2018

The Expansion of Child Pornography Law

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Publication: *New Criminal Law Review*

THE EXPANSION OF CHILD PORNOGRAPHY LAW

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This Symposium essay identifies two dramatic expansions of child pornography law: prosecutions for possessing images of children who are clothed and not engaged in any sexual activity, and prosecutions for possessing smaller portions of artistic and non-pornographic images. These prosecutions have expanded the definition of the term "child pornography" well beyond its initial meaning. What is more, they signal that child pornography laws are being used to punish people not necessarily because of the nature of the picture they possess, but rather because of the conclusion that those individuals are sexually attracted to children. If law enforcement concludes that a person finds an image of a child to be sexually arousing, then these laws can subject that individual to punishment, even though the image would have been perfectly innocuous had it been possessed by someone else.

Keywords: *child pornography, criminal law, First Amendment, Texas, New Jersey*

INTRODUCTION

Over the past four decades, America has waged a legal battle against child pornography. That battle has become more intense in the past twenty years. We have dramatically increased the punishment associated with creation, distribution, and possession of child pornography.[1] We have significantly increased the number of child pornography prosecutions.[2]

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

2. *See* Carissa Byrne Hessick, *Questioning the Modern Criminal Justice Focus on Child Pornography Possession*, *in* REFINING CHILD PORNOGRAPHY LAW: CRIME, LANGUAGE, AND

New Criminal Law Review, Vol. 21, Number 3, pps 321–344. ISSN 1933-4192, electronic ISSN 1933-4206. DOI: https://doi.org/10.1525/nclr.2018.21.3.321.

And we have increasingly come to view child pornography prosecutions as a way to protect children from sexual abuse.

Increasing the number of prosecutions and the severity of punishment is not the only way in which we have targeted child pornography; we have also increased the scope of child pornography law. Legislatures and prosecutors have begun to use child pornography laws not only to punish those who create or possess traditional child pornography images—images that are created when a child is molested or sexually manipulated by an adult—but also to punish those who create or possess different types of images. Some defendants have been punished for secretly filming underage individuals; some have been punished for digitally altering an innocent image of a child to make it appear sexually explicit; and teenagers have even been prosecuted for taking sexually explicit images of themselves (a practice sometimes referred to as "sexting").

This symposium essay identifies two dramatic expansions of child pornography law: prosecutions for possessing images of children who are clothed and not engaged in any sexual activity, and prosecutions for possessing smaller portions of artistic and non-pornographic images. These prosecutions have expanded the definition of the term "child pornography" well beyond its initial meaning. What is more, they signal that child pornography laws are being used to punish people not necessarily because of the nature of the picture they possess, but rather because of the conclusion that those individuals are sexually attracted to children. If law enforcement concludes that a person finds an image of a child to be sexually arousing, then these laws can subject that individual to punishment, even though the image would have been perfectly innocuous had it been possessed by someone else.

This focus on the subjective thoughts of defendants is problematic. It changes child pornography law from an endeavor designed to protect children from harm, to an effort to punish those individuals who are sexually attracted to children. This shift is inconsistent with child pornography law's constitutional origins, and it creates incentives that may ultimately leave children less safe.

Social Consequences 148 tbl.1 (C.B. Hessick ed., 2016) [hereinafter Hessick, *Questioning*]; Bureau of Justice Statistics, Federal Prosecution of Commercial Sexual Exploitation of Children Cases, 2004–2013, at 6 fig.4 (2017), *available at* https://www.bjs.gov/content/pub/pdf/fpcsecc0413.pdf

The essay proceeds in three parts. Part I traces the rise of child pornography law in the Supreme Court, and it notes how lower courts have expanded on the definition. Part II describes two recent expansions of the category of child pornography—a new statutory definition in New Jersey, and a recent case out of Texas. Part III provides a critical analysis of those expansions.

