The Limits of Child Pornography

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The Limits of Child Pornography

CARISSA BYRNE HESSICK

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.”

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.

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.

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.

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. 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. The states have also steadily increased criminal sentences for possession of child pornography;

2. United States v. Hotaling, 634 F.3d 725, 727 (2d Cir. 2011).
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.
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.\textsuperscript{7}

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.\textsuperscript{8} 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.”\textsuperscript{9}

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,\textsuperscript{10} that sexting is a matter best handled by parents or schools rather than the justice system,\textsuperscript{11} that child pornography penalties are disproportionate to the wrongdoing of sexting,\textsuperscript{12} and that minors cannot appreciate the consequences of their actions.\textsuperscript{13}

\begin{itemize}
  \item \textsuperscript{7} Hessick, supra note 5, at 857–62.
  \item \textsuperscript{8} See, e.g., Erica Goode, \textit{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).
  \item \textsuperscript{9} See, e.g., Emily Shaaya, \textit{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.”).
  \item \textsuperscript{13} See, e.g., Maryam F. Mujahid, Note, \textit{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).\end{itemize}
Some commentators have argued that criminal prosecutions for teen sexting raise First Amendment issues.\textsuperscript{14} 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.\textsuperscript{15}

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,\textsuperscript{16} 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.\textsuperscript{17} Because it is the status of the image—that is, whether an image is or is not child pornography—that determines constitutional protection,\textsuperscript{18} 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,\textsuperscript{19} and legal scholars have largely failed to fill the gap.\textsuperscript{20} This Article


\textsuperscript{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.”).

\textsuperscript{16}. See United States v. Stevens, 130 S. Ct. 1577, 1584 (2010).

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


\textsuperscript{19}. See infra note 87.

\textsuperscript{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. 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. 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


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,”23 and the private possession of pornographic images, even if obscene, is also protected.24 But beginning with its 1982 decision in New York v. Ferber,25 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.26 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.27 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.28 Ferber was convicted for

23. E.g., Miller v. California, 413 U.S. 15 (1973); see also Adler, Inverting, supra note 20, at 929.
27. 458 U.S. at 747.
28. Id. at 749.
selling two films “depicting two young boys masturbating.” Ferber argued that the films were protected by the First Amendment because a jury had found the films were not obscene. 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. The first harm is the physical and psychological harm that a child experiences in the process of creating child pornography. 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, the Court

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” and often involves “[s]exual molestation” of children by adults.

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. 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.

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.”

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.” 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.”

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.” The Court suggested that closing the distribution network was equally as important as preventing sexual abuse and exploitation during creation, if not more so.

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.” 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 (“Pornography poses an even greater threat to the child victim than does sexual abuse or prostitution.” (alteration in original) (quoting David P. Shouvlin, 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 \textit{visual} depictions.\textsuperscript{44}

\textbf{B. Osborne v. Ohio}

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

The Supreme Court rejected Osborne’s argument. As in \textit{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.\textsuperscript{48} The Court also noted the harm caused by circulation.\textsuperscript{49} It explained that prohibiting private possession would “encourage[] the possessors of these materials to destroy them.”\textsuperscript{50}

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,\textsuperscript{51} but that the interests of the State in prohibiting child pornography “far exceed the interests justifying the Georgia law at issue in \textit{Stanley}.”\textsuperscript{52}

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

\textsuperscript{44.} \textit{Id.} at 764 (“[T]he nature of the harm to be combated requires that the state offense be limited to works that \textit{visually} depict sexual conduct by children below a certain age.” (emphasis in original)); \textit{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.”).

\textsuperscript{45.} 495 U.S. 103 (1990).

\textsuperscript{46.} \textit{Id.} at 106–07.

\textsuperscript{47.} 394 U.S. 557 (1969).

\textsuperscript{48.} \textit{Osborne}, 495 U.S. at 109–10. \textit{Osborne} explicitly relied on \textit{Ferber} for this argument and extended the logic from distribution to “all levels in the distribution chain,” including possession. \textit{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.” \textit{Id.}

\textsuperscript{49.} \textit{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. \textit{Ferber}, 458 U.S. 747, 759 (1982))).

