THE CATEGORICAL FAILURE OF CHILD PORNOGRAPHY LAW

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I. INTRODUCTION

In 1942, the Supreme Court laid the foundation for the excision of entire categories of speech from the protection of the First Amendment.[1] It did so on the basis that such categories are comprised of expression evincing societal harms that clearly outweigh any benefit arising from the speech.[2] Recognizing that this approach carries with it a high risk of censoring protected expression, the Court charged itself with ensuring that unprotected categories would both specifically define the speech to be excluded and include firm limits on what expression falls within the allowable scope of regulation. Generally, the Court has taken its responsibility very seriously, scrupulously narrowing the speech categories cast outside the First Amendment.

The Court has virtually ignored its charge in the context of child pornography. Unlike incitement and obscenity, which were both subjected to years of judicial scrutiny, refinement, and narrowing, the capacity of child pornography law has consistently expanded since its genesis. Although many have argued that this expansion is the result of a panic-discourse concerning children and sex, the essence of child pornography law's unprecedented growth lies in the continuing abnegation of the Court to devise a suitable definition of child pornography and place meaningful restrictions on the reach of regulation. Bloated from its inception, child pornography law has become more and more attenuated from the grave harms that justify prohibitions on speech. The result is a failure of meaning—in other words—a categorical failure.

II. CATEGORIZING SPEECH

At the crux of the debate concerning freedom of speech is the question of whether, and under what circumstances, the government may restrict speech because its content threatens harm to society. The command that "Congress shall make no law . . . abridging the freedom of speech"[3] can certainly be read literally, and it has by some,[4] but the Court has never considered the freedom

* J.D. 2014, Tulane University School of Law. Laura would like to thank Professor Keith Werhan for his support and mentorship.

1 *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (holding that "certain well-defined and narrowly limited" categories of speech, such as "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words," fall outside the bounds of constitutional protection).

2 *Id.*

3 U.S. CONST. amend. I.

4 *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250, 274-75 (1952) (Black, J., dissenting) ("[T]he First Amendment, with the Fourteenth, 'absolutely' forbids such laws without any 'ifs' or 'buts'

to be absolute. Although, as a default matter, all speech is protected by the First Amendment, there are "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[5] This is so because, in the Court's judgment, there have always existed categories of speech that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[6]

The requirement that the harm "clearly outweigh" any benefit to be derived from the speech works a substantial and important limit on categorization: the First Amendment default position that all speech is within the freedom can only be defeated by a societal danger produced by the speech that is significantly disproportionate to the speech's value. Perjury, for example, is unprotected because the speech—lying under oath—provides minimal communicative value, but causes significant societal harm.[7] However, the task of identifying categories of speech that are unworthy of First Amendment protection is rarely so easy. On the contrary, it is typically a struggle, either in terms of arriving at a satisfactory definition of the prohibited expression—one that is both well-defined and narrow—or in diagnosing the basis for the proscription, or both. Additionally, because speech categories exclude expression at a definitional or wholesale level, i.e., without consideration of the factual content of individual cases, they run the risk of imposing artificial unity on great swaths of expression that, when broken into their constituent parts, do not share a common set of attributes. Categories are inflexible and can establish false binaries between the protected and the unprotected, the in and the out, by ignoring the fact that divergence within is possible. Thus, it is essential for the categorically unprotected speech in question to be well-defined and to have substantial limits placed on what falls within the category.

The Court's struggle with subversive advocacy reflects the difficulty and importance of precisely defining and limiting the content and scope of categorically unprotected speech. Subversive advocacy was initially punishable without consideration of the speaker's intent or the likelihood of violence arising from the speech if the speech had a tendency to rouse its audience to illegal action.[8] This so-called bad tendency test swept in a considerable

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or 'whereases.'"); *see generally* Lyle Denniston, *Absolutism: Unadorned, and Without Apology*, 81 GEO. L.J. 351 (1992) (discussing absolute or literal interpretation of the First Amendment); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961) (containing an extensive discussion of the absolute nature of the First Amendment).

[5] *Chaplinsky*, 315 U.S. at 571-72.

[6] *Id.* at 572.

[7] United States v. Alvarez, 132 S. Ct. 2537, 2546 (2012) (plurality opinion).

[8] *See, e.g.*, Debs v. United States, 249 U.S. 211, 214-15 (1919) ("[T]he opposition was so expressed that its natural and intended effect would be to obstruct recruiting. If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief."); Frohwerk v. United States, 249 U.S. 204, 209 (1919) ("But we must take the case on the record as it is, and on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be

amount of speech now considered protected. Thanks in large part to the well-known and eloquent dissents of Justices Holmes and Brandeis in core subversive advocacy cases,[9] the Court reworked the test to the point of inverting it. Now, an advocate-speaker's call for illegal action is fully protected by the First Amendment absent a judgment that it is actually directed to inciting imminent, lawless action and is likely to do so.[10] Where subversive advocacy under the bad tendency test was essentially unprotected, under the modern test, it is wholly protected unless it is so united with violent action that it is tantamount to the action itself.[11]

The story of the Court's subversive advocacy saga is one of a greater and greater commitment to safeguarding speech, resulting in a test that is extraordinarily speech-protective given the conceivable harm that can arise from subversive advocacy; violence, even violent overthrow of the government, is its potential byproduct. Still, it is only under the rarest of circumstances—where the harm is both grave and proximate—that the speech can be enjoined.[12] This settlement indicates the Court's constitutional commitment to freedom of speech, or at least freedom of speech in the political arena.

III. CATEGORIZING SEXUAL SPEECH

The Court's commitment to freedom of speech in the sexual arena is far more dubious. A theme of the subversive advocacy saga was the Court's increasing awareness of the need to protect unpopular speech from majoritarian censorship. That understanding and its corollary that majority attitudes do not establish a basis for the prohibition of speech form "the central moral value of the first amendment."[13] Sexual expression, no less than other forms of speech, deserves the full protection of the First Amendment, whether or not the expression reflects mainstream attitudes, conventions, or mores. Further, due to the highly subjective, controversial, and personal nature of its content, sexual expression is an especially enticing target for censorship and as such requires judicial vigilance to ensure that speakers are protected.

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enough to kindle a flame . . . ."); Schenck v. United States, 249 U.S. 47, 52 (1919) ("If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime.").

[9] *See* Whitney v. California, 274 U.S. 357, 372-73, 378 (1927) (Brandeis, J., concurring); Gitlow v. New York, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616, 626-28 (1919) (Holmes, J., dissenting).

[10] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

[11] *Id.*

[12] *Id.*

[13] David A. J. Richards, *Free Speech and Obscenity Law: Toward A Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 80 (1974); *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964) (stating that the constitutional protection of speech "does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered'" (citing NAACP v. Button, 371 U.S. 415, 445 (1963))).

Since 1957, two species of sexual expression have been categorized as outside the First Amendment. These categories, obscenity and child pornography, present a variety of conceptual, moral, and legal challenges arising from the peculiar nature of sex as well as the mercurial and, at times, irrational and discriminatory social attitudes about sexuality and its expression. Thus, to remain faithful to the central value of the First Amendment, it is pivotal that both obscenity and child pornography be well-defined and narrowly limited.

A. Obscenity: "Indefinable" but Narrowly Limited

Justice Stewart once commented that the difficulty with obscenity was that the Court was "faced with the task of trying to define what may be indefinable."[14] Indeed, the Court struggled for many years to delineate the standards by which the obscene could be identified and regulated without running afoul of the First Amendment, as reflected in the "somewhat tortured history of the Court's obscenity decisions."[15] This "tortured history" began with *Roth v. United States*, when the Court held for the first time that the First Amendment did not protect obscene material.[16]

The defendant in *Roth* was in the business of selling sexually explicit materials and was convicted by a New York jury under the federal obscenity statute for mailing obscene circulars to promote sales.[17] The Supreme Court granted certiorari to decide whether obscenity was "utterance within the area of protected speech and press."[18] Early in the opinion, the Court noted that historically it had "always assumed that obscenity is not protected by the freedoms of speech and press"[19] and, more generally, that "the unconditional phrasing of the First Amendment was not intended to protect every utterance."[20] Sidestepping the contention that the obscenity statute was unconstitutional for punishing expression that merely incited "impure sexual thoughts, not shown to be related to any overt antisocial conduct,"[21] the Court stated that "the rejection of obscenity as utterly without redeeming social importance" was "implicit in the history of the First Amendment."[22] Thus, for the Court, obscenity, unlike subversive advocacy, could be enjoined

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[14] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Justice Stewart's concern is not unique. Many others have expressed doubts about obscenity law. For example, Justice Gregory of the Fourth Circuit observed that "[t]he Supreme Court's attempts to define obscenity for over half a century, including its enunciations of differing standards for obscenity and child pornography, reveal one truth: a material's obscenity, or lack thereof, ultimately depends on the subjective view of at least five individuals." United States v. Whorley, 550 F.3d 326, 346 (4th Cir. 2008) (Gregory, J., concurring).

[15] Miller v. California, 413 U.S. 15, 20 (1973).

[16] Roth v. United States, 354 U.S. 476, 485 (1957).

[17] *Id.* at 480.

[18] *Id.* at 480-81.

[19] *Id.* at 481.

[20] *Id.* at 483.

[21] *Id.* at 485-86 (emphasis omitted).

[22] *Roth*, 354 U.S. at 484.

without proof of a direct and immediate link between the speech and a resulting harm.

Still, the Court was aware of the importance of distinguishing the obscene from protected sexual speech.[23] The distinction lay in the prurience of the expression: the obscene, unlike protected sexual expression, "deals with sex in a manner appealing to prurient interest,"[24] judged through the application of "contemporary community standards,"[25] which regionalizes and temporalizes the determination.[26] The work would not be "judged merely by the effect of an isolated excerpt upon particularly susceptible persons."[27] Instead, the test would be "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[28]

The Court recognized that the standard was not precise.[29] Although it defined prurience as "a shameful or morbid interest in nudity, sex, or excretion, [going] substantially beyond customary limits of candor in description or representation of such matters,"[30] the definition would "not mean the same thing to all people, all the time, everywhere"[31] and was sufficiently loose to allow for "marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls . . . ."[32] But, in the end, the Court felt that the standard "[did] not offend constitutional safeguards against convictions based upon protected material, or fail to give . . . adequate notice of what [was] prohibited."[33]

Despite the Court's relative confidence in the narrowness of the holding, the Court was almost immediately confronted with a situation where a state tested the limits of the prohibition.[34] In *Kingsley International Pictures Corp. v.*

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[23] *Roth*, 354 U.S. 487 ("The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.").

[24] *Id.*

[25] *Id.* at 489.

[26] Miller v. California, 413 U.S. 15, 32 (1973) ("It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.").

[27] *Roth*, 354 U.S. at 488-89.

[28] *Id.* at 489.

[29] *Id.* at 491.

[30] *Id.* at 487 n.20.

[31] *Id.* at 491.

[32] *Id.* at 491-92. Chief Justice Warren concurred in the opinion, but, for fear of capricious results, would not have categorized the obscene as outside the protection of the First Amendment. *Id.* at 494-96 (Warren, J., concurring) ("I agree with the result reached by the Court in these cases, but, because we are operating in a field of expression and because broad language used here may eventually be applied to the arts and sciences and freedom of communication generally, I would limit our decision to the facts before us and to the validity of the statutes in question as applied.").

[33] *Roth*, 354 U.S. at 492.

[34] Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 685 (1959).

Regents, the Motion Picture Division of the New York Education Department denied a license to a distributor of a motion picture version of *Lady Chatterley's Lover*.[35] The statute provided that a license would be denied if a "film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime."[36] Although the film was not obscene under *Roth*, the state had refused to license it on the ground that the theme of the film was "immoral . . . for that theme is the presentation of adultery as a desirable, acceptable and proper pattern of behavior."[37]

The Supreme Court overturned the state's refusal to license the film.[38] Noting that the film was neither obscene nor operating as an incitement to illegal action,[39] the Court held that the state had banned the film on the basis of its theme as opposed to the way that the theme was portrayed—something that the state could not constitutionally do.[40] The Court unequivocally stated:

> What New York has done, therefore, is to prevent the exhibition of a motion picture because that picture advocates an idea—that adultery under certain circumstances may be proper behavior. Yet the First Amendment's basic guarantee is of freedom to advocate ideas. The State, quite simply, has thus struck at the very heart of constitutionally protected liberty.[41]

Thus, in *Kingsley*, the Court made good on its promise in *Roth* that material treating sex in a non-obscene manner, even if "unorthodox," "controversial," or "hateful to the prevailing climate of opinion,"[42] would enjoy the full protection of the First Amendment.

Kingsley established a significant limitation on the ability of states to censor sexual expression: only the obscene would be outside the area of constitutional protection; however, the issue of what constituted the obscene remained unsettled. Seven years later, the Court attempted to refine the *Roth* definition and restrict the scope of obscenity in *A Book Named John Cleland's Memoirs of a*

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[35] *Kingsley*, 360 U.S. at 685.

[36] *Id.* A statutory amendment provided that: the term "immoral" and the phrase "of such a character that its exhibition would tend to corrupt morals" shall denote a motion picture film or part thereof, the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior. *Id.* at 685 (internal quotations marks omitted) (citing N.Y. EDUC. LAW § 129 (McKinney's 1953)).

[37] *Id.*

[38] *Id.* at 690.

[39] *Id.* at 688. The state had argued that, because the film advocated for adultery (an illegal activity under state law), it could constitutionally be banned. The Court disagreed. Referring back to subversive advocacy doctrine, the Court quoted Justice Brandeis: Advocacy of illegal conduct alone is not "a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on." *Id.* at 689 (quoting Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring)).