I. CHILD PORNOGRAPHY LAW

The first child pornography prohibitions appear to have been prompted by media coverage.[3] In 1977, the *Chicago Tribune* ran a series of articles on "child predators." The series ran on the front page, for four consecutive days, and it included an article devoted to child pornography.[4] Before these stories ran, only a small handful of states had criminalized child pornography.[5] But then a "wave of child pornography legislation . . . swept the statehouses" in 1977 and 1978.[6] Most of these new laws criminalized the production and distribution of child pornography images that were obscene.[7] Because obscenity was already widely prohibited in American jurisdictions,[8] the new child pornography laws provided little in the way of

3. *See* Carissa Byrne Hessick, *Introduction*, *in* REFINING CHILD PORNOGRAPHY LAW: CRIME, LANGUAGE, AND SOCIAL CONSEQUENCES 3 (C.B. Hessick ed., 2016) [hereinafter Hessick, *Introduction*].

4. Richard S. Pope, *Child Pornography: A New Role for the Obscenity Doctrine*, 1978 U. ILL. L.F. 711, 713–14 n.10; *see also* T. Christopher Donnelly, *Protection of Children from Use in Pornography: Towards Constitutional and Enforceable Legislation*, 12 U. MICH. J.L. REFORM 295, 295 n.1 (1979) (collecting media sources).

5. California enacted the first prohibition in 1961. 1961 Cal. Stat., c. 2147 § 5, pp. 4428–29. North Dakota and Tennessee enacted laws in 1975. 1975 N.D. Stat., c. 119, pp. 429–31; Tenn. Code Ann. § 39-3013 (1975).

6. Jennifer M. Payton, Note, *Child Pornography Legislation*, 17 J. FAM. L. 505, 520 (1978–79). *See also* Donnelly, *supra* note 4, at 305–06 nn.64–67 (collecting statutes).

7. *See* Pope, *supra* note 4, at 712 ("Ten of the thirteen jurisdictions that had enacted child pornography legislation by early 1978 either based their statutes on the obscenity exception to first amendment protection, or did not punish speech, and thus did not need an obscenity requirement."); *see also* NATIONAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, CHILD SEXUAL EXPLOITATION: BACKGROUND & LEGAL ANALYSIS 112–13 (1984) (noting different approaches to obscenity issue in the states); Payton, *supra* note 6, at 521–31 (same).

8. *See generally* FREDERICK F. SCHAUER, THE LAW OF OBSCENITY 8–29 (1976).

added protection for children. But then the U.S. Supreme Court, in *New York v. Ferber*,[9] held that child pornography was entitled to no First Amendment protection, and that states could criminalize its production and distribution even if the images were not obscene.[10]

After *Ferber* was decided in 1982, state and federal laws criminalizing non-obscene child pornography proliferated.[11] Child pornography laws expanded again when the Supreme Court upheld the constitutionality of a law criminalizing the private possession of child pornography in *Osborne v. Ohio*.[12] Because the Supreme Court had previously stated that the private possession of obscene materials was protected by the First Amendment,[13] some thought that the private possession of child pornography was also constitutionally protected.[14] *Osborne* explained that possession of child pornography was not protected because the state's interest in prohibiting private possession of child pornography was much stronger than their interests in prohibiting possession of other obscene materials.[15] Before *Osborne* was decided in 1990, only some states criminalized possession of child pornography.[16] Now, all fifty states prohibit the creation, distribution, and possession of child pornography,[17] as does the federal government.[18]

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9. 458 U.S. 747 (1982).

10. The "[illegible]" pornography is generally used to refer to sexually explicit images. Whether a specific image is obscene is a legal question that is determined according to "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24 (1972).

11. Hessick, *Introduction*, *supra* note 3, at 4.

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

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

14. *E.g.*, Susan G. Caughlan, Note, *Private Possession of Child Pornography: The Tensions Between* Stanley v. Georgia *and* New York v. Ferber, 29 Wm. & Mary L. Rev. 187 (1987)

15. *Osborne*, 495 U.S. at 109–11.

