he filmed because there was no sexual contact.”<sup>249</sup> He contrasted the images he produced with images of “hardcore pornography that depict[] children being raped by adults or engaged in explicit sexual activity with other children,” and he argued that the images he created ought to result in a less severe punishment than such hardcore images.<sup>250</sup> The Seventh Circuit rejected the defendant’s argument, noting that “child pornography is pernicious precisely because the harm it produces is not limited to the sexual abuse it depicts”; child pornography also causes “distinct and serious harm” to the minors depicted by “giving their images a permanent existence and the potential for endless replication, all of which is beyond the control of the victims.”<sup>251</sup> Other courts have also permitted child pornography convictions on the basis of surreptitious films or photographs.<sup>252</sup>

The proposed definition would exclude surreptitious photographing and filming from the constitutional definition of child pornography. Under the proposed definition, the manner in which an image is produced is essential in assessing whether it is appropriately classified as child pornography.<sup>253</sup> In situations like *Klug*, the child depicted is neither abused nor exploited in the creation of the image.<sup>254</sup>

One might argue that these children have been exploited because the images were created without the children’s consent. As noted above, lack of consent is one feature of sexual exploitation.<sup>255</sup> If a child is photographed or filmed without her knowledge, then the image was necessarily created without her consent. But the lack of consent must relate not only to the creation of the image but also to the activity depicted.<sup>256</sup> The children in *Klug* were showering and masturbating of their own accord; the defendant did not, for example, request or encourage a boy to masturbate in front of him and then film the boy without his knowledge.<sup>257</sup> That

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248. *See id.*

249. *Id.* at 800.

250. *Id.*

251. *Id.*

252. *See, e.g.,* United States v. Johnson, 639 F.3d 433, 435 (8th Cir. 2011); United States v. Stewart, 839 F. Supp. 2d 914, 925–26 (E.D. Mich. 2012) (“[A] child may still be exploited even without knowingly participating in the taking of the photograph.”).

253. *Cf. Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250–51 (2002) (“*Ferber*’s judgment about child pornography was based upon how it was made, not on what it communicated.”).

254. *Cf. Rogers, supra* note 90, at 16 (noting that in cases of surreptitious filming, the harm of circulation exceeds the harm of creation).

255. *See supra* text accompanying notes 100–06.

256. *See supra* Part II.A.

257. The facts in *Johnson* present a close case under this standard. In that case, the defendant, a weightlifting coach, moved a scale into a small examining room and then hid a video camera in a position where it would capture the actions of the young women he coached as they weighed themselves. Johnson proceeded to instruct the young women (some of whom were minors) to go into the examination room, take off all of their clothes, and weigh themselves. *Johnson*, 639 F.3d at 436.

alternative factual scenario would meet the proposed standard because the producer would have manipulated the victim into engaging in sexual activity,<sup>258</sup> activity to which the boy could not consent. In contrast, where the producer acts as “a sort of ‘peeping Tom’ catching children at intimate moments and exposing them for the world to see,”<sup>259</sup> the resulting image is not a record of abuse or exploitation.<sup>260</sup>

There is no doubt that a child who is surreptitiously filmed while showering or masturbating has suffered a serious invasion of privacy. But an invasion of privacy is a harm that is different in kind from sexual abuse or exploitation. A similar privacy invasion could occur in the absence of a visual depiction, such as in the peeping Tom example discussed above.<sup>261</sup> A reputational harm could occur without a visual depiction, such as in the publication of the name of a victim of child sex abuse. And the harm associated with the wide circulation of an image that is outside of an individual’s control could occur in the absence of sexual activity. Consider, for example, the bullying and mental anguish that the so-called Star Wars Kid experienced after an embarrassing video of him mock “lightsaber” fighting was widely publicized and circulated.<sup>262</sup>

Of course, the mere fact that images created through surreptitious photographing or filming do not fall within the limits of child pornography does not mean there is no legal recourse against those who have created these images. Alternative methods could be used to prosecute those who create such images and to compensate those children whose privacy has been violated. For example, some jurisdictions criminalize so-called “video voyeurism,” which includes surreptitious photographing or filming not only of children but also of adults.<sup>263</sup> Many jurisdictions recognize the invasion of privacy tort, which would allow victims to recover damages when such a surreptitious image is created.<sup>264</sup> The disclosure of

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258. “When a photographer selects and positions his subjects, it is quite a different matter from the peeping of a voyeur upon an unaware subject pursuing activities unrelated to sex.” *United States v. Steen*, 634 F.3d 822, 828 (5th Cir. 2011); *see also United States v. Ward*, 686 F.3d 879, 883 (8th Cir. 2012) (concluding that surreptitious filming of nude minor getting in and out of shower constituted sexual exploitation where defendant “us[ed] verbal commands and touch[ed] her body, so that the secret camera repeatedly filmed her pubic area”).

259. *United States v. Klug*, 670 F.3d 797, 802 (7th Cir. 2012) (Cudahy, J., concurring).

260. *Cf. Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249 (2002) (explaining that when abuse *does* occur through the production of child pornography, circulation perpetuates the harm to the child).

261. *See supra* text accompanying note 136.

262. *See* Walter Araujo, Note, *Punishing Cyberbullies: Using Supreme Court Guidance Beyond Tinker to Protect Students and School Officials*, 34 T. JEFFERSON L. REV. 325, 333–34 (2012) (describing the incident).

263. *See, e.g.*, 18 U.S.C. § 1801 (2012); ARK. CODE ANN. § 5-16-101 (Supp. 2013); FLA. STAT. ANN. § 810.145 (West Supp. 2014); HAW. REV. STAT. § 711-1110.9 (West 2008); IDAHO CODE ANN. § 18-6609 (2004); KY. REV. STAT. ANN. § 531.100 (LexisNexis 2008); LA. REV. STAT. ANN. § 14:283 (Supp. 2014); R.I. GEN. LAWS § 11-64-2 (Supp. 2013).