[40] *Id.*

[41] *Kingsley*, 360 U.S. at 688.

[42] Roth v. United States, 354 U.S. 476, 484 (1957).

Woman of Pleasure' v. Attorney General of Massachusetts ("*Memoirs*").[43] The *Roth* Court had held that obscenity could be proscribed because it was "utterly without redeeming social importance."[44] In *Memoirs*, the Court incorporated that concept as an element of the definition of obscenity.[45] Under *Memoirs*, a successful obscenity prosecution required proof that "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."[46]

The "utterly without redeeming social value" criterion powerfully restricted the realm of the obscene. It is difficult to imagine a work that is "utterly" devoid of value and equally difficult to imagine how total valueless-ness might be proven in a prosecution. Not surprisingly, successful application of the *Memoirs* approach proved unrealizable.[47] The Court, now splintered on the issue, resorted to a per curiam treatment of obscenity that became known as "redrupping."[48] During the redrupping period, the Court reversed obscenity convictions when at least five members of the Court, each applying his own test, found the material at issue to be non-obscene. The practice continued for several years and resulted in a stockpile of precedent that failed to offer any meaningful guidance to lower courts, prosecutors, legislators, or anyone engaged in the production or dissemination of potentially obscene material.[49]

The redrupping period came to an end with the companion cases of *Miller v. California*[50] and *Paris Adult Theatre I v. Slaton*.[51] The *Memoirs* formulation

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[43] A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney General of Massachusetts, 383 U.S. 413 (1966) (plurality opinion).

[44] *Roth*, 354 U.S. at 484.

[45] *Memoirs*, 383 U.S. at 418.

[46] *Id.*

[47] *See, e.g.*, Mishkin v. New York, 383 U.S. 502 (1966).

[48] The Court first employed this approach in Redrup v. New York, 386 U.S. 767, 768 (1967).

[49] *See, e.g.*, Wiener v. California, 404 U.S. 988 (1971); Hartstein v. Missouri, 404 U.S. 988 (1971); Burgin v. South Carolina, 404 U.S. 806 (1971); Bloss v. Michigan, 402 U.S. 938 (1971); Childs v. Oregon, 401 U.S. 1006 (1971); Hoyt v. Minnesota, 399 U.S. 524 (1970) (per curiam); Walker v. Ohio, 398 U.S. 434 (1970) (per curiam); Bloss v. Dykema, 398 U.S. 278 (1970) (per curiam); Cain v. Kentucky, 397 U.S. 319 (1970) (per curiam); Henry v. Louisiana, 392 U.S. 655 (1968) (per curiam); Felton v. City of Pensacola, 390 U.S. 340 (1968) (per curiam); I. M. Amusement Corp. v. Ohio, 389 U.S. 573 (1968) (per curiam); Robert-Arthur Mgmt. Corp. v. Tennessee *ex rel.* Canale, 389 U.S. 578 (1968) (per curiam); Chance v. California, 389 U.S. 89 (1967) (per curiam); Central Magazine Sales, Ltd. v. United States, 389 U.S. 50 (1967) (per curiam); Conner v. City of Hammond, 389 U.S. 48 (1967) (per curiam); Potomac News Co. v. United States, 389 U.S. 47 (1967) (per curiam); Schackman v. California, 388 U.S. 454 (1967) (per curiam); Mazes v. Ohio, 388 U.S. 453 (1967) (per curiam); A Quantity of Copies of Books v. Kansas, 388 U.S. 452 (1967) (per curiam); Books, Inc., v. United States, 388 U.S. 449 (1967) (per curiam); Aday v. United States, 388 U.S. 447 (1967) (per curiam); Avansino v. New York, 388 U.S. 446 (1967) (per curiam); Sheperd v. New York, 388 U.S. 444 (1967) (per curiam); Cobert v. New York, 388 U.S. 443 (1967) (per curiam); Ratner v. California, 388 U.S. 442 (1967) (per curiam); Friedman v. New York, 388 U.S. 441 (1967) (per curiam); Keney v. New York, 388 U.S. 440 (1967) (per curiam).

[50] Miller v. California, 413 U.S. 15 (1973).

having "been abandoned as unworkable,"[52] the Court used *Miller* to revise the *Roth* definition of obscenity again by offering a more expansive test than *Memoirs* had proposed. The *Miller* definition integrated the *Roth* limitation to material that, taken as a whole, appeals to the "prurient interest in sex" and added the requirements that regulation be limited to works that "depict or describe sexual conduct" in a "patently offensive way" and "do not have serious literary, artistic, political, or scientific value."[53] With the exception of the serious value criterion, each element of the test would be determined from the perspective of "the average person, applying contemporary community standards."[54]

Having used *Miller* to "clarify the constitutional definition of obscene material subject to regulation by the States,"[55] the Court used *Paris* to reassert the exclusion of obscenity from constitutional protection. *Paris* involved the application of an anti-obscenity law to a theater that presented pornographic films to consenting adults.[56] Although the purveyor in *Paris* had taken precautions to avoid exposing unwitting recipients to the content of the films, the Court "categorically disapprove[d] the theory . . . that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only."[57] The Court stated that the state's interest in "regulating the exposure of obscene materials to juveniles and unconsenting adults" was high, but it was not the only interest permitting regulation of the material.[58] The Court now accentuated the "legitimate state interests at stake in stemming the tide of commercialized obscenity," including "the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself."[59]

The Court's introduction of the "tone of society"[60] justification for the proscription of obscenity was an overhaul of First Amendment doctrine. Unlike incitement, which requires a close connection between speech and harmful action, the *Paris* Court expressly rejected the argument that, without scientific proof that obscene material "adversely affects men and women or their society," state regulation of obscene materials, screened for consenting adults only, was constitutionally impermissible.[61] The Court acknowledged the lack of "conclusive proof of a connection between antisocial behavior and

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[51] Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

[52] *Miller*, 413 U.S. at 23.

[53] *Id.* at 24.

[54] *Id.*

[55] *Paris*, 413 U.S. at 54-55.

[56] *Id.* at 50-51. The theater displayed signs indicating that it exhibited "Atlanta's Finest Mature Feature Films." *Id.* at 52. On the door of the theater was another sign, which read: "Adult Theatre—You must be 21 and able to prove it. If viewing the nude body offends you, Please Do Not Enter." *Id.*

[57] *Id.* at 57.

[58] *Id.*

[59] *Id.* at 57-58.

[60] *Id.* at 59.

[61] *Paris*, 413 U.S. at 60.

obscene material," but held that "the legislature of Georgia could quite reasonably determine that such a connection does or might exist" and "could legitimately act on such a conclusion to protect 'the social interest in order and morality.'"[62]

In the end, the *Paris* Court remanded the case to the Georgia Supreme Court to determine if the films at issue were obscene under the new definition established in *Miller*.[63] But the *Paris* Court's holding that states were free to conclude that obscenity had "a tendency to exert a corrupting and debasing impact leading to antisocial behavior,"[64] even absent proof of such, combined with the new *Miller* definition, which submitted that juries determine whether the content of material was obscene with the exception of the serious value criterion, opened the door for new attempts to expand obscenity's scope. After all, since juries represent the community and have the power to determine what is obscene, could they not make a determination that a particular film, although not obscene by another community's standards, would have a corrosive impact on the welfare of their community and should therefore be banned?

The Court addressed this very question just one year after deciding *Miller* and *Paris* in *Jenkins v. Georgia*.[65] The appellant in *Jenkins*, who was the manager of a movie theater, was convicted of distributing obscene material under Georgia obscenity law.[66] The "obscene" material was the film *Carnal Knowledge*.[67] The state contended that, under *Miller*, "the obscenity *vel non* of

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[62] *Paris*, 413 U.S. at 60-61 (emphasis omitted).

[63] *Id.* at 69-70.

[64] *Id.* at 63.

[65] Jenkins v. Georgia, 418 U.S. 153 (1974).

[66] *Id.* at 154-55.

[67] *Id.* at 154. The Court also quoted a passage reviewing the film, which observed that:

> [It is basically a story] of two young college men, roommates and lifelong friends forever preoccupied with their sex lives. Both are first met as virgins. Nicholson is the more knowledgeable and attractive of the two; speaking colloquially, he is a burgeoning bastard. Art Garfunkel is his friend, the nice but troubled guy straight out of those early Feiffer cartoons, but *real*. He falls in love with the lovely Susan (Candice Bergen) and unknowingly shares her with his college buddy. As the "safer" one of the two, he is selected by Susan for marriage.
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> The time changes. Both men are in their thirties, pursuing successful careers in New York. Nicholson has been running through an average of a dozen women a year but has never managed to meet the right one, the one with the full bosom, the good legs, the properly rounded bottom. More than that, each and every one is a threat to his malehood and peace of mind, until at last, in a bar, he finds Ann-Margret, an aging bachelor girl with striking cleavage and, quite obviously, something of a past. "Why don't we shack up?" she suggests. They do and a horrendous relationship ensues, complicated mainly by her paranoidal desire to marry. Meanwhile, what of Garfunkel? The sparks have gone out of his marriage, the sex has lost its savor, and Garfunkel tries once more. And later, even more foolishly, again.

Id. at 158-59 (citing Hollis Alpert, *SR Goes to the Movies: Why Are They Saying Those Terrible Things About Us?*, SATURDAY REVIEW, July 3, 1971, at 18).

the film 'Carnal Knowledge' was a question for the jury" and, because the jury had found the film obscene, the conviction should be affirmed.[68] The Court disagreed, stating that "it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is 'patently offensive.'"[69] In support, the Court noted that *Miller* had listed examples of what might rise to the level of patent offensiveness.[70] The Court stated:

> These examples included "representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," and "representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." While this did not purport to be an exhaustive catalog of what juries might find patently offensive, it was certainly intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to such a determination. It would be wholly at odds with this aspect of *Miller* to uphold an obscenity conviction based upon a defendant's depiction of a woman with a bare midriff, even though a properly charged jury unanimously agreed on a verdict of guilty.[71]

As it had in *Kingsley*, the Court held that the state had no power to censor a film based merely on its subject matter—in this case, sex in a broad sense—and not the manner in which the subject matter was depicted.[72] *Carnal Knowledge* was not obscene under *Miller*, so it had the full protection of the First Amendment regardless of the jury's assessment.[73] The Court, having potentially widened the scope of obscenity in *Paris* and *Miller*, used *Jenkins* to limit it once again.

The history of the Court's obscenity decisions reflects a continuous effort to find an approach to obscenity that balances the conflicting interests implicated by sexual expression. The jurisprudence has been far from uncontroversial. First, the lack of a requirement that the material at issue be closely connected to a resultant harm is in disharmony with the incitement test from subversive advocacy doctrine. Further, the harms associated with obscenity are elusive, and the idea that consumption of obscene materials leads to moral corruption seems downright quaint today. The stipulation that jurors are invested with the main responsibility of distinguishing protected sexual expression from obscenity is in conflict with the core First Amendment function of protecting unpopular speech from majoritarian censorship. Finally, the choice to prosecute an individual for obscenity can be

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[68] *Jenkins*, 418 U.S. at 159.
[69] *Id.* at 160.
[70] *Id.* (quoting Miller v. California, 413 U.S. 15, 25 (1973)).
[71] *Id.* at 160-61.
[72] *Id.* at 161.
[73] *Id.*

discriminatory. Particularly, many have argued that prosecutions disproportionately target minority and homosexual sexual expression.[74]

Despite these very legitimate observations and concerns, the categorization of obscenity as outside the First Amendment does not pose a significant threat to speech. Obscenity prosecutions are rare and there has been no upsurge in obscenity convictions since *Paris* and *Miller* endowed jurors with the responsibility previously shouldered primarily by judges. More importantly, the many constraints established by the jurisprudence, including but not limited to the definitional hurdles from *Miller* and the serious value safety net, the legality of possession of obscene materials in the privacy of one's home,[75] and the pronouncement that nudity alone does not constitute the obscene,[76] confine the reach of the doctrine and help ensure that obscenity remains a narrow category—and a narrow exception to the protection of sexual expression.

B. Categorizing Non-Obscene Sexual Expression: Pornography and Animal Cruelty

While it is fair to say that obscenity operates as a narrow exception to the protection of sexual expression, it is not altogether accurate. Sexual expression not rising to the level of the obscene is, to a limited extent, regulable. Although possession of sexually explicit materials in the privacy of the home, including obscene material, remains protected activity,[77] communities may channel non-obscene sexually explicit expression into, or away from, particular locations through the use of zoning restrictions on adult theaters and the like.[78] Still, non-obscene sexual expression may not be prohibited outright, and legislative attempts to create new categories of unprotected, non-obscene sexual expression (with the notable exception of child pornography, as we shall see) failed.[79]

One attempt occurred in the 1980's when the city of Indianapolis adopted an anti-pornography ordinance based on the work of Catherine MacKinnon.[80] The ordinance conceptualized pornography in a considerably different way than obscenity: as a practice that discriminates against women, to be remedied through "judicial methods used for other discrimination."[81] It defined pornography as:

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[74] *See, e.g.*, Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379, 1385 (2008) ("The collateral effect of failing to distinguish gay and lesbian content from obscenity has been an implicit yet pervasive sanctioning of the censoring of gay content.").

[75] Stanley v. Georgia, 394 U.S. 557, 565 (1969).

[76] *Jenkins*, 418 U.S. at 161 ("[N]udity alone is not enough to make material legally obscene under the *Miller* standards.").

[77] *Stanley*, 394 U.S. at 565.

[78] *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 54-55 (1986); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 72-73 (1976).

[79] *See, e.g.*, Dworkin v. Hustler Magazine Inc., 867 F.2d 1188, 1199 (9th Cir. 1989).

[80] *See* Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324-25 (1985).

[81] *Id.* at 324.