16. *See* Josephine R. Potuto, Stanley + Ferber = *The Constitutional Crime of At-Home Child Pornography Possession*, 76 Ky. L.J. 15, 18 n.18 (1978) (collecting statutes criminalizing the possession of child pornography); *see also* Caughlan, *supra* note 14, at 201 (similar).

17. *See* Shannon Shafron-Perez, *Average Teenager or Sex Offender? Solutions to the Legal Dilemma Caused by Sexting*, 26 J. Marshall J. Computer & Info. L. 431, 437 n.35 (2009) (collecting sources).

18. 18 U.S.C. §§ 2251–2260.

In its early child pornography decisions, the Supreme Court emphasized that child pornography is not entitled to First Amendment protection because children are harmed in the creation of child pornography images.[19] Specifically, children are molested or exploited in order to create the images.[20] But the harm of creating child pornography is not the only reason the Court gave for exempting child pornography from First Amendment protection. In both *Ferber* and *Osborne* the Court also expressed concern that the children depicted in child pornography suffered further privacy harms from the subsequent circulation of their images.[21] And the *Osborne* Court also indicated that child pornography was exempt from First Amendment protection because prohibiting possession of child pornography could help to protect *future* victims of child sex abuse, not just those children depicted in child pornography. The Court based this conclusion on sources suggesting that "pedophiles use child pornography to seduce other children into sexual activity."[22]

The Supreme Court eventually abandoned this argument from *Osborne* and imposed some limits on what can qualify as child pornography in *Ashcroft v. Free Speech Coalition*.[23] *Ashcroft* involved a First Amendment challenge to the Child Pornography Prevention Act of 1996, which outlawed virtual child pornography—that is, pornographic images created wholly by technological means—and any other "visual depiction" that "is, or appears to be, of a minor engaging in sexually explicit conduct."[24] The Court concluded that the statute was unconstitutional, explaining that virtual child pornography fell outside the constitutional category of child pornography.[25]

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19. *See Osborne*, 495 U.S. at 109–11; *Ferber*, 458 U.S. at 757–59. The Court also identified the privacy interests of the children depicted as another reason. *See* Carissa Byrne Hessick, *The Limits of Child Pornography*, 89 IND. L.J. 1437, 1443–51 (2014) [hereinafter Hessick, *Limits*] (discussing the role that these two rationales play in the Court's child pornography decisions).

20. *See Ferber*, 458 U.S. at 757, 758 n.9; *see also* Hessick, *Limits*, *supra* note 19, at 1452–64 (arguing that the definition of child pornography ought to be limited to "those images created through the sexual exploitation or abuse of children" and should not include images whose only harm to children is to infringe upon their privacy rights).

21. *Osborne*, 495 U.S. at 111; *Ferber*, 458 U.S. at 759–60.

22. *Osborne*, 495 U.S. at 111.

23. 535 U.S. 234 (2002).

24. *Id.* at 241.

25. *See id.* at 246; *see also id.* at 240 ("The principal question to be resolved, then, is whether the CPPA is constitutional where it proscribes a significant universe of speech that is neither obscene under *Miller* nor child pornography under *Ferber*.").

In so holding, the *Ashcroft* Court explicitly rejected the reasoning from *Osborne* about protecting *future* victims of child sex abuse, as a sufficient government interest to outweigh the individual interests at stake.[26] The *Ashcroft* Court also left no doubt that the harm of creation—that is, the sexual exploitation and abuse of children to produce child pornography—is the touchstone of its child pornography doctrine. It noted that its analysis in previous cases about the state interests outweighing private interests "was based on how [an image] was made, not on what it communicated."[27]