\textsuperscript{50.} \textit{Id.}

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

\textsuperscript{52.} \textit{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.”53 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.54 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.55

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,56 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.”57 The Court concluded that the statute was unconstitutional, explaining that virtual child pornography fell outside the constitutional category of child pornography.58

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

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.
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. 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.” 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.” 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.” 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. At other times, however, the opinion uses language that

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.64

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

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.”66 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

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 ‘inextricably related’ to the sexual abuse of children . . . .”); id. at 250 (“Virtual child pornography is not ‘inextricably 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 . . . .”67

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,68 addressed limitations on “the pandering or solicitation of child pornography.”69 While the holding in Williams did not turn on the limits of child pornography,70 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.71 First, Williams stated that the category of child pornography “consists of sexually explicit visual portrayals that feature children.”72 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.”73

Another case that provides some insight into the definition of child pornography is United States v. Stevens.74 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.”75 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.”76 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.’”77

67. Id. at 255 (alteration and omission in original) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973)).
69. Id. at 288.
70. See id. at 297–99.
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).
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.* 78 *Giboney* itself did not clearly define the reach of the exception, nor have subsequent cases applying *Giboney*. 79 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).
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. 80 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.” 81

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: 82 “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.” 83

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

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).
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. 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. As explained more fully below, computer
morphing does not involve child sexual exploitation or abuse.

The conflicting language from the Court’s decisions and its failure to offer an
explicit definition of the child pornography exception 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.

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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. 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.

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, not the possibility that a person might be mistakenly identified as a child abuse victim.

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 or it is necessary to prevent the consumers of child pornography (who

89. Hessick, supra note 5, at 869.


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.”).


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.

are assumed to be sexually attracted to children) from sexually assaulting children later in time.94

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.95 We cannot rely on


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).

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

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.97 Many child pornography statutes prohibit depictions of sexual intercourse, bestiality, masturbation, sado-masochistic abuse, or lewd or lascivious exhibition of the genitals.98 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.99

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.100 Some have suggested that the category

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 or in which the audience derives sexual gratification. 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. And if emotional injury were the only criterion, then child pornography could include, for example, written descriptions rather than visual depictions.

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

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”).


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). 105

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. 106 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.” 107 This broad common understanding of the term has doubtless led many to define sexual exploitation to include any sexual depiction of a child. 108 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. 109 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

105. See Shouvl, supra note 42, at 537 (defining “sexual exploitation” as “sexual activity by a child that is encouraged, promoted, or paid for by an adult”).
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.110

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 1984.111 Enforcement concerns also led Congress to prohibit virtual child pornography in 1996,112 the prohibition that was struck down by the Supreme Court in Ashcroft v. Free Speech Coalition.113

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.114 Second, the proposed definition is not the last

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).


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, and victims of surreptitious filming and photographs could be protected by criminal statutes prohibiting video voyeurism. 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.

The 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.

The 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.


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. 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.”

The harm of circulation is distinct from the harm of creation. 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. As the Ferber Court tells

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 Shouvlin, 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).
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.’” 122 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.123

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,124 but also that a child could suffer such harm even if the child suffered no abuse or exploitation in the creation of the image.125 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.126 Although the image was created without exploitation or abuse,127 some maintain that the image nonetheless constitutes child pornography because it is a depiction of sexual activity that involves a real child.128

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.”129 Reputational and emotional harm also occur upon the disclosure of facts surrounding all sexual activity, not simply those activities that are abusive or exploitative.130

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”).
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. 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, just as a person repeating a defamatory statement in an empty room causes no new reputational harm.

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. 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. 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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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.
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. 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.

Some commentators have suggested that possession of child pornography cases are best justified by the harm of circulation. 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. 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

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 thirty-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.\textsuperscript{140} Stevens says that child pornography is but one manifestation of this “previously recognized, long-established category of unprotected speech.”\textsuperscript{141} 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.”\textsuperscript{142}

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.,\textsuperscript{143} did not clearly define the reach of the exception, nor have subsequent cases applying Giboney.\textsuperscript{144}

The “integral part” phrase could be read to define child pornography based on the illegality of the activity depicted.\textsuperscript{145} Such a reading would exclude images that depict “completely legal sexual acts.”\textsuperscript{146} But such a definition is at odds with the Court’s child pornography cases.\textsuperscript{147} Although the Court’s child pornography cases include references to the illegality of sexual exploitation and abuse that occurred during production,\textsuperscript{148} 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.