> the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:
>
> (1) Women are presented as sexual objects who enjoy pain or humiliation; or
> (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
> (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
> (4) Women are presented as being penetrated by objects or animals; or
> (5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or
> (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.[82]

In *American Booksellers v. Hudnut*, the Seventh Circuit held that the Indianapolis ordinance was an impermissible exercise of viewpoint discrimination.[83] The ordinance did not incorporate any reference to prurience, offensiveness, or community standards, nor did it allow for any inquiry into the literary, artistic, political, or scientific value of the expression.[84] Instead, it selected among viewpoints. Speech that "subordinated" women or portrayed women as being "penetrated by objects" constituted actionable pornography without regard to the literary or artistic value of the work as a whole,[85] whereas speech that portrayed women in "sexual encounters 'premised on equality' [was] lawful no matter how sexually explicit."[86] Thus, the court found the ordinance unconstitutional.[87]

The Indianapolis ordinance not only defined pornography as separate from obscenity, it relied on a different animating rationale for its proscription.

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[82] *Am. Booksellers*, 771 F.2d at 324 (quoting INDIANAPOLIS, IND., CODE § 16-3(q) (1984)).

[83] *Id.* at 325. Several years later, the Supreme Court employed the "viewpoint discrimination" approach in the context of hate speech. In *R.A.V. v. City of St. Paul*, a municipal ordinance banned placing a burning cross on private property with the knowledge that the act would arouse "anger, alarm, or resentment in others on the basis of race . . . ." R.A.V. v. City of St. Paul, 505 U.S. 377, 380 (1992). Although all the justices seemed to concur that the ordinance was overbroad, considering that some speech that would not fall within the parameters of fighting words would nevertheless be prohibited by the ordinance, the Court used a different approach. *Id.* at 381, 397. Construing the ordinance as a fighting words prohibition, the majority held that it was an impermissible exercise of viewpoint discrimination, i.e., that it banned cross burning because of government hostility towards the content of the message. *Id.* at 384-89.

[84] *Am. Booksellers*, 771 F.2d at 324-25.

[85] *Id.* at 328.

[86] *Id.* at 325 (quoting Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 22 (1985)).

[87] *Id.* at 334.

Obscenity law is based on the worthlessness of the expression,[88] but the anti-pornography ordinance excluded pornography because of the harmfulness of the images.[89] The court presented two interpretations of that harm.[90] The first was that pornography is "a systemic practice of exploitation and subordination based on sex which differentially harms women."[91] It "affects thoughts" and causes men to subordinate women after seeing depictions of women as subordinate.[92] While the court was willing to accept the theory that "[d]epictions of subordination tend to perpetuate subordination," it rejected that premise as a legitimate basis for proscription, stating:

> Racial bigotry, anti-semitism, violence on television, reporters' biases—these and many more influence the culture and shape our socialization. None is directly answerable by more speech, unless that speech too finds its place in the popular culture. Yet all is protected speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.[93]

Thus, although pornography may cause societal harm, the court refused to ban it on the basis of its insidiousness.[94]

The second interpretation of the harm arising from pornography focused on the injury suffered by models or actresses in the course of production.[95] The court rejected the claim on two grounds. First, the court noted that, although the models in the films may appear to be suffering, the "image of pain is not necessarily pain,"[96] just as "a book about slavery is not itself slavery, or a book about death by poison a murder."[97] Second, even if some of the models in pornographic films and pictures may suffer injury in the

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[88] *See* Roth v. United States, 354 U.S. 476, 485 (1957) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)). However, as noted above, sexually explicit expression does not have to be utterly without value for it to be obscene. Miller v. California, 413 U.S. 15, 24 (1973).

[89] *Am. Booksellers*, 771 F.2d at 328.

[90] *Id.* at 328-30.

[91] *Id.* at 329 (quoting INDIANAPOLIS, IND., CODE § 16-1(a)(2) (1984)).

[92] *Id.* at 328. In other words, pornography does not merely depict the social subordination of women, but also enacts that subordination. *Id.*

[93] *Id.* at 330.

[94] *Id.*

[95] *Am. Booksellers*, 771 F.2d at 329-30.

[96] *Id.* at 330.

[97] *Id.* This observation illustrates the basic semiotic principle that there is a difference between the signifier and the signified. Semiotics posits that all communication systems, including language, function through the use of signs. Signs are culturally constituted codes that organize the arbitrary relationship between the concept of a thing (the signified) and that which stands in for that concept (the signifier). A semiotic approach to photographic representation accepts that the signifier and the signified are distinct and asks how, and why, the illusion of seeing the "real world" through the sign, i.e., the photograph, occurs. *See Logic as Semiotic: The Theory of Signs, in* PHILOSOPHICAL WRITINGS OF PEIRCE 98-100 (Justus Buchler ed., Dover Publications, Inc. ed. 1955) (1940).

course of production, "a state may not penalize speech that does not cause immediate injury."[98] The legislature's concern that models may suffer injury during production was definitely not unfounded, but the injury was too speculative for the speech to be prohibited. In the end, the Seventh Circuit was unwilling to uphold the anti-pornography ordinance.[99] Because it punished expression that did not fit the definition of obscenity, the ordinance created a new category of unprotected sexual expression.[100] This new category discriminated among viewpoints and punished expression that did not evince an immediate nexus between the expression and tangible harm.[101] Thus, the ordinance was unconstitutional.[102] The Supreme Court affirmed the Seventh Circuit's opinion.[103]

The Indianapolis ordinance had targeted sexually explicit depictions of the subordination of women. Although such depictions are potentially damaging, there is nothing necessarily illegal about the underlying conduct. But note that even portrayals of unlawful conduct are generally protected speech. For example, Congress enacted 18 U.S.C. Section 48 in 1999 to prohibit the commercial creation, sale, or possession of certain depictions of animal cruelty.[104] The law targeted "crush videos."[105] Crush videos "appeal to persons with a very specific sexual fetish" and typically portray "women slowly crushing animals to death with their bare feet or while wearing high heeled shoes" as the animals cry out, "obviously in great pain."[106]

Crush videos depict acts that are prohibited by law.[107] Congress was motivated to pass the statute largely because of the difficulty in prosecuting the underlying conduct.[108] When the law was challenged, the government argued that depictions of animal cruelty were categorically unprotected by the First Amendment.[109] The Court disagreed.[110] Noting that "the prohibition of animal cruelty itself has a long history in American law," the Court found that there was no "similar tradition excluding *depictions* of animal cruelty from 'the freedom of speech' codified in the First Amendment . . . ."[111] While the Court acknowledged that it was possible that there were "some categories of speech

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[98] *Am. Booksellers*, 771 F.2d at 333.

[99] *Id.* at 334.

[100] *Id.* at 327.

[101] *Id.* at 325, 333-34.

[102] *Id.* at 334.

[103] Hudnut v. Am. Booksellers Ass'n, 475 U.S. 1001 (1986).

[104] United States v. Stevens, 559 U.S. 460, 465 (2010). The law defined a depiction of animal cruelty as one "'in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed,' if such conduct was in violation of federal or state law where 'the creation, sale, or possession [took] place.'" *Id.* (citing 18 U.S.C. § 48(c)(1) (1999)).

[105] *Id.*

[106] *Id.* at 465-66 (internal quotation marks omitted).

[107] *Id.* at 466.

[108] *Id.* ("[C]rush videos rarely disclose the participants' identities, inhibiting prosecution of the underlying conduct.").

[109] *Id.* at 468.

[110] *Stevens*, 559 U.S. at 468.

[111] *Id.* at 469.

that have been historically unprotected, but have not yet been specifically identified or discussed," the depiction of animal cruelty was not among them.[112]

Read together, *Booksellers* and *Stevens* strongly suggest that, for a new class of speech to be categorized as outside the First Amendment, it must be so well-defined and narrowly limited as to survive viewpoint discrimination and overbreadth challenges, must evince a harm arising from the speech that greatly outweighs any benefit or value, and be a "previously recognized, long-established category of unprotected speech" that has not yet been "specifically identified."[113] The hurdles to categorization advocated by these cases illustrate the Court's awareness of the high risk of censorship stemming from the categorical approach and the indispensability of clear definitions that emphasize limitations, as well as the Court's reluctance to proliferate new categories of unprotected speech. Thus, the Court's willingness to accept the constitutionality of laws criminalizing child pornography was surprising where these laws emphasize expanse over limits, carry a high risk of censorship, and do not fall within the traditionally proscribed speech categories.

C. Child Pornography: Undefined and Expansive

The Court's foray into child pornography began in 1982, when the country was in something of a moral crisis involving child sex abuse.[114] In 1976, the year the term "family values" first appeared in the Republican Party platform, a series of raids aimed at cleaning up Times Square revealed a small stash of child pornography.[115] In response, Congress passed the Protection of Children Against Sexual Exploitation Act of 1977, which prohibited the production and commercial distribution of obscene depictions of children under the age of sixteen.[116] The Act adhered to the *Miller* standard in that only obscene depictions were prohibited.

It was not long before the Court removed that barrier.[117] The abductions of Etan Patz in 1979 and Adam Walsh in 1981 garnered national attention and

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[112] *Stevens*, 559 U.S. at 472.

[113] *Id.* at 471, 472.

[114] *See, e.g.*, Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 928 (2001) ("Child pornography law arose in direct response to a cultural crisis: starting in the late 1970s, child sexual abuse was 'discovered' as a malignant cultural secret, wrenched out of its silent hiding place and elevated to the level of a 'national emergency.'"); Richard Goldstein, *The Culture of Child Abuse*, VILLAGE VOICE, June 10, 1997, at 39-41. *But see* Abigail Bray, *Merciless Doctrines: Child Pornography, Censorship, and Late Capitalism*, 37 SIGNS 133, 138 (2011) (arguing that moral panic critiques "fail to challenge the unregulated commodification of child sexual abuse within late capitalism"). For comprehensive overviews of the dynamics of moral panic, see PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 127-29 (1998); STANLEY COHEN, FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS xvi-ii (Routledge 3d ed. 2002) (1972).

[115] Lawrence Stanley, *The Child Porn Myth*, 7 CARDOZO ARTS & ENT. L.J. 295, 295 (1989).

[116] Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, §§ 2252, 2253(1), 92 Stat. 7-8 (current version at 18 U.S.C. §§ 2252, 2256 (2012)).

[117] New York v. Ferber, 458 U.S. 747, 764-65 (1982).

inspired countless hyperbolic news reports.[118] By 1982, the "missing and exploited child" emerged as the newest-named player in the spectacle.[119] Pictures appeared on milk cartons. Police departments nationwide established child-finding units, distributed pamphlets, and dispatched speakers, increasing the stridency of the message: pedophiles can be anyone and are everywhere.[120] It was in this cultural context that the Court decided *New York v. Ferber*, the first case addressing the constitutionality of child pornography law.[121]

In *Ferber*, the proprietor of a New York City "adult" bookstore was indicted under state obscenity and child pornography laws for selling two films depicting boys masturbating.[122] The child pornography statute proscribed the use of a child in a "sexual performance", i.e., a visual representation of "sexual conduct."[123] After a jury trial, Ferber was acquitted of the obscenity charge, but found guilty of promoting child pornography.[124] The New York Court of Appeals reversed the conviction, finding the state child pornography law prohibited materials dealing with sex in a non-obscene way, and so was unconstitutional under *Miller*.[125] The Supreme Court granted certiorari to answer whether New York could, consistent with the First Amendment, prohibit the dissemination of non-obscene visual depictions of children engaged in sexual activity.[126]

The Court answered in the affirmative. Opening with the declaration that, "[i]n recent years, the exploitative use of children in the production of pornography has become a serious national problem,"[127] the Court began laying its foundation for the categorization of child pornography as outside the protection of the First Amendment. First invoking the familiar "balancing" reasoning from *Chaplinsky* that "[t]here are certain well-defined and narrowly limited classes of speech . . . of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality,"[128] the Court then discussed the application of that reasoning to obscenity. Although historically punishable, the Court acknowledged the years of difficulty it experienced in settling on a definition

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[118] JUDITH LEVINE, HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX 34 (2002).

[119] *Id.*

[120] *Id.* For excellent recitations and analyses of the events leading up to and surrounding the birth of the child pornography prohibition, see *id.* at 10-17; PHILIP JENKINS, BEYOND TOLERANCE: CHILD PORNOGRAPHY ON THE INTERNET 30-35 (2001).

[121] *Ferber*, 458 U.S. at 749.

[122] *Id.* at 751-52.

[123] *Id.* at 751 (citing N.Y. PENAL LAW § 263.00(1), (4) (McKinney 1977)). The law defined "sexual conduct" as "actual or simulated intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." *Id.*

[124] *Id.* at 752.

[125] *Id.*

[126] *Id.* at 753.

[127] *Ferber*, 458 U.S. at 749.

[128] *Id.* at 754 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)).

of obscenity that included meaningful limits on "what fell within the permissible scope of regulation."[129]

With child pornography, however, the *Ferber* Court made it clear that the emphasis would not be on carefully defining the scope of punishable expression.[130] After recognizing that the *Miller* standard represented a compromise between the State's interests in protecting unwilling recipients from exposure to obscene material and the "dangers of censorship inherent in unabashedly content-based laws,"[131] the Court boldly stated, "the States are entitled to greater leeway in the regulation of pornographic depictions of children."[132] Having so declared, the rest of the Court's job was relatively easy; it had only to catalogue its reasons before upholding New York's statute.