Ashcroft clarified that virtual child pornography is so different from real child pornography that it is not exempt from First Amendment protection. But it explicitly left open the question whether images depicting real children, but created without sexual molestation or exploitation, are sufficiently similar to real child pornography to be exempt from First Amendment protection. The Court declined to reach the question whether morphed computer images—that is, sexually explicit images of children created by "alter[ing] innocent pictures of real children so that the children appear to be engaged in sexual activity"[28]—were also entitled to First Amendment protection. The Court did, however, note that morphed images "implicate the interests of real children and are in that sense closer to the images in *Ferber.*"[29]

In the wake of *Ashcroft*, most courts have decided that images depicting real children, but created without sexual molestation or exploitation, still qualify as child pornography.[30] Many courts have interpreted child

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

27. *Id.* at 250–51.

28. *Id.* at 242.

29. *Id.*

30. *See* Amy Adler, *The "*Dost *Test" in Child Pornography Law: "Trial by Rorschach Test," in* Refining Child Pornography Law: Crime, Language, and Social Consequences 85 (C.B. Hessick ed., 2016) (noting that "lower courts have expanded the definition of child pornography since *Ferber* and *Ashcroft* in a way that makes the category less and less connected to the problem child abuse as the Supreme Court envisioned").

pornography laws to include images that are the result of surreptitious filming or photographing.[31] Courts have decided that morphed computer images also qualify as child pornography and are not entitled to First Amendment protection.[32] Perhaps most controversially,[33] courts have upheld convictions based on sexually explicit images that minors created of themselves—a practice sometimes referred to as "sexting." Some states have even prosecuted the minors who created the images of themselves.[34]

But not all judges have taken this view. When the Washington Supreme Court recently upheld a teenager's conviction for sexting, it did so over the vigorous dissent of Justice Gordon McCloud.[35] Justice McCloud argued that it was "absurd" to read Washington's child pornography statute, which "was specifically intended to protect children depicted in pornography," for creating "depictions of themselves."[36] And although the Kansas Court of Appeals has previously held that "morphed" child pornography is not protected by the First Amendment,[37] a recent decision from that court signaled that its judges may be open to revisiting that decision.[38]

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31. *E.g.*, United States v. Klug, 670 F.3d 797 (7th Cir. 2012); United States v. Johnson, 639 F.3d 433 (8th Cir. 2011); United States v. Stewart, 839 F. Supp. 2d 914, 925–26 (E.D. Mich. 2012) ("[A] child may still be exploited even without knowingly participating in the taking of the photograph."). *But see* State v. Gates, 182 Ariz. 459, 465, 897 P.2d 1345, 1351 (Ct. App. 1994).

32. *E.g.*, United States v. Hotaling, 634 F.3d 725 (2d Cir. 2011); United States v. Ramos, 685 F.3d 120, 134 (2d Cir. 2012); *see also* Doe v. Boland, 630 F.3d 491 (6th Cir. 2011). *But see* People v. Gerber, 196 Cal. App. 4th 368, 386 (2011) ("Although we may find such altered images morally repugnant, we conclude that mere possession of them remains protected by the First Amendment to the United States Constitution."); Parker v. State, 81 So. 3d 451 (Fla. App. 2011) (holding that manual cutting and pasting of photographs of children's heads onto sexually explicit images featuring adults did not meet the state statutory definition of child pornography).

33. *See, e.g.*, Emily Shaaya, *States Address the Disconnect: Teens in a Sext-Crazed Culture*, Criminal Justice, Summer 2012, at 18; Editorial, *'Sexting' Overreach*, Christian Sci. Monitor (Apr. 28, 2009), at 8.

34. *See, e.g.*, State v. Gray, 402 P.3d 254 (Wash. 2017); A.H. v. State, 949 So.2d 234 (Fla. Dist. Ct. App. 2007); *see also* John A. Humbach, *'Sexting' and the First Amendment*, 37 Hastings L.J. 433, 433–35 (2010) (collecting cases).

35. State v. Gray, 402 P.3d 254 (Wash. 2017).

36. *Id.* at 262 (2017) (McCloud, J., dissenting).