\textsuperscript{140} 130 S. Ct. 1577, 1586 (2010).
\textsuperscript{141} Id.
\textsuperscript{142} Haynes, supra note 14, at 395.
\textsuperscript{143} 336 U.S. 490 (1949).
\textsuperscript{144} Volokh, supra note 79, at 1326.
\textsuperscript{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.”).
\textsuperscript{146} Haynes, supra note 14, at 373–74.
\textsuperscript{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.
\textsuperscript{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 \textit{distribution} is permitted because the \textit{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. \textit{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, \textit{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 \textit{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)), \textit{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 \textit{Ferber} rested on films “depicting young boys masturbating.”\textsuperscript{149} 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.\textsuperscript{150} Similarly, the conviction affirmed in \textit{Osborne} rested on “photographs” that depicted “a nude male adolescent posed in a sexually explicit position.”\textsuperscript{151} The \textit{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 \textit{Ferber} or the photographs in \textit{Osborne}, those minors were sexually exploited (as that term is defined in this Article).\textsuperscript{152} 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.\textsuperscript{153} 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.”\textsuperscript{154}

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 \textit{Ferber} and \textit{Osborne}, for example, the Court explained that the targeted “conduct in violation of a valid criminal statute” was the production of child pornography.\textsuperscript{155} 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.\textsuperscript{156}

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

\begin{enumerate}
\item\textsuperscript{149} 458 U.S. at 752.
\item\textsuperscript{150} See Humbach, supra note 14, at 468 (making this observation).
\item\textsuperscript{151} Osborne v. Ohio, 495 U.S. 103, 107 (1990).
\item\textsuperscript{152} See supra text accompanying notes 100–09.
\item\textsuperscript{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”).
\item\textsuperscript{154} Id. at 468.
\item\textsuperscript{155} \textit{Ferber} makes this statement in connection with the following observation: \\
[W]here 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.
\item\textsuperscript{156} New York v. Ferber, 458 U.S. 747, 762 (1982). \textit{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.
\item\textsuperscript{156} \textit{Cf.} Volokh, supra note 79, at 1315.
the abuse or exploitation that occurs in creating child pornography.157 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.158 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.159

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.160 This definition of child pornography is also at odds with other First Amendment cases.161 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.’”162 Indeed, such reasoning would have prohibited publication in the Pentagon Papers case,163 as well as other cases in which the Court has found First Amendment protection.164

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

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.
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.
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.\textsuperscript{169} There is significant evidence that viewing child pornography does not cause individuals to engage in sexual contact with children.\textsuperscript{170} Thus the “integral part” language (as limited by \textit{Brandenburg}) does not provide a rationale that permits an appropriate definition of child pornography.

\section*{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 \textit{Dost} test\textsuperscript{171}—provides a standard for determining whether an image falls within the federal prohibition on the lascivious display of a minor’s genitals.\textsuperscript{172} The \textit{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.\textsuperscript{173}

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.\textsuperscript{174} The \textit{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.

\textsuperscript{169} 395 U.S. at 447–49.
\textsuperscript{170} See Melissa Hamilton, \textit{The Child Pornography Crusade and Its Net-Widening Effect}, 33 CARDOZO L. REV. 1679, 1694–716 (2012); Hessick, \textit{supra} note 5, at 873–80; see also \textit{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)).
\textsuperscript{171} The test was first articulated in \textit{United States v. Dost}, 636 F. Supp. 828 (S.D. Cal. 1986), \textit{aff’d}, 813 F.2d 1231 (9th Cir. 1987) (unpublished table decision).
\textsuperscript{172} For a very persuasive critique of the \textit{Dost} test, see Adler, \textit{Inverting, supra} note 20.
\textsuperscript{173} \textit{Dost}, 636 F. Supp. at 832. While the \textit{Dost} test has been the subject of criticism, see \textit{United States v. Rivera}, 546 F.3d 245, 250–52 (2d Cir. 2008) (collecting sources), it remains popular with lower courts, see Adler, \textit{Inverting, supra} note 20, at 953 (“Virtually all lower courts that have addressed the issue have embraced the so-called ‘Dost test.’”).
\textsuperscript{174} \textit{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.”\(^{175}\) 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 \textit{United States v. Johnson}\(^{176}\) and \textit{United States v. Steen}.\(^{177}\) Both cases involved defendants who filmed nude minors without their knowledge or permission.\(^{178}\) 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.\(^{179}\) The \textit{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.\(^{180}\) 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.”\(^{181}\) The court apparently concluded that this satisfied the first Dost factor.\(^{182}\)

\(^{175}\). \textit{Dost}, 636 F. Supp. at 832.