First, the Court emphasized the important State interest in the protection of minors, an interest that was, to the Court, "evident beyond the need for elaboration."[133] Nevertheless, the Court elaborated, listing instances in which it had upheld dubiously constitutional state laws aimed at protecting children: special treatment of indecent broadcasting, prohibitions against using children to distribute literature on the street, and attempts to curtail children's exposure to obscene materials.[134] However important the States' interests had been in those cases, the Court found the interest in suppressing child pornography to be "surpassing."[135] As proof, it quoted findings of the New York legislature accompanying passage of the law at issue:

> [T]here has been a proliferation of exploitation of children as subjects in sexual performances. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based on the exploitation of children. The public policy of the state demands the protection of children from exploitation through sexual performances.[136]

Accepting this judgment without further inquiry, the Court maintained that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child," a judgment that, for the Court, "easily passe[d] muster under the First Amendment."[137]

Having made the uncontroversial determination that the State had a compelling interest in protecting children from harm, the Court then set about linking the distribution of films and photographs depicting minors engaged in

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[129] *Ferber*, 458 U.S. at 755 ("[O]ur difficulty was not only to assure that statutes designed to regulate obscene materials sufficiently defined what was prohibited, but also to devise substantive limits on what fell within the permissible scope of regulation.").

[130] *Id.* at 756.

[131] *Id.*

[132] *Id.*

[133] *Id.* at 756-57.

[134] *Id.* at 757.

[135] *Ferber*, 458 U.S. at 757.

[136] *Id.* (alteration in original) (citing 1977 N.Y. Laws ch. 910, sec. 1).

[137] *Id.* at 758.

sexual activity to the harm suffered by the minors depicted.[138] The Court could see "at least two ways" distribution was equated with harm.[139] The first was spectral: the films constituted a permanent record of the child's participation in them, and the harm to the child would be "exacerbated by their circulation."[140] Although similar reasoning would be rejected a few years later by the Seventh Circuit in *Booksellers* when applied to pornographic materials featuring adult women, the *Ferber* Court easily accepted the idea that these materials would haunt the child subjects by either compounding or creating afresh the assumed harm suffered by the subjects during production.[141]

The Court's second source of harm was less phantasmatic, although also speculative. Shifting focus from injury to the extant subjects, the Court set its sights on the potential for future injury to others. In passing the statute criminalizing distribution, the New York legislature had thought it "difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies."[142] The Court agreed completely, and reasoned that "[t]he most expeditious" way for law enforcement to "dry up the market" for child pornography, and thus prevent future harm to children, was to target those who sell, advertise, or promote the materials.[143]

Ferber argued that it was indeed within the power of the State to target and punish those who distribute child pornography, but only child pornography that was legally obscene under *Miller*.[144] After all, the only form of sexual expression that had heretofore been denied constitutional protection was the obscene. The Court disagreed.[145] Deferring again to the judgment of the states, the Court argued that, while an obscenity standard might be good enough for some, the states were not prevented from going further when it came to sexual expression involving children.[146] According to the Court, the *Miller* standard did "not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children."[147] First, the question of prurience bore no connection to whether a child was harmed during production.[148] Second, whether the material was patently offensive was similarly irrelevant—the issue of offense to the audience was off the table.[149] The third and final *Miller* criterion, that the work be protected if it contains serious literary, artistic, political, or scientific value,

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[138] *Ferber*, 458 U.S. at 759.
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.* at 759-60.
[143] *Id.* at 760.
[144] *Ferber*, 458 U.S. at 760.
[145] *Id.* at 760-61.
[146] *Id.*
[147] *Id.* at 761.
[148] *Id.*
[149] *Id.*

was also dismissed.[150] The focus remained squarely on the child who was the victim of abuse. Thus, a new category of constitutionally prohibited expression was born: child pornography.[151]

The Court went on to discuss the limits on the new, unprotected category, of which there were not many. First, "the conduct to be prohibited must be adequately defined by the applicable state law," and the "category of 'sexual conduct' proscribed must also be suitably limited and defined."[152] Second, the offense must be "limited to works that *visually* depict sexual conduct by children below a specified age."[153] Finally, "criminal responsibility may not be imposed without some element of scienter on the part of the defendant."[154] For extra "clarity," the Court emphasized that the test for child pornography is separate from the test for obscenity and compared the two abstractly and in negative terms.[155] With child pornography, the "trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole."[156] After giving states very little guidance as to what child pornography *need* be (with the exception of the explicit inclusion of the visual element), the Court furnished a list of what it *need not* be. Unlike obscenity, child pornography was not defined by its limits. Instead, it was defined by its expanse.

Having decided that non-obscene sexual materials involving minors could be proscribed with no First Amendment problem, the Court turned to the issue on which *Ferber* had previously prevailed: that the child pornography law was unconstitutionally overbroad because it would apply not only to material linked to the harm of child exploitation, but also to material with serious literary, scientific, or educational value, and to material which did not "threaten the harms sought to be combated by the State."[157] The Court conceded that concern about the threat to protected expression was understandable, but not compelling enough.[158] The Court articulated its skepticism about the potential value of this sort of expression earlier in the opinion, calling it "exceedingly modest, if not *de minimis*."[159] After all, if it were necessary for literary or artistic reasons, a young-looking actor could play the part.[160] In terms of works possessing scientific or medical value, the Court

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[150] *Ferber*, 458 U.S. at 761.
[151] *Id.* at 764.
[152] *Id.*
[153] *Id.*
[154] *Id.* at 765.
[155] *Id.* at 764.
[156] *Ferber*, 458 U.S. at 764.
[157] *Id.* at 766.
[158] *Id.* at 773.
[159] *Id.* at 762.
[160] *Id.* at 763. The Court remarked in *R.A.V. v. City of St. Paul*, that, in removing child pornography from First Amendment protection, there was no question of "censoring a particular literary theme." R.A.V. v. City of St. Paul, 505 U.S. 377, 384 (1992). The remark was apparently in reference to the fact that young-looking actors could be used as opposed to statutory children in expression referencing children and sex. This reasoning, however,

could envision two types that "would fall prey to the statute"—medical textbooks and National Geographic.[161] But the Court considered these merely "a tiny fraction of the materials within the statute's reach,"[162] and expressed confidence that the state would not "widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on 'lewd exhibition[s] of the genitals.'"[163]

Ferber was a clear departure from the Court's historical approach to defining and eliminating categories of expression. Typically, as we have seen, when the Court eliminates a category of expression from constitutional protection, it carefully defines the speech to be banned, and that definition then serves as a limit on legislative enactments and provides guidance to lower courts. This method recurs throughout free speech jurisprudence. It was the approach taken by the Court in the subversive advocacy cases, which evolved into the *Brandenburg* incitement standard. It was the approach that the Court used in its obscenity jurisprudence, beginning with *Roth*, to create a precise definition of the obscene, despite the difficulty of that project. Despite this history, the Court has never attempted to define child pornography itself. Rather, it has simply upheld the statutory definitions it has confronted.[164] The lack of meaningful, discernible limits for what qualifies as child pornography enabled the expansion of the category in a number of ways and has had serious ramifications both for the individuals who have been caught in its capacious web and freedom of speech.

1. "Lascivious Exhibition of the Genitals"

The expansive potential of child pornography was inherent in the statutory definition the Court upheld in *Ferber*. The statute criminalized child "sexual conduct," including acts that were clearly sexual in nature, like "intercourse, sexual bestiality, . . . [and] sado-masochistic abuse," but also the "lewd exhibition of the genitals."[165] Because *Ferber* equated child pornography with child abuse, it follows that a picture of a child[166] engaged in sexual intercourse, for example, is a record of child sexual abuse, and therefore fits within the category. Identifying the presence of "lewd exhibition of the genitals" in a visual depiction, however, proved far more problematic and provided for

problematizes the identification of the category of child pornography. Judith Butler writes: "Although it seems that one must be able to recognize the genre of child pornography, to identify and delimit it in order to exempt it from the categorical protection of content, the identifying marks of such a product can be neither literary nor thematic." JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE 63 (1997).

[161] *Ferber*, 458 U.S. at 773.

[162] *Id.*

[163] *Id.*

[164] *See, e.g.*, Osborne v. Ohio, 495 U.S. 103 (1990); Massachusetts v. Oakes, 491 U.S. 576 (1989) (plurality opinion); *Ferber*, 458 U.S. at 747.

[165] *Ferber*, 458 U.S. at 751.

[166] "Child" as defined in child pornography law includes all persons under the age of sixteen. *Id.*

increasingly subjective, broad, and at times absurd, applications of child pornography statutes.

Consider *Massachusetts v. Oakes*.[167] The respondent, Oakes, had taken about ten photographs of his "physically mature 14-year-old stepdaughter, . . . who at the time was attending modeling school."[168] The photographs were just of the girl, and showed her "sitting, lying, and reclining on top of a bar," dressed in a red scarf and "a red and white striped bikini panty."[169] Her breasts were exposed.[170] Under the New York statute in *Ferber* the photographs would not have qualified as child pornography.[171] The Massachusetts statute in *Oakes*, however, provided in pertinent part:

> Whoever with knowledge that a person is a child under eighteen years of age . . . knowingly permits such child to pose or be exhibited in a state of nudity or to participate or engage in any live performance or in any act that depicts, describes or represents sexual conduct for purpose of visual representation . . . shall be punished by imprisonment in the state prison for a term of not less than ten . . . years.[172]

Nudity, which is apparently not self-defining, was defined in another statute as:

> uncovered or less than opaquely covered post-pubertal human genitals, pubic areas, the post-pubertal human female breast below a point immediately above the top of the areola, or the covered male genitals in a discernibly turgid state. . . . [A] female breast in considered uncovered if the nipple or the nipple or areola only are covered. In the case of pre-pubertal persons nudity shall mean uncovered or less than opaquely covered pre-pubertal human genitals or pubic area.[173]

Though the Supreme Court had repeatedly noted in its speech cases that depictions of nudity are protected under the First Amendment,[174] supposedly even in child pornography law,[175] Oakes was found guilty by a jury and sentenced to ten years' imprisonment.[176]

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[167] *Oakes*, 491 U.S. 576.

[168] *Id.* at 580.

[169] *Id.*

[170] *Id.*

[171] The New York statute defined child pornography as a visual representation of "sexual conduct," with sexual conduct defined as "actual or simulated intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." New York v. Ferber, 458 U.S. 747, 751 (1982).

[172] *Oakes*, 491 U.S. at 578-79 (quoting MASS. GEN. LAWS ch. 272, § 29A (1986)).

[173] *Id.* at 579 (quoting MASS. GEN. LAWS ch. 272, § 31 (1986)).

[174] *See e.g.*, Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981) ("'[N]udity alone' does not place otherwise protected material outside the mantle of the First Amendment." (quoting Jenkins v. Georgia, 418 U.S. 153, 161 (1974))).

[175] *Ferber*, 458 U.S. at 765 n.18 (noting that "nudity, without more, is protected expression").

[176] *Oakes*, 491 U.S. at 580.

The Massachusetts Supreme Judicial Court reversed Oakes' conviction and struck down the statute as substantially overbroad, noting that it would make "a criminal [out] of a parent who takes a frontal view picture of his or her naked one-year-old running on a beach or romping in a wading pool."[177] The United States Supreme Court granted certiorari, but did not reach the overbreadth question because the Massachusetts legislature had amended the statute to add a "lascivious intent" requirement to its nudity portion.[178] The case was vacated and remanded.[179] Still, two members of the Court said they would have approved of a law that prohibited any depictions of child nudity, so long as the law drew certain exemptions for materials having "a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum or library."[180] As for artistic non-pornographic depictions of "preadolescent genitals and postadolescent breasts," the partial-dissenters thought the body of material that would be covered was "insignificant compared with the lawful scope of the statute."[181] And the ubiquitous family photo of the romping, naked one-year-old? The partial-dissenters assumed they could "deal with such a situation in the unlikely event some prosecutor brings an indictment."[182]

2. "Graphic Focus on the Genitals"

The partial-dissenters' willingness to imagine the constitutionality of statutory definitions of child pornography that include criteria that broaden the already biased criterion of lewd or lascivious exhibition of the genitals was portentous. One year after *Oakes*, the Court upheld an Ohio statute that prohibited depictions of nude minors if "such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals."[183] The definition widened *Ferber* in two respects. First, *Osborne* introduced the "graphic focus on the genitals" test.[184] Under this test, a graphic focus on the genitals may "involve nothing more than a subjective estimation of the centrality or prominence of the genitals in a picture."[185] Thus, a finding of graphic focus may depend on where the photographer pointed his camera,[186] or the picture's lighting, making the determination of constitutional protection depend on what could be accidental. Moreover, the determination is dependent on—and peculiar to—the perspective of the viewer. Second, the *Osborne* statute was

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[177] *Oakes*, 491 U.S. at 580-81 (citing Commw. v. Oakes, 518 N.E.2d 836, 838 (Mass. 1988)).

[178] *Id.* at 581-84.

[179] *Id.* at 585.

[180] *Id.* at 588-590 (Scalia, J., concurring in judgment).

[181] *Id.* at 589.

[182] *Id.* at 580.

[183] Osborne v. Ohio, 495 U.S. 103, 113 (1990) (quoting State v. Young, 525 N.E.2d 1363, 1368 (Ohio 1988)).

[184] *Id.* at 138 (Brennan, J., dissenting) ("This phrase, a stranger to obscenity regulation . . . .").

[185] *Id.* (Brennan, J., dissenting).