37. State v. Coburn, 176 P.3d 203 (Kan. Ct. App. 2008).

38. State v. Langston, 404 P.3d 362, 2017 WL 4558573 at *12 (Kan. Ct. App. Oct. 13, 2017) ("A reasonable argument can be made that a statute that goes beyond the prohibition of images created by harming children through sexual exploitation or abuse to a prohibition of

II. RECENT EXPANSIONS

Although reasonable judges can disagree over whether sexting images and morphed images are entitled to First Amendment protection, two states recently expanded the definition of child pornography much further. These expansions are very difficult to square with the Supreme Court's decisions in this area.

A. New Jersey

In 2017, the New Jersey Legislature amended its child pornography statute to include images that fall far outside of the traditional definition of child pornography. Like other states, New Jersey previously defined child pornography to include images "depict[ing] a child engaging in a prohibited sex act."[39] It now defines child pornography to include not only images depicting sex acts, but also images "portray[ing] a child in a sexually suggestive manner."[40] The statute contains the following definition of the latter term:

> "Portray a child in a sexually suggestive manner" means:
>
> (a) to depict a child's less than completely and opaquely covered intimate parts, as defined in N.J.S.2C:14-1, in a manner that, by means of the

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initially innocent images in which the children weren't harmed in making the images does infringe on constitutionally protected speech."). The Kansas court did not reach the issue, however, because the defendant raised it as part of an overbreadth claim that failed to establish that "a significant part of the conduct" the Kansas child pornography statute targeted were images that were created without sexual exploitation or abuse. *Id.* at *12–*13.

39. N.J. Stat. Ann. § 2C:24-4(b)(1). The statute defines a "prohibited sex act" as:

> (a) Sexual intercourse; or
> (b) Anal intercourse; or
> (c) Masturbation; or
> (d) Bestiality; or
> (e) Sadism; or
> (f) Masochism; or
> (g) Fellatio; or
> (h) Cunnilingus; or
> (i) Nudity, if depicted for the purpose of sexual stimulation or gratification of any person who may view such depiction; or
> (j) Any act of sexual penetration or sexual contact

Id.

40. N.J. Stat. Ann. § 2C:24-4(b)(1).

> posing, composition, format, or animated sensual details, emits sensuality with sufficient impact to concentrate prurient interest on the child; or
>
> (b) to depict any form of contact with a child's intimate parts, as defined in N.J.S.2C:14-1, in a manner that, by means of the posing, composition, format, or animated sensual details, emits sensuality with sufficient impact to concentrate prurient interest on the child; or
>
> (c) to otherwise depict a child for the purpose of sexual stimulation or gratification of any person who may view the depiction where the depiction does not have serious literary, artistic, political, or scientific value.[41]

Subsection (c) expands child pornography well beyond its traditional definition.[42] Child pornography statutes ordinarily prohibit depictions of sexual intercourse, bestiality, masturbation, sado-masochistic abuse, or lewd or lascivious exhibition of the genitals.[43] Subsection (c) defines child pornography, not in terms of whether it depicts some sort of sexual activity, but rather in terms of the reaction the image is meant to evoke. The statute is thus remarkably broad, and the prohibition is based entirely on subjective (rather than objective) criteria.[44]

New Jersey is not the first jurisdiction to use subjective criteria to define child pornography. When trying to determine whether an image falls

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41. N.J. Stat. Ann. § 2C:24-4(b)(1).

42. Subsection (c) is not the only problematic part of this statute. Subsections (a) and (b) are arguably unconstitutionally vague. The phrase "emits sensuality with sufficient impact to concentrate prurient interest on the child" does not give individuals notice about what is likely to satisfy this standard and what is not. *Cf.* Rabeck v. New York, 391 U.S. 462 (1968) (striking down as unconstitutionally vague a statute prohibiting the sale of "any . . . magazines . . . which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes"). But at least one New Jersey Court has rejected a vagueness challenge to this language. *See* State v. Seigel, 139 N.J. Super. 373, 381–82 (Law. Div. 1975).