\(^{176}\). 639 F.3d 433 (8th Cir. 2011).

\(^{177}\). 634 F.3d 822 (5th Cir. 2011).

\(^{178}\). \textit{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 \textit{Johnson} involved a conviction for attempted production of child pornography and \textit{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, \textit{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.

\(^{180}\). \textit{Steen}, 634 F.3d at 827.

\(^{181}\). 639 F.3d at 441.

\(^{182}\). \textit{Id.} at 436–37, 440–41. As noted above, \textit{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.

\textit{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. For example, in United States v. Stewart, the defendant cropped pictures in such a way as to make the children’s genitalia the “focal point of the images.” 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, the court held that the defendant’s decision to crop the photographs rendered the new photographs lascivious and thus child pornography.

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. 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.

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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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.”).
Whether someone derives sexual pleasure from a photograph does not retroactively create exploitation or abuse during the creation of the image.190 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.192

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.193 Prohibiting speech based on the feelings or thoughts that it provokes in others conflicts with the very core of First Amendment protection.194 United States v. Larkin195 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.196 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.197

192. 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.198

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.”199 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.200

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,201 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.202 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.203 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
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.\(^{204}\) 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.\(^{205}\)

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

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.206

A. Age of Consent

Our first application of the proposed definition (and likely the least controversial application) is drawn from United States v. Bach.207 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.208 Bach argued that these images could not be punished as illegal child pornography because they “portray[ed] noncriminal consensual sexual conduct.”209 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.210

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.211 But the

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\textsuperscript{212}) 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.\textsuperscript{213}

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.\textsuperscript{214} 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,\textsuperscript{215} 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

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 . . . 

\textit{Id.} at 629 (citations omitted).


\textsuperscript{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).

\textsuperscript{214}. See Wooley v. Maynard, 430 U.S. 705, 715–17 (1977). \textit{But see} Schauer, \textit{supra} note 18, at 1768 (“\textit{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, \textit{A Brief Introduction to Free Speech Doctrine}, 29 ARIZ. ST. L.J. 461, 468 (1997) (“\textit{S}o 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.”).

\textsuperscript{215}. \textit{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.216

Although courts have repeatedly rejected challenges to child pornography convictions based on age of consent arguments,217 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.218 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.219 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,220 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.221 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.222

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

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.
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).
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. 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. 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. 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. “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.” 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.” 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.”

The Hotaling court was not alone in deciding that morphed computer images constitute child pornography. But not all lower courts to consider the issue have categorized morphed computer images as child pornography. 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.” 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.” 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.

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. The conceptual foundation of this harm relies on the distribution of an image to other individuals, just as reputation and privacy torts require publication. 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

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).


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).
The Hotaling court identified the “psychological harm of knowing that their images were exploited . . . by a trusted adult.” The precise nature of this harm is unclear. Is it the discomfort or revulsion the child feels upon learning of the images? 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.

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. Even if the images are distributed without profit, the child may be able to recover


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 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.

for false light invasion of privacy or perhaps for defamation. 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.

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.

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

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.”249 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.250 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.”251 Other courts have also permitted child pornography convictions on the basis of surreptitious films or photographs.252

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.253 In situations like Klug, the child depicted is neither abused nor exploited in the creation of the image.254

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.255 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.256 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.257 That

248. See id.
249. Id. at 800.
250. Id.
251. Id.
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,\textsuperscript{258} 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,"\textsuperscript{259} the resulting image is not a record of abuse or exploitation.\textsuperscript{260}

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.\textsuperscript{261} A reputational harm could occur without a visual depiction, such as in the publication of the name of a victim of child sexual 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.\textsuperscript{262}

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.\textsuperscript{263} Many jurisdictions recognize the invasion of privacy tort, which would allow victims to recover damages when such a surreptitious image is created.\textsuperscript{264} The disclosure of

\textsuperscript{258} "When a photographer selects and positions his subjects, it is quite a different matter from the peeking 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").

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


\textsuperscript{261} See supra text accompanying note 136.


\textsuperscript{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. 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.

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—such as teen sexting cases—but also because child pornography laws are being used as a proxy to punish child sex abuse. Many judges state that they are putting child pornography offenders in prison to protect children, and law enforcement officials regularly tout their child pornography arrests and convictions as success in...
their efforts to prevent child sex abuse.271 There is continuing disagreement over the social science evidence tying the possession of child pornography to contact sex offenses against children.272 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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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).