[186] Adler, *supra* note 114, at 949.

broader than the one upheld in *Ferber*, which banned "lewd exhibition of the genitals."[187] The statute in *Osborne* banned "nudity constitut[ing] a lewd exhibition or involv[ing] a graphic focus on the genitals."[188] Note the disjunctive. Under the *Osborne* statute, a depiction of "'buttocks with less than a full, opaque covering, or of a female breast with less than a full opaque covering of any portion thereof'" is actionable.[189]

Oakes and *Osborne* suggest that the Supreme Court may be willing to allow states to criminalize depictions of child nudity without more, so long as the statute contains narrow exceptions for work produced for "bona fide" institutions such as museums and schools—reasoning that runs counter to the *Ferber* Court's pronouncement that "nudity, without more, is protected expression."[190] After *Osborne* and *Oakes*, that may no longer be true, at least where children are concerned. Another development in the law of child pornography undermines the *Ferber* Court's confidence that legislatures and courts would not give expansive constructions to ambiguous criteria such as "lewd exhibition of the genitals." Some lower courts have held that even images of clothed children can constitute "child pornography."

One such holding was in a Third Circuit case, *United States v. Knox*.[191] Defendant Stephen Knox was indicted on two counts: "(1) knowingly receiving through the mail visual depictions of a minor engaged in sexually explicit conduct; and (2) knowingly possessing three or more videotapes that contain a visual depiction of a minor engaging in sexually explicit conduct."[192] "'Sexually explicit conduct' for both . . . offenses [was] defined to include a 'lascivious exhibition of the genitals or pubic area.'"[193] The Third Circuit held that a depiction could constitute a "lascivious exhibition of the genitals or pubic area" even if the child is fully clothed.[194]

The videotapes did not contain any depictions of nudity or of children engaged in obviously sexual conduct.[195] Instead, the tapes contained

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[187] New York v. Ferber, 484 U.S. 747, 751 (1982).

[188] *Osborne*, 495 U.S. at 113.

[189] *Id.* at 126 (Brennan, J., dissenting). Presumably, such a depiction would be actionable only if sufficiently lewd, but Justice Brennan pointed out in dissent that the statute's plain language makes it a crime to "[p]ossess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity." *Id.* (alteration in original) (quoting OHIO REV. CODE ANN. § 2907.323 (A)(3) (Supp. 1989)).

[190] *Ferber*, 458 U.S. at 765 n.18.

[191] United States v. Knox, 32 F.3d 733, 754 (3d Cir. 1994).

[192] *Knox*, 32 F.3d at 737-38.

[193] *Id.* at 738 (citing 18 U.S.C. § 2256(2)(E) (Supp. IV 1992)).

[194] *Id.* at 754. The Third Circuit upheld its construction of the definition even after a remand from the Supreme Court, instructing it to consider the case "in light of the position asserted by the Solicitor General in his brief," in which the government argued that the plain language of the statute required, at a minimum, that "the genitals or pubic area exhibited be at least somewhat visible or discernible through the child's clothing." *Id.* at 737. The Third Circuit rejected this argument, holding that the statute, on its face, contained no "discernibility" requirement. *Id.*

[195] *Id.* at 737 (stating that "the genitalia and pubic areas of the young girls were always concealed by an abbreviated article of clothing" and noting nothing in terms of recorded sexual conduct).

"numerous vignettes of teenage and preteen females, between the ages of ten and seventeen, striking provocative poses for the camera" while clothed in "bikini bathing suits, leotards, underwear, or other abbreviated attire."[196] In some scenes, the subjects were "dancing or gyrating in a fashion not natural for their age."[197] Most damning was the fact that the camera would "zoom in on the children's pubic and genital area and display a close-up view for an extended period of time."[198] To the court, this was evidence that the videotapes "clearly were designed to pander to pedophiles."[199] Knox was sentenced to a term of imprisonment of five years.[200]

The Third Circuit in *Knox* was not the first court to arrive at an ample interpretation of "lewd" or "lascivious exhibition of the genitals." In an opinion later affirmed by the Ninth Circuit,[201] a California district court announced a six-factor test that could be used by the trier of fact in determining whether a visual depiction of a minor constitutes a "lascivious exhibition of the genitals."[202] The factors were:

> 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.[203]

With the exception of the first criterion, none of the *Dost* factors addressed what a "lascivious exhibition of the genitals" might mean. Instead, the test presented highly subjective, contextually dependent clues that further expanded the category of child pornography itself.

A survey of the ways in which courts have applied *Dost* is illustrative of its expansive potential. In *United States v. Horn*, the Eighth Circuit found that "an otherwise innocent videotape" could be made into a "lascivious exhibition of the genitals by freeze-framing."[204] In that case, the defendant possessed two tapes, one that showed children and adults on a topless beach and one that

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[196] *Knox*, 32 F.3d at 737.
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] *Id.* at 738.
[201] *See* United States v. Dost, 813 F.2d 1231 (9th Cir. 1987).
[202] United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986).
[203] *Dost*, 636 F. Supp. at 832.
[204] United States v. Horn, 187 F.3d 781, 790 (8th Cir. 1999).

showed nude children playing on a jungle gym.[205] The court, relying mostly on the "focus of the depiction" criterion,[206] held that the tapes contained lascivious exhibitions of the genitals solely because of freeze-framing.[207] The court stated: "By focusing the viewer's attention on the pubic area, freeze-framing can create an image intended to elicit a sexual response in the viewer. The 'lascivious exhibition' is not the work of the child, whose innocence is not in question, but of the producer or editor of the video."[208]

Horn can be read as blending the first and sixth *Dost* factors: because the use of freeze-framing focused the viewer's attention on the pubic area (the first factor), that is evidence that the images were intended to elicit a sexual response in the viewer (the sixth factor).[209] Note how contingent and subjective the factors are. Had there been no freeze-framing, or had the freeze-framing not been edited in at moments when, to the court, the children's "pubic areas [were] most exposed, as, for instance, when they are doing cartwheels," or had the pubic areas not been at the center of the image during the freeze-framed moments, there very well may have been no child pornography.[210] Such a broad and amorphous construction of the "focus of the depiction" criterion not only has the potential to sexualize otherwise innocent pictures of children. More importantly, it extends the *Ferber* concept of harm into uncharted territory—to images that record no child abuse.[211]

3. Designed to Elicit a Sexual Response in the Viewer

Take as another example a case that implicates the widely felt apprehension that a picture or video of children playing in a bathtub—an image so culturally ubiquitous it is a cliché—can constitute child pornography.[212] In *State v. Dixon*, the defendant videotaped his neighbor's minor daughters while they were bathing.[213] Again, the pertinent definition of "sexual activity" was the

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[205] *Horn*, 187 F.3d at 789.

[206] *Id.* ("In particular, we believe that when the child is nude or partially clothed, when the focus of the depiction is the child's genitals or pubic area, and when the image is intended to elicit a sexual response in the viewer, the depiction is lascivious.").

[207] *Id.* at 790 ("Shots of young girls are freeze-framed at moments when their pubic areas are most exposed, as, for instance, when they are doing cartwheels; and these areas are at the center of the image and form the focus of the depiction.").

[208] *Id.*

[209] *Id.* at 789.

[210] *Id.* at 790.

[211] *See* Adler, *supra* note 114, at 961-62 ("[C]hild pornography law has become less and less focused on reducing that harm; instead, it has increasingly come to target pictures that were not the product of child abuse. Not only do these expansive laws, therefore, have less to do with protecting children from molestation suffered in the production of child pornography, but these laws also threaten a significant amount of protected speech."). Further, as discussed below, the Court in *Ashcroft v. Free Speech Coalition*, would reject the idea that virtual child pornography, "speech that records no crime and creates no victims by its production," was nevertheless unprotected. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 250 (2002).

[212] *See, e.g.*, State v. Dixon, No. 01C01–9802–CC–00085, 1998 WL 712344, at *1 (Tenn. Crim. App. Oct. 13, 1998).

[213] *Id.*

"'[l]ascivious exhibition of the female breast or genitals or pubic area of any person.'"[214] Although the defendant argued that the filming of two girls bathing did not meet the statutory definition of sexual activity, the court applied the *Dost* factors and found that four were present.[215] First, the court held that the defendant focused the camera on the breasts and pubic area of one of the girls during portions of the tape.[216] Second, a third party, the girls' aunt, encouraged the girls to pose for a pretend camera during the bath, and the court stated that "[t]hese poses were not natural for a young child to be doing while taking a bath."[217] Third, the girls were nude.[218]

It is improbable (albeit possible) that the first three factors listed by the *Dixon* court would have sustained the charge. The third factor in particular seems redundant, if not outwardly humorous given the context. The girls were nude because they were taking a bath. It was the fourth and final factor that sealed the defendant's fate. According to testimony, the defendant viewed the videotape immediately before having sex with his girlfriend.[219] Thus, the video created by the defendant was intended to elicit a sexual response in the viewer—the defendant.[220] Based on the foregoing, the court found the video "clearly" fell within the definition of "sexual activity."[221] The defendant was sentenced to ten years imprisonment.[222]

But do the photographer's intentions really determine the meaning of a photograph? The sixth *Dost* factor suggests that the answer is yes, but logic (and photographic theory) suggests that the answer is no. As Susan Sontag wrote, an image "will have its own career, blown by the whims and loyalties of the diverse communities that have use for it."[223] In the legal setting in particular, photographs are furnished with meaning and are bent to serve narrative ends.[224] As one scholar has remarked, although the producer of the image frames the representation, it is the viewers who tender the meaning themselves in the form of narratives, which are heavily influenced by the viewers' subjective and social positions.[225]

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[214] *Dixon*, 1998 WL 712344, at *1 (alteration in original) (citing TENN. CODE ANN. § 39-17-1002(7)(G) (1995)).

[215] *Id.* at *2.

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *Dixon*, 1998 WL 712344, at *2.

[221] *Id.*

[222] *Id.* at *5.

[223] SUSAN SONTAG, REGARDING THE PAIN OF OTHERS 39 (Picador 2003) [hereinafter SONTAG, REGARDING THE PAIN OF OTHERS].

[224] *See* David Sternbach, *Hanging Pictures: Photographic Theory and the Framing of Images of Execution*, 70 N.Y.U. L. REV. 1100, 1110 (1995) ("Photographs are used to bolster stories, and stories are spun to explain photographs. If, granting authenticity, spectators of the images believe that photographs simply transcribe reality, then the rhetorical, argumentative nature of the act of photographing (and the act of observing photographs) is obscured.").

[225] *Id.* at 1141.

Obscenity law accounts for this by insisting that juries look at the work as a whole before determining whether the average person, applying contemporary community standards, would consider the work obscene.[226] Then, the judge appraises the material for serious value.[227] The obscenity approach does not ask that the jurors determine the effect of the expression on its intended audience. On the contrary, it insists that jurors use the frame of the average person.[228] Nor does obscenity law allow triers of fact to view scenes in isolation.[229] This "web of constraints" leaves little room for juries to supply their own narratives, and also builds in a judicial safeguard for "inevitable instances of abuse."[230]

Child pornography doctrine, by contrast, allows juries to look at images in isolation, eschews any judicial safety net for valuable expression, and imposes methods of interpretation (often by way of the *Dost* factors) that all but mandate the projection of the child pornography narrative onto images. The sixth *Dost* factor in particular (whether the picture is "designed to elicit a sexual response in the [pedophilic] viewer")[231] forces the interpretive frame of seeing as a pedophile sees upon juries.[232] Under this standard, "an everyday image can be child pornography because a pedophile found it sexually stimulating."[233] Recall that in *Dixon*, the court found that the tape of the girls in the bathtub was child pornography largely because the defendant viewed it before having sex with his adult girlfriend.[234] The circularity of this reasoning

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[226] Miller v. California, 413 U.S. 15, 30 (1973).

[227] *Id.*

[228] *Id.* at 33.

[229] *Id.* at 31.

[230] Keith Werhan, *The Tie That Binds: Constitutional Law and Culture, Obscenity and Child Pornography*, 100 S. ATL. Q. 897, 907 (2002).

[231] United States v. Amirault, 173 F.3d 28, 34 (1st Cir. 1999).

[232] Adler, *supra* note 114, at 958-59. Another approach, one that holds that child pornography is evident in the picture itself, has been utilized. *See* United States v. Villard, 885 F.2d 117, 125 (3d Cir. 1989). This approach, although appealing in its attempt at objectivity, is unworkable because it rests on the assumption that a photograph can be divorced from context and that every picture has a pre-interpretive, or "true," meaning. This is, of course, not the case. *See generally* SONTAG, REGARDING THE PAIN OF OTHERS, *supra* note 223.

[233] Adler, *supra* note 114, at 959. Arguably, every *Dost* factor requires the viewer to take on the perspective of the pedophile to determine whether or not a given image is child pornography. *See* Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 263-64 (2001) ("The application of each *Dost* factor demands a heightened awareness of the erotic appeal of children. We must search out whether the child's genitals are the focal point of the picture, whether the pubic area is prominent, if the child is in a setting normally associated with sex, if the child conveys an erotic acquiescence in his gaze, or if there is some suggestion of his 'coyness or willingness to engage in sexual activity.' If a videotape depicts a clothed child dancing, we must look closer: Is the child innocently dancing or is she engaging in 'gyra[tions] . . . indicative of adult sexual relations?'" (quoting United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986) (alteration in original) (footnote omitted)).