264. “Invasion of privacy by ‘intrusion’ is triggered when defendant intrudes, physically or otherwise, into the solitude or seclusion of plaintiff in a manner which is highly offensive to a reasonable person. While . . . not an essential element, publication can increase the mental distress and damages.” 1 MCCARTHY, *supra* note 133, § 5:87; *see also* Prosser, *supra* note 241, at 392 (“[I]n all probability when [an individual] is merely in the seclusion of his home, the making of a photograph without his consent is an invasion of a private right, of which he

private facts tort may allow victims to recover when such an image is distributed.<sup>265</sup> But, as noted above, the fact that criminal or civil charges may prevail in cases involving surreptitious filming or photographing does not have the same legal implications as a determination that the filming or photographing produced child pornography.<sup>266</sup>

#### CONCLUSION

The First Amendment protects speech except in limited circumstances. Child pornography is one category of speech to which the Supreme Court has denied protection. In creating a categorical exception to free speech, however, the Court has failed to provide a clear definition of child pornography. In the absence of constitutional limits, prosecutors and lower courts have expanded the category to include images that were created without any sexual abuse or exploitation of a child.

This Article makes the case for limiting child pornography to those images that are the product of child sex exploitation or abuse. Not only is there support for such a definition in the Court's child pornography cases, but this definition most logically supports the differing treatment of child and adult pornography.

Providing meaningful limits on child pornography is important not only because of the occasional prosecutorial abuse that makes headlines<sup>267</sup>—such as teen sexting cases<sup>268</sup>—but also because child pornography laws are being used as a proxy to punish child sex abuse.<sup>269</sup> Many judges state that they are putting child pornography offenders in prison to protect children,<sup>270</sup> and law enforcement officials regularly tout their child pornography arrests and convictions as success in

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is entitled to complain.”). For examples of courts recognizing that surreptitious filming constitutes an intrusion of privacy, see *In re Marriage of Tigges*, 752 N.W.2d 452 (Iowa Ct. App. 2008) (unpublished table decision), *aff'd*, 758 N.W.2d 824 (Iowa 2008); *Lewis v. LeGrow*, 670 N.W.2d 675 (Mich. Ct. App. 2003); *Miller v. Brooks*, 472 S.E.2d 350 (N.C. Ct. App. 1996).

265. See Prosser, *supra* note 241, at 392–98. “The tort of publication of private facts involves the publication of true but intimate or private facts about the plaintiff, such as matters concerning the plaintiff’s sexual life or health.” 1 MCCARTHY, *supra* note 133, § 5:69; see also *Anderson v. Blake*, 469 F.3d 910, 915 (10th Cir. 2006).

266. See *supra* text accompanying note 245.

267. See Adler, *Perverse Law*, *supra* note 20, at 241 (describing numerous instances of aggressive prosecutions).

268. See, e.g., Charlie Butts, *Sexting Teen Ends Up on Sex Offender Registry*, ONENEWSNOW (Sept. 22, 2009), <http://www.onenewsnow.com/legal-courts/2009/09/22/sexting-teen-ends-up-on-sex-offender-registry>; *Police Investigate Sexting at Chambersburg High School*, WGAL.COM (Oct. 7, 2009, 11:36 AM), <http://www.wgal.com/Police-Investigate-Sexting-At-Chambersburg-High-School/6683538>; *Two Teens Face Child Pornography Charges*, S. COAST TODAY, Mar. 30, 2006, <http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20060330/NEWS/303309972>.

269. Hessick, *supra* note 5, at 880–82.

270. See, e.g., *United States v. Crandon*, 216 F. App’x 613, 614 (8th Cir. 2007) (per curiam) (recounting that district court imposed statutory maximum sentence for receipt of child pornography after noting the defendant’s “‘compulsive and destructive’ behavior and the need to protect children”). *But see* *United States v. Bradley*, 628 F.3d 394, 401 (7th Cir. 2010) (“[T]he district court relied on its unsubstantiated belief that possessors of child pornography inevitably are child sex offenders. Such speculation cannot survive due process challenge.”).

their efforts to prevent child sex abuse.<sup>271</sup> There is continuing disagreement over the social science evidence tying the possession of child pornography to contact sex offenses against children.<sup>272</sup> But there is no doubt that the First Amendment leeway legislators and law enforcement have enjoyed with respect to child pornography is founded on the compelling interest of protecting children from child sex abuse and exploitation.

When there is no link between an image and such exploitation or abuse, ordinary First Amendment principles ought to apply.

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271. *See, e.g.*, Deborah J. Daniels, Assistant Attorney Gen., Remarks at the Conference on Child and Family Maltreatment: Protecting Our Children: No Job for the Lone Ranger (Jan. 28, 2004), available at <http://www.ojp.usdoj.gov/archives/speeches/2004/confonchildabuse.htm> (reporting arrest rates for “Internet-based child sexual exploitation” and noting that every “such arrest means that untold numbers of innocent children will be protected from abuse” at the hands of “pedophiles”).

272. *See* Adler, *Perverse Law*, *supra* note 20, at 216 n.32 (“Although public discussion often presumes that there is a strong relationship between use of child pornography and molestation of children, the statistics on this connection are uncertain, not only in terms of causation, but even in terms of correlation.”); Hamilton, *supra* note 170, at 1694–716 (explaining, in detail, how those studies “that are repeatedly cited as objective evidence supporting the position that child pornography consumers are high-risk offenders” are often misinterpreted or overgeneralized); Hessick, *supra* note 5, at 876 n.91 (collecting sources).