[234] State v. Dixon, No. 01C01–9802–CC–00085, 1998 WL 712344, at *2 (Tenn. Crim. App. Oct. 13, 1998).

is disturbing and contributes to the self-generating nature of child pornography.[235]

4. Criminalizing Possession

Another remarkable expansion of the reach of child pornography law occurred in *Osborne*, when the Court extended *Ferber's* holding to prohibit the possession of child pornography.[236] *Ferber's* holding only applied to production and distribution.[237] In the context of obscenity, possession of obscene materials in the home is legal.[238] However, the *Osborne* Court noted that, unlike *Stanley*, where Georgia "was concerned that obscenity would poison the minds of its viewers,"[239] the Ohio legislature in *Osborne* had "not rel[ied] on a paternalistic interest in regulating Osborne's mind."[240] Instead, the Court found Ohio had been motivated to proscribe mere possession of child pornography "to protect the victims" by "destroy[ing the] market for the exploitative use of children."[241]

The Court held that "the interests underlying child pornography prohibitions far exceed[ed] the interests justifying the Georgia law at issue in *Stanley*."[242] In addition to the "drying up the market" rationale, the Court found several interests that justified Ohio's prohibition upon possession of child pornography. First, echoing *Ferber*, the Court held that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child,"[243] and then applied the *Ferber* rationale prohibiting distribution (which had been based on the practical difficulties law enforcement faced in prosecuting producers of child pornography) to possession, stating that "penaliz[ing] those who possess and view" child pornography would decrease its production, "thereby decreasing demand."[244] The Court went further, and found that "encouraging the destruction of these materials is . . . desirable because evidence suggests that

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[235] *See* Adler, *supra* note 233, at 264 ("As everything becomes child pornography in the eyes of the law—clothed children, coy children, children in settings where children are found—perhaps everything really does become pornographic."); *see also* Adler, *supra* note 114, at 960 ("Given that everyday pictures of children can also hold sexual appeal for pedophiles, a focus on a photograph's use means that *all* pictures of children can become suspiciously erotic if they are in the hands of a pedophile. The circularity becomes dizzying: 'child pornography' is defined as pictures that appeal to a pedophile and a 'pedophile' is defined as someone who likes child pornography.").

[236] Osborne v. Ohio, 495 U.S. 103, 111 (1990).

[237] New York v. Ferber, 458 U.S. 747, 774 (1982).

[238] Stanley v. Georgia, 394 U.S. 557, 565 (1969).

[239] *Osborne*, 495 U.S. at 109 (citing *Stanley*, 394 U.S. at 565).

[240] *Id.*

[241] *Id.*

[242] *Id.* at 108.

[243] *Id.* at 109.

[244] *Id.* at 109-10.

pedophiles use child pornography to seduce other children into sexual activity."[245]

Osborne listed one more state interest justifying the ban on possession. Relying on *Ferber*, the Court reasoned: "[M]aterials produced by child pornographers permanently record the victim's abuse. The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come. The state's ban on possession and viewing encourages the possessors of these materials to destroy them,"[246] presumably putting an end to the haunting. This "permanent record" rationale is one of the most puzzling aspects of child pornography law. Even if one is willing to accept that pornographic images, "*if distributed* may be harmful to the depicted child, such harm does not necessarily follow from the mere possession" of the images.[247] As one court has stated, "the harm is contingent upon the occurrence of another arguably unlawful act; to wit, distribution."[248]

On the other hand, it is true that on a theoretical level, visual depictions or photographs do possess the ability to record and haunt.[249] As Sontag notes, "After the event has ended, the picture will still exist, conferring on the event a kind of immortality (and importance) it would never otherwise have enjoyed."[250] Nostalgia, for one, is "actively promote[d]" by photographs.[251]

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[245] *Osborne*, 495 U.S. 111. In support of this proposition, the Court cited a report of the Attorney General's Commission on Pornography: "Child pornography is often used as part of a method of seducing child victims. A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having 'fun' participating in the activity." *Id.* at n.7 (quoting 1 ATT'Y GEN. COMM'N ON PORNOGRAPHY FINAL REP. 649 (1986)). It is worth noting that the Court would reject similar reasoning when applied to virtual child pornography in *Ashcroft*. The Government sought to justify the prohibition of virtual child pornography on several grounds, including that "pedophiles may use virtual child pornography to seduce children." Ashcroft v. Free Speech Coal., 535 U.S. 234, 251 (2002). The Court rejected the argument, stating that "[t]here are many things innocent in themselves . . . such as cartoons, video games, and candy, that might be used for immoral purposes, yet we would not expect those to be prohibited because they can be misused." *Id.* *Ashcroft* and *Osborne* draw a distinction between the character of the material used in the service of crime, although both virtual child pornography and child pornography have the potential to be used to seduce children. However, the distinction is off base; under settled First Amendment precedent, the speculative potential of expression to be used in furtherance of subsequent illegal acts is not enough to ban the material, regardless of its content. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

[246] *Osborne*, 495 U.S. at 111 (internal citations omitted).

[247] State v. Zidel, 940 A.2d 255, 263 (N.H. 2008) (emphasis in original).

[248] *Id.*

[249] In the end, the potential of photographs to "haunt" may apply more to the spectator than the subject. *See* SUSAN SONTAG, ON PHOTOGRAPHY, 168-69 (Farrar, Straus, & Giroux, 6th prtg. 1977) (1973) [hereinafter SONTAG, ON PHOTOGRAPHY] ("Often something disturbs us more in photographed form than it does when we actually experience it. . . . One is vulnerable to disturbing events in the form of photographic images in a way that one is not to the real thing. That vulnerability is part of the distinctive passivity of someone who is a spectator twice over, spectator of events already shaped, first by the participants and second by the image maker.").

[250] *Id.* at 11.

[251] *Id.* at 15.

"To take a photograph is to participate in another person's (or thing's) mortality, vulnerability, mutability. Precisely by slicing out this moment and freezing it, all photographs testify to time's relentless melt."[252] Thus, photographic images are, in a way, "able to usurp reality" because "a photograph is not only an image (as a painting is an image), an interpretation of the real; it is also a trace, something directly stenciled off the real, like a footprint or death mask."[253]

To the extent that the photograph is a "trace," it is not a simple "transparency of something that happened."[254] Where, "in primitive societies, the thing and its image were simply two different, that is, physically distinct, manifestations of the same energy or spirit,"[255] making it possible to gain control over the thing by gaining control over the image; however, we do not typically regard a photograph of a thing as the thing itself. Instead, the relationship between depiction and reality is complementary ("[w]hen the notion of reality changes, so does that of the image, and vice versa")[256] and contingent ("[p]hotographs, which cannot themselves explain anything, are inexhaustible invitations to deduction, speculation, and fantasy").[257] But it is not only the relationship of depiction to reality that is variable. The victims depicted can have varying reactions to the depiction. In some contexts, "[p]hotographs of the suffering and martyrdom of a people are more than reminders of death, of failure, of victimization. They invoke the miracle of survival."[258] Sontag, writing about the Holocaust Memorial Museum in Washington, D.C., notes that "many victim peoples want a memory museum, a temple that houses a comprehensive, chronologically organized, illustrated narrative of their sufferings."[259] Under this view, "victims are interested in the representation of their own sufferings."[260] Child pornography law eschews this phenomenon by insisting that the "permanent record" of abuse "haunts" its victims for years to come and should therefore be destroyed.

Most troubling, though, is the incongruity of the haunting rationale under First Amendment law. The Court in *Ferber* explained that "[b]ecause the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place."[261] Ostensibly based in privacy concerns, the haunting rationale may attempt to acknowledge an injury similar to the reputational injuries arising from defamation[262] or public

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[252] SONTAG, ON PHOTOGRAPHY, *supra* note 249, at 15.

[253] *Id.* at 154.

[254] SONTAG, REGARDING THE PAIN OF OTHERS, *supra* note 223, at 46.

[255] SONTAG, ON PHOTOGRAPHY, *supra* note 249, at 155.

[256] *Id.* at 60.

[257] *Id.* at 23.

[258] SONTAG, REGARDING THE PAIN OF OTHERS, *supra* note 223, at 87.

[259] *Id.*

[260] *Id.* at 112.

[261] New York v. Ferber, 458 U.S. 747, 759 n.10 (1982) (quoting David P. Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981)).

[262] The standard elements of a cause of action for defamation are: "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of

disclosure of private facts.[263] The injury potentially caused by the permanent record of abuse could then be redressed by those very torts or by libel law in general, instead of being used as a supplemental rationale for the proscription of child pornography. Moreover, since child pornography law has expanded to include images that do not constitute a record of child abuse (which is discussed in some detail in the forthcoming sections), "it is inaccurate to suppose that children depicted in such photographs would be 'haunted' by anything, since haunting implies a return of a previous experience."[264] As we have seen, the First Amendment typically requires proof of a serious harm flowing from speech for the speech itself to be criminalized.[265] In the realm of haunting, there may be no harm at all.

5. The Obsolescence of an Underlying Act of Child Abuse

It should be plain from the foregoing that child pornography law has the expansive potential to threaten at least some depictions of children that ought to be protected. More importantly, as we have already begun to see, as increasingly lax interpretations of legislative definitions of child pornography have proliferated, unchecked by the Supreme Court, child pornography law has developed to such a capacity that it provides for the prosecution of pictures in which there was no underlying act of child abuse. Thus, as the category has expanded, it has become more and more attenuated from the grievous harms that initially justified its rigidity, leading to an acceptance of a theory of speech that has been rejected in every other First Amendment context. As one scholar stated, "child pornography law has enshrined a vision of how speech works that is fundamentally incompatible with the way we think about speech in all other areas of First Amendment law."[266]

The problem began in *Ferber* with the introduction of the concept that a representation can be banned because of the underlying act that produced it.[267] This logic, unique to child pornography, rests on the assumption that child pornography is child abuse based on the abuse of a child in production. The Seventh Circuit in *Booksellers* roundly rejected the parallel reasoning that pornography *is* the subjection of women.[268] When a Boston newspaper briefly posted a video online that depicted the beheading of the kidnapped American journalist Daniel Pearl, a heated debate took place during which the right of Pearl's widow to be spared more sadness was pitted against the right of the

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the statement irrespective of special harm or the existence of special harm caused by the publication." 128 AM. JUR. *Trials* 1 § 2 (2013).

[263] The standard elements of the cause of action for invasion of privacy based on public disclosure of private facts are: "(1) the public disclosure (2) of a private fact (3) that would be offensive and objectionable to a reasonable person, and (4) that is not of legitimate public concern." 103 AM. JUR. 3D *Proof of Facts* 159 § 2 (2008).

[264] Adler, *supra* note 114, at 990.

[265] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

[266] Adler, *supra* note 114, at 972.

[267] *Id.* at 982.

[268] Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 330 (1985).

news media to print and post what it saw fit and the right of the public to receive the information.[269] Neither side, however, suggested that the newspaper should be penalized for posting the video in the first place, although both sides interpreted the video as a snuff film.[270] The Supreme Court held in *Stevens* that portrayals of even the most heinous acts of animal cruelty could not be prohibited based on the underlying crime they depict.[271] What makes child pornography different?

In *Ferber*, the Court had announced five reasons that supported the exclusion of child pornography from First Amendment protection. First, the state has a compelling interest in "safeguarding the physical and psychological well-being of a minor."[272] Second, "[t]he materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation"[273] and distribution of the materials must be curbed to hamper the exploitation.[274] Third, "[t]he advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production" of child pornography.[275] Fourth, the chance that there would be any material of value that would be prohibited under the category of child pornography is "exceedingly modest, if not *de minimis*."[276] Fifth, prohibiting categories of speech is an accepted approach in First Amendment jurisprudence and is therefore acceptable in this instance.[277] The first three reasons addressed the central basis for the child pornography proscription—that child pornography must be prohibited because of the harm done to children.[278] The Court's key assumption was that when child pornography exists, it exists because of an act of child abuse, and therefore lacks First Amendment protection.[279]

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[269] SONTAG, REGARDING THE PAIN OF OTHERS, *supra* note 223, at 69.

[270] *Id.*

[271] *See* United States v. Stevens, 559 U.S. 460 (2010). The en banc Third Circuit explicitly rejected an analogy between animal cruelty depictions and child pornography. *Id.* at 467.

[272] New York v. Ferber, 458 U.S. 747, 756-57 (1982).

[273] *Ferber*, 458 U.S. at 759. This rationale is often referred to as the power of the expression to "haunt" the child, as discussed above.

[274] *Id.* at 760. The Court stated that the production of child pornography is a "low-profile, clandestine industry" and the "most expeditious if not the only practical method of law enforcement may be to dry up the market for this material" by punishing its distribution and sale. *Id.*

[275] *Ferber*, 458 U.S. at 761.

[276] *Id.* at 762.

[277] *Id.* at 763-64.

[278] *Id.* at 758. The fourth rationale assumes either that such speech is almost always low-value, or that the speech's value has no relationship to harm suffered by the child, or both. *Id.* at 762-63. The fifth reason is nothing more than an assertion that the Court has banned entire speech categories in the past, and so a categorical ban on child pornography is consistent with precedent. *Id.* at 763-64.

[279] *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 249 (2002).

a. Virtual Child Pornography: CPPA and *Ashcroft*

This rationale was central to the Court in *Ashcroft v. Free Speech Coalition*.[280] At issue in *Ashcroft* was the constitutionality of the Child Pornography Prevention Act of 1996 ("CPPA").[281] Congress passed the Act in response to the development of virtual child pornography.[282] The Act defined child pornography as "'any visual depiction . . . of sexually explicit conduct,' where . . . 'such visual depiction is, or *appears to be*, of a minor engaging in sexually explicit conduct' . . . or 'such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that *conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.'"[283] Although Congress could have construed virtual child pornography as a means of bypassing the problem of child abuse that had heretofore been necessary for the production of child pornography,[284] they attempted to further expand the category to include sexually explicit materials that appear to depict minors but were produced without using real children.[285]

The Supreme Court held that the CPPA was unconstitutional and overbroad.[286] *Ferber* had held that, where the images were the product of child sexual abuse, "the State had an interest in stamping it out without regard to any judgment about its content."[287] Because the sexual abuse of an actual child was not necessary for the production of virtual child pornography, the Court reasoned that, under Congress's proffered rationales, any harm emanating from the images would necessarily flow from their content, as opposed to the means of their production.[288] Thus, though the government asserted that virtual child pornography could lead to actual instances of child abuse, the Court found the causal link to be "contingent and indirect."[289]

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[280] *Ashcroft*, 535 U.S. at 249.

[281] *Id.* at 239.

[282] Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009-26 (codified as amended in scattered sections of 18 U.S.C.). The phrase "virtual child pornography" refers to wholly computer-generated depictions of children engaged in sexual conduct. *Ashcroft*, 535 U.S. at 241.

[283] 18 U.S.C. § 2256(8)(B)-(D) (Supp. IV 1994) (emphasis added), *invalidated by* United States v. Stewart, 839 F. Supp. 2d 914 (E.D. Mich. 2012).

[284] Prior to 1996, Congress defined child pornography as images created using actual children. 18 U.S.C. § 2252(a)(1)(A) (1994) (codified as amended in scattered sections of 18 U.S.C.).

[285] Although the images do not harm or even involve any children in the production process, Congress rationalized the prohibition based on the notion first articulated in *Osborne* that pedophiles might use the materials to lure children into engaging in sexual activity. *Ashcroft*, 535 U.S. at 241; Osborne v. Ohio, 495 U.S. 103, 111 n.7 (1990). Congress also thought that "pedophiles might whet their own sexual appetites with the pornographic images, thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children." *Ashcroft*, 535 U.S. at 241 (internal quotation omitted).

[286] *Ashcroft*, 535 U.S. at 258.

[287] *Id.* at 249.

[288] *Id.* at 242.

[289] *Id.* at 250.

When it came to virtual child pornography, any evil flowing from the speech would depend "upon the actor's unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question."[290]

After rebuking the government's argument that "virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct,"[291] the Court soliloquized on the need to protect speech for its own sake—a discursive strategy reminiscent of Justices Holmes and Brandeis, but absent from previous child pornography jurisprudence. The Court opined: "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."[292]

The Court went on to point out that its "First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct" and that drawing these distinctions is fundamental to the preservation of core First Amendment freedoms, freedoms which are fragile by nature.[293] The Court invoked its holding in *Brandenburg* that the government may suppress speech for advocating the use of force or violation of law only if "such advocacy is directed at inciting or producing imminent lawless action and is likely to incite or produce such action."[294] With virtual child pornography, the Court saw "no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse."[295] The Court concluded that, "[w]ithout a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it . . . encourage[s] pedophiles to engage in illegal conduct."[296]

The majority ultimately ruled that while Congress may prohibit child pornography, sexually explicit speech that does not constitute child pornography can only be banned if obscene.[297] The Court struck down the provisions of the CPPA that prohibited (1) material that "appears to be" child

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[290] *Ashcroft*, 535 U.S. at 252.

[291] *Id.* at 253 ("The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.").

[292] *Id.*

[293] *Id.* As Justice Oliver Wendell Holmes famously wrote of the governmental impulse to censor oppositional speech:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think speech impotent . . . or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[294] *Ashcroft*, 535 U.S. at 253 (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam)).

[295] *Id.*

[296] *Id.* at 253-54.

[297] *Id.* at 256-57.

pornography and (2) depictions of sexually explicit conduct that are "'advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.'"[298] Those provisions were ruled to have banned materials that were neither obscene under *Miller* nor produced by the exploitation of real children as in *Ferber*; therefore, they were held to be overbroad and unconstitutional.[299]

b. "Morphed" Images

Although the Court clarified *Ferber* and provided a limit on the category of child pornography by excluding virtual child pornography from prohibition, *Ashcroft* left intact an unchallenged provision of the CPPA prohibiting a species of sexual expression that radically problematizes both virtual child pornography and child pornography as categories of description: the notion of "morphed images."[300] The Court defined "morphed images" as "a more common and lower tech means of creating virtual images, known as computer morphing. Rather than creating original images, pornographers can alter innocent pictures of real children so that the children appear to be engaged in sexual activity."[301] The Court then made a statement that enabled, but did not necessarily endorse, the criminalization of this "lower tech" subspecies of expression: "[a]lthough morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are

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[298] *Ashcroft*, 535 U.S. at 257. Although the "conveys the impression" provision sounds a lot like the "appears to be" provision, the Court distinguished between the two on these grounds:

> Under § 2256(8)(D) [the "conveys the impression" provision], the work must be sexually explicit, but otherwise the content is irrelevant. Even if a film contains no sexually explicit scenes involving minors, it could be treated as child pornography if the title and trailers convey the impression that the scenes would be found in the movie. The determination turns on how the speech is presented, not on what is depicted. While the legislative findings address at length the problems posed by materials that look like child pornography, they are silent on the evils posed by images simply pandered that way.

Id.

[299] *Id.* at 256.

[300] *Id.* at 242.

[301] *Id.* To say that the majority of these images are actually "morphed" would be a mischaracterization. The word "morphing" suggests a transformation from an image of one object into that of another. The cases that address morphed images involve images that more accurately could be defined as compositions (made up of distinct parts), juxtapositions (instances of placing two or more things side by side), or collages (sticking together photographs to form an artistic image). At least one case has noted this distinction. *See* United States v. Rearden, 349 F.3d 608, 613 (9th Cir. 2003) (noting that images can either be "composited (which involves the altering of images by, for example, transferring the head of one person to the body of another) or morphed (which . . . involves the creation of an intermediate image from two other images)").

in that sense closer to the images in *Ferber*. Respondents do not challenge this provision, and we do not consider it."[302]

There are two possible interpretations of the *Ashcroft* "morphing" dictum. On one hand, it can be read as the Court holding that, although morphed images are virtual child pornography and therefore protected, they implicate the interests of real children and are in that sense closer to the images in *Ferber* than wholly computer-generated images are. This is a logical construction, especially considering *Ashcroft's* many reiterations of what it held to be the central premise of *Ferber*—that child pornography is a record of physical, sexual child abuse and must be prohibited.[303] On the other hand, the dictum can alternatively be read as follows: although morphed images may technically be 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* than they are to wholly computer-generated images. The second construction allows "morphed" images—images created without any act of child abuse whatsoever[304]—to fall within the rubric of child pornography. This construction also "morphs" the *Ferber* rationale from "child pornography is a record of child abuse and therefore must be prohibited" to "child pornography 'implicate[s] the interests of real children'"[305] and therefore must be prohibited.

The Eighth Circuit was the first to directly address CPPA's prohibition against "morphed" images of child pornography.[306] In *United States v. Bach*, the defendant was indicted under the CPPA and subsequently convicted of receiving child pornography after a jury found that he knowingly received a visual depiction that "'involve[d] the use of a minor engaging in sexually explicit conduct' or 'ha[d] been created, adapted, or modified to appear that an identifiable minor [was] engaging in sexually explicit conduct.'"[307] The facts underlying his conviction were as follows:

> One email in Bach's account had been received from Fabio Marco in Italy; . . . Marco's email to Bach had an attached photograph which showed a young nude boy sitting in a tree, grinning, with his pelvis tilted upward, his legs opened wide, and a full erection. Below the image was the name of AC, a well known

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[302] *Ashcroft*, 535 U.S. at 242.

[303] *See 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."); *see also id.* at 250-51 ("The speech [at issue in *Ferber*] had what the Court in effect held was a proximate link to the crime from which it came . . . *Ferber's* judgment about child pornography was based upon how it was made, not on what [was] communicated.").

[304] In this sense, "morphed" images are not so different from the images at issue in cases such as *Knox*, *Horn*, and *Dixon*, which also "implicate[d] the interests of real children," but were created without an act of child abuse—and yet were found to be child pornography. *Ashcroft*, 535 U.S. at 242.

[305] *Id.* at 242.

[306] United States v. Bach, 400 F.3d 622, 624 (8th Cir. 2005).

[307] *Id.* at 629.

> child entertainer. Evidence at trial showed that a photograph of AC's head had been skillfully inserted onto the photograph of the nude boy so that the resulting image appeared to be a nude picture of AC posing in the tree.[308]

Bach contended that his conviction violated the First Amendment.[309] Specifically, he argued that morphed images were protected by the Supreme Court in *Ashcroft* "because [they do] not involve the abuse of a real minor and there was no evidence that a real minor was used to produce the image with AC's head."[310]

The Eighth Circuit disagreed on the basis that the subsection of the CPPA under which Bach had been indicted targeted harm to an "identifiable minor."[311] The court explained:

> Unlike the virtual [child] pornography protected by the Supreme Court in [*Ashcroft*], the picture with AC's face implicates the interests of a real child and does record a crime. The picture depicts a young nude boy who is grinning and sitting in a tree in a lascivious pose with a full erection, his legs spread, and his pelvis tilted upward. The jury could find from looking at the picture that it is an image of an identifiable minor, and that the interests of a real child were implicated by being posed in such a way.[312]

From this passage, it seems that the "interests of a real child" that were implicated by this image were those of the nude boy who was "posed in [a lascivious way]."[313] However, the Court went on to state "[t]he interests of real children are implicated in the image received by Bach showing a boy with the identifiable face of AC in a lascivious pose. This image involves the type of harm which can constitutionally be prosecuted under [*Ashcroft*] and *Ferber*."[314]

Neither *Ashcroft* nor *Ferber* had held that harm that can constitutionally be prosecuted occurs whenever the "interests of real children are implicated." However, Bach had received an image that combined the head of an identifiable minor and the body of another minor posed in a sexually explicit way.[315] Because the image involved the sexuality of a real child, it probably would have been considered child pornography under current precedent with or without the morphing.

Thus far, *Bach* is the only case in which a defendant was prosecuted for receiving a morphed image that combined a non-sexual image of a child with the sexually explicit image of another child. Typically, cases involve images of

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[308] *Bach*, 400 F.3d at 625.
[309] *Id.* at 629.
[310] *Id.* at 630.
[311] *Id.* at 631.
[312] *Id.* at 632.
[313] *Id.*
[314] *Bach*, 400 F.3d at 632.
[315] *Id.*

a child's head grafted onto an adult's body, or in juxtaposition with adult genitalia.[316] Additionally, many of the images that form the bases for successful prosecutions were not produced using any computer program.[317] An Alabama court described the images at issue in 2010 in *McFadden v. State*, as collages or montages:

> State's Exhibit 11 includes various cut-out photographs of clothed and unclothed young children combined with photographs of adult genitalia and photographs of the performance of adult sexual intercourse and oral sex. Some of the collages or montages . . . include sexually explicit verbiage cut from magazines that is pasted alongside cut-out children's photographs and cut-out photographs of adult sexual acts and body parts. State's Exhibits 11 and 12 also include several photographs of the genitalia of what appear to be young children, which could have been taken from an anatomic, scientific, or medical reference, affixed above or near the cut-out photographs of adult genitalia and sexual acts. State's Exhibit 13 showed collages or montages of adult males and females having sexual intercourse and oral sex juxtaposed with photographs of young children.[318]

The court held that although children did not actually engage in any sexual activity to create the images, "the images of real children were edited to appear as though the children were engaged in genital nudity and often sexual conduct."[319] The images, which were composited of materials that are legal to possess and were created using no computer program, nevertheless constituted child pornography.[320] The defendant was convicted of "one count of possession of obscene matter containing a visual reproduction of a person under the age of 17 years" and "one count of production of obscene matter."[321] Because the defendant was on probation for prior convictions,[322] pursuant to Alabama's Habitual Felony Offender Act, he was sentenced to life imprisonment on the production-of-obscenity charge and thirty years

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[316] *See, e.g.*, United States v. Hotaling, 599 F. Supp. 2d 306, 308 (N.D.N.Y. 2008) (stating that although the cut-out images of heads were of minors, "[t]here is no evidence that the bodies of the unidentified nude females in the altered images are those of minors"); *see also* Parker v. State, 81 So. 3d 451, 452 (Fla. Dist. Ct. App. 2011) (stating that the defendant "cut the children's heads from some of his photographs and pasted them to photographs of bodies of nude or partially nude adult women.").

[317] In *Ashcroft v. Free Speech Coalition*, the Court defined morphed images as "a more common and lower tech means of creating virtual images, known as computer morphing." Ashcroft v. Free Speech Coal., 535 U.S. 234, 242 (2002). The explicit reference to computers suggests that it is likely that the Court in declining to rule on morphing did not consider the fact that prosecutions for receipt, production, or possession of morphed child pornography produced without computers would be brought against multiple defendants.

[318] McFadden v. State, 67 So. 3d 169, 178-79 n.8 (Ala. Crim. App. 2010).

[319] *Id.* at 182.

[320] *Id.* at 182-83.

[321] *Id.* at 174.

[322] *Id.* The court does not indicate what the prior convictions were.

imprisonment on the possession-of-obscenity charge.[323] There is no indication that the children depicted in the collages were aware of the existence of the material or any indication that the defendant ever showed his collages to anyone.

McFadden is not an aberration. The majority of courts addressing morphing hold that as long as an image of a real child is used, the morphed image is child pornography if it is sexually explicit in some way.[324] However, some courts find such images constitute protected speech.[325] For example, the Supreme Court of New Hampshire reversed a conviction for possession of morphed child pornography in *State v. Zidel*.[326] The defendant in *Zidel* worked as a photographer at a summer camp for children fifteen years old and younger.[327] In his capacity as a photographer, "[he] took pictures that were to be used to make an end-of-summer video yearbook or scrapbook for the children attending the camp."[328] The defendant gave several CD ROM discs

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[323] *McFadden*, 67 So. 3d at 174 n.1.

[324] *See, e.g.*, Doe *ex rel.* United States v. Boland, 698 F.3d 877, 883 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 2825, 2825 (2013) (internal citations omitted) ("[The] images 'implicate the interests of real children' and thus bear a closer similarity to actual child pornography than to virtual or simulated child pornography. Jane Doe and Jane Roe are real children. Their likenesses are identifiable in Boland's images. That Doe and Roe were real victims with real injuries offers one reason for rejecting Boland's First Amendment challenge."); United States v. Hotaling, 634 F.3d 725, 729-30 (2d Cir. 2011) ("We agree with the Eighth Circuit that the interests of actual minors are implicated when their faces are used in creating morphed images that make it appear that they are performing sexually explicit acts."); United States v. Hoey, 508 F.3d 687, 693 (1st Cir. 2007) ("An image of an identifiable, real child involving sadistic conduct—even if manipulated to portray conduct that was not actually inflicted on that child—is still harmful, and the amount of emotional harm inflicted will likely correspond to the severity of the conduct depicted."); United States v. Stewart, 839 F. Supp. 2d 914, 925 (E.D. Mich. 2012) ("[C]hildren are harmed whenever they actually appear in lascivious photographs, even if they were not posed and even when the lasciviousness results from image manipulation. The Court, therefore, must reject the defendant's argument on First Amendment grounds."); State v. Coburn, 176 P.3d 203, 222-23 (Kan. Ct. App. 2008); Cobb v. Coplan, No. CIV. 03-017-M, 2003 WL 22888857, at *7 (D.N.H. Dec. 8, 2003); Commw. v. Simone, No. 03-0986, 2003 Va. Cir. LEXIS 215, at *13 (Va. Ct. App. Nov. 12, 2003).

[325] *See, e.g.*, Parker v. State, 81 So. 3d 451, 453 (Fla. Dist. Ct. App. 2011) ("Each [morphed image] depicts a child's head superimposed on a body of an adult female engaged in sexual intercourse, deviate sexual intercourse, or masturbation. The conduct falls within the scope of [the child pornography statute]. But, whether the conduct is 'actual' or, as the dissent suggests, 'simulated,' the conduct is that of an adult. The crudely constructed depictions, fortunately, leave no doubt that no child engaged in the sexual conduct. Accordingly, we cannot conclude that Mr. Parker possessed child pornography."); Stelmack v. State, 58 So. 3d 874, 874-75 (Fla. Dist. Ct. App. 2010) ("John Stelmack was found to be in possession of several images showing the faces and heads of two girls, ages eleven and twelve, cut and pasted onto images of a nineteen-year-old woman lewdly exhibiting her genitals. . . . Because the statute requires sexual conduct *by a child* and the only sexual conduct in the images is that of an adult, we are compelled to conclude that the court erred in denying Stelmack's motion [for a judgment of acquittal]."); State v. Zidel, 940 A.2d 255, 264 (N.H. 2008) ("[W]hile distribution of these morphed images might implicate the interests of real children, mere possession does not cause harm to the child.").

[326] *Zidel*, 940 A.2d at 256.

[327] *Id.*

[328] *Id.*

to the camp director, who discovered images on one of the discs of the "heads and necks of minor females superimposed upon naked adult female bodies, with the naked bodies engaging in various sexual acts."[329] The discs also contained the original non-pornographic photographs the defendant had taken of the campers.[330] The camp director, after identifying two of the faces as those of campers from the previous summer, who were fifteen years old at the time the photographs were taken, gave the discs to the police.[331]

The defendant was indicted for possession of child pornography.[332] Before trial, the defendant moved to dismiss, arguing that his prosecution pursuant to the state's child pornography statute was unconstitutional.[333] The statute provided, in relevant part, that "[a] person is guilty of a felony if such person . . . [k]nowingly buys, procures, possesses, or controls any visual representation of a child engaging in sexual activity."[334] The trial court denied the motion.[335]

On appeal, the defendant contended that *Ashcroft*, *Ferber*, and *Osborne* required the conclusion that morphed images do not constitute child pornography because they are not the product of the crime of child abuse.[336] This time, the court agreed. Although the court found the defendant's conduct "distasteful, reprehensible, and valueless,"[337] it understood the First Amendment as protecting every individual's right to "observe what he pleases."[338] The court stated:

> This protection is central to our long and sacred tradition of prohibiting the government from intruding into the privacy of our thoughts and the contents of our homes. We cannot displace this guarantee simply because the materials at issue may express ideas that are unconventional and not shared by a majority.[339]

The court also referenced the dictum in *Ashcroft* that morphed images "'implicate the interests of real children and are in that sense closer to the

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[329] *Zidel*, 940 A.2d at 256. The court described the images:

> One image shows an act of sexual intercourse; two images depict a person engaging in or about to engage in cunnilingus; two images depict a person digitally penetrating or touching a female's genitalia; and four images show comparably explicit sexual activity. The defendant and at least one of his family members appear in some of the images.

Id.

[330] *Id.* at 256.

[331] *Id.*

[332] *Id.*

[333] *Id.*

[334] *Id.* at 256-57 (alteration in original) (quoting N.H. REV. STAT. ANN. § 649-A:3(I) (2007)).

[335] *Zidel*, 940 A.2d at 256.

[336] *Id.* at 262.

[337] *Id.* at 264.

[338] *Id.* (quoting Stanley v. Georgia, 394 U.S. 557, 567-68 (1969)).

[339] *Id.*

images in *Ferber*,'"[340] but noted that *Ferber* involved the distribution of child pornography and not mere possession.[341] Where only the possessor views the images and neither the child nor the general public observes them, there is no harm to the child.[342] Thus, the defendant's First Amendment rights had been violated and his convictions were reversed.[343]

The *Zidel* court understood that no public policy would be served by criminalizing the possession of morphed images. Although the court found the conduct and the images "distasteful," it was able to set aside its disgust in favor of the defendant's right to free expression. If *Ferber* means that child pornography can be prohibited because the participants are children who have been sexually abused in the production of the materials, it seems obvious that possession of morphed images, which do not record abuse, is protected activity.

Ironically, much more than the morphing dictum in *Ashcroft*, it is *Ferber* that enabled the expansion of child pornography law to reach these images. First, *Ferber* did not expressly define the contents or limits of the category of child pornography. Instead, it trumpeted the state's many interests in protecting children from harm, no matter how speculative the harm might be. *Ferber* introduced the assumption that child pornography permanently records the victims' abuse, which in turn haunts them for years to come, and *Osborne* easily extended this concept to possession. These cases emphasized that children are not only harmed through the actual production of child pornography, but by its continued existence. Thus, it is perhaps not that shocking that many courts find morphed images to constitute child pornography, even if the images are never distributed. Under *Ferber's* expansive concept of child pornography, the harm to the child does not just occur during production; it inheres in the image itself. Therefore, courts finding that morphed images constitute child pornography are able to justify their holdings on the basis that harm is caused to the child depicted (as long as that child is identifiable and real) simply because of the depiction, even absent any act of abuse or distribution.

c. *United States v. Williams* and the "PROTECT" Act

The morphing cases expose a loophole in *Ashcroft* and *Ferber*—sexually explicit images of children may be punishable where the image of a real child was used, even when the image records no abuse. But however, the morphing cases are not the only enlargement of the child pornography category in the wake of *Ashcroft*. *Ashcroft* also struck down a provision of the CPPA that criminalized the possession and distribution of material that was pandered as child pornography, regardless of its content.[344] The Court held that the

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[340] *Zidel*, 940 A.2d at 264 (quoting Ashcroft v. Free Speech Coal., 535 U.S. 234, 242 (2002)).
[341] *Id.*
[342] *Id.*
[343] *Id.* at 265.
[344] *Ashcroft*, 535 U.S. at 257, 258 (2002).

second provision was overbroad in that it allowed for prosecutions of persons possessing protected material (i.e. virtual child pornography) that *someone else* had pandered.[345]

In response, Congress passed the "unlikely title[d]"[346] Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today ("PROTECT") Act of 2003.[347] The PROTECT Act amended the pandering provision struck down in *Ashcroft*.[348] Congress was apparently concerned that because *Ashcroft* limited the prohibition "to material that could be *proved* to feature actual children," many child pornographers would be able to evade conviction.[349] Congress sought to avoid this prosecutorial difficulty by banning the solicitation or pandering of child pornography, whether or not the underlying material was actual child pornography.[350] Thus, the Act did not directly prohibit transactions in virtual child pornography, but "*proposals* for transactions in pornography when a defendant manifestly believes or would induce belief . . . that the subject of an exchange or exhibition is or will be an actual child."[351] Under the PROTECT Act, if a hapless Internet user solicits child pornography from an undercover agent, the user violates the law even if the agent did not actually possess child pornography.[352] Similarly, a person who "advertises virtual child pornography as depicting actual children also falls within the reach of the statute."[353]

The Court upheld the Act in *United States v. Williams*.[354] Even though *Ashcroft* held that a pornographic depiction produced using no actual child the depiction is protected, the Act criminalized "the manifest belief or intent to

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[345] *Ashcroft*, 535 U.S. at 258.

[346] United States v. Williams, 553 U.S. 285, 289 (2008).

[347] Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today ("PROTECT") Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18 U.S.C.).

[348] The "PROTECT" Act provides that:

> (a) Any person who . . . (3) knowingly . . . (B) advertises, promotes, presents, distributes, or solicits through the mails, or using any means or facility of interstate or foreign commerce . . . by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or (ii) a visual depiction of an actual minor engaging in sexually explicit conduct; . . . shall be punished as provided in subsection (b).

18 U.S.C. § 2252A(a)(3)(B)(i)-(ii) (2012). The law defines "sexually explicit conduct" as "actual or simulated—(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. § 2256(2)(A)(i)-(v).

[349] *Williams*, 553 U.S. at 290.

[350] *See id.* at 308, 309 (Stevens, J., concurring).

[351] *Id.* at 310 (Souter, J., dissenting) (emphasis added).

[352] *Id.* at 293 (majority opinion).

[353] *Id.*

[354] *Id.* at 307.

cause a belief that a true minor is shown" in the depiction, regardless of whether a "true minor" was actually depicted.[355] After *Williams*, a speaker may face a criminal prosecution for merely proposing a transaction in child pornography, even if the speaker does not in fact possess child pornography at all. This development has the potential to functionally erase the line between regulable child pornography and protected virtual child pornography. As the dissent in *Williams* pointed out:

> No one can seriously assume that after [the *Williams*] decision the Government will go on prosecuting defendants for selling child pornography . . . ; it will prosecute for merely proposing a pornography transaction manifesting or inducing the belief that a photo is real child pornography, free of any need to demonstrate that the extant underlying photo does show a real child. If the Act can be enforced, it will function just as it was meant to do, by merging the whole subject of child pornography into the offense of proposing a transaction, dispensing with the real-child element in the underlying subject.[356]

Thus, *Williams* and the PROTECT Act further untether child pornography law from the constraints proposed by *Ferber* and *Ashcroft* by allowing prosecution "whether pornography shows actual children or not."[357]

IV. CONCLUSION

What to make of these expansions? In the end, they are all traceable to *Ferber* and its lax interpretation of the confines of the categorization principle. The *Ferber* Court assumed that lower courts would not give an "expansive construction to the proscription on 'lewd exhibition[s] of the genitals.'"[358] Nevertheless, lower courts have done just that. *Ferber* also refused to build in a judicial safeguard for artistic expression and other valuable works. With obscenity, that very safeguard works a substantial limit on the expanse of the category. *Ferber* introduced the theory that a representation can be banned because of the underlying act that created it—an anomaly in First Amendment jurisprudence. This theory enabled the introduction of the concept that child pornography is a permanent record of abuse, haunting the subjects for years to come, in spite of the *Brandenburg* command that the harm must be imminent

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[355] *Williams*, 553 U.S. at 313 (Souter, J., dissenting). This reasoning further collapses the distinction between the real and the virtual by making the utterance (that the proposed child pornography is indeed real) identical to the act (a successful transaction in real child pornography). Thus, the linguistic manifestation becomes, in and of itself, the real fact—the signified and the referent are identical—by way of reference to a reality that it (the utterance) itself constitutes. For a discussion of this theory of performative utterances, see EMILE BENVENISTE, PROBLEMS IN GENERAL LINGUISTICS 231-38 (Univ. of Miami Press 1971) (1966).

[356] *Williams*, 553 U.S. at 319 (Souter, J., dissenting) (internal quotations omitted).

[357] *Id.* at 323 (Souter, J., dissenting).

[358] New York v. Ferber, 458 U.S. 747, 773 (1982) (alteration in original) (quoting N.Y. PENAL LAW § 263.00(3) (McKinney 1977)).

and likely for the speech to be enjoined. Although *Ferber* used that reasoning to criminalize distribution of the materials, it was easily extended to criminalize possession in *Osborne*, while possession of obscenity is legal. *Ashcroft* limited the reach of the law to depictions of real children only, but courts rely on the *Ferber* permanent record rationale to criminalize morphed images even though no children are harmed in their production. *Williams* further erodes the requirement of an actual child by criminalizing proposals to transact in child pornography, even when the materials are not real child pornography, supported by *Ferber's* assertion that drying up the market for child pornography is essential because of the difficulty in prosecuting producers.

The most recent developments in child pornography law—the morphing cases and the PROTECT Act—portend the development of an even broader category. As the category expands, it increasingly loses meaning and it seems as though the one body that can curb this expansion, the Supreme Court, is not interested in doing so.[359] Consider Justice Souter, writing in dissent in *Williams*:

> I would be willing to reexamine *Ferber*. Conditions can change, and if today's technology left no other effective way to stop professional and amateur pornographers from exploiting children there would be a fair claim that some degree of expressive protection had to yield to protect the children.[360]

Thus, the Court may be willing to revisit *Ferber*, but it appears unlikely that they would do so in an attempt to restrict the expanse of child pornography law. Instead, it appears more likely that the Court will only continue to expand, drifting further and further away from the confines of categorization and the core of the First Amendment.

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[359] For example, the Court has, so far, denied certiorari in every case involving morphed images.

[360] *Williams*, 553 U.S. at 323.