43. This is the definition from both *Ferber* and the current federal statute. N.Y. Penal Law § 263.00(1), 263.00(3), 263.00(4) (McKinney 1980); 18 U.S.C. § 2256(2)(A)–(E). The Supreme Court appears to have affirmed the constitutionality of this definition *sub silentio* in *Ferber*.

44. To be sure, the statute exempts images that "have serious literary, artistic, political, or scientific value." Whether an image possesses such value is arguably objective—namely, a question whether a reasonable person would find such value, rather than whether the person who possesses the image finds such value. But even if this limitation is framed in objective terms, the prohibition itself is framed in subjective terms.

within the federal prohibition of the lascivious display of a minor's genitals, some federal courts have relied on a series of factors called the *Dost* test.[45] The *Dost* test asks

> 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.[46]

The sixth *Dost* factor—"whether the visual depiction is intended or designed to elicit a sexual response in the viewer"—has sometimes been interpreted as speaking only to the content of an image.[47] But other courts have interpreted it to encompass an inquiry into the subjective thoughts of the creator or possessor.[48] In other words, some federal courts have considered the subjective views of particular individuals as one factor in deciding whether a particular image qualifies as child pornography.

As Amy Adler has explained, this subjective focus is deeply problematic. It dilutes the category of child pornography, detracting attention (and perhaps resources) from images that were created through horrific abuse.[49]

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45. For a very persuasive critique of the *Dost* test, see Amy Adler, *Inverting the First Amendment*, 149 U. Pa. L. Rev. 921 (2001) [hereinafter Adler, *Inverting*].

46. United States v. Dost, 636 F. Supp. 828, 832 (S.D.Cal.1986), *aff'd* 813 F.2d 1231 (9th Cir.1987) (unpublished table decision). Although the *Dost* test has been the subject of criticism, *see United States v. Rivera*, 546 F.3d 245, 250–52 (2d Cir. 2008) (collecting sources), it remains popular with lower courts, *see* Adler, *Inverting*, *supra* note 45, at 953 ("Virtually all lower courts that have addressed the issue have embraced the so-called '*Dost* test.'").

47. *See, e.g.*, United States v. Villard, 885 F.2d 117, 122 (3d Cir. 1989) ("We must . . . look at the photograph, rather than the viewer," because if "we were to conclude that the photographs were lascivious merely because [the viewer] found them sexually arousing, we would be engaging in conclusory bootstrapping rather than the task at hand—a legal analysis of the sufficiency of the evidence of lasciviousness.").

48. *See, e.g.*, United States v. Brown, 579 F.3d 672, 683–84 (6th Cir. 2009) (adopting a "limited context test" that "permits consideration of the context in which the images were taken"); *see also* Adler, *Inverting*, *supra* note 45, at 954 n.149 ("Courts have wavered on the question of whether the focus must be on the audience, the photographer, or both.").

49. Adler, *supra* note 30, at 95–96.

It may be constitutionally vague because it is so unpredictable.[50] And it "threatens to turn child pornography law into a thought crime."[51] If what matters is what a person thinks about an image, rather than how the image was created, then the law is no longer focused on whether a child was harmed. Given that child pornography is exempted from First Amendment protection because of the harm suffered by children,[52] the subjective focus raises constitutional concerns.

The New Jersey statute goes even further than the *Dost* test. While the *Dost* test considers subjective thoughts of a creator or possessor as one of six factors, the New Jersey statute makes subjective thoughts the sole test of criminality. That is not to say a subjective factor can never serve as the dividing line between legal and illegal behavior.[53] But where, as here, the dividing line is between illegal behavior and *constitutionally protected* behavior, it seems as though more should be required than simply a subjective purpose.[54] That is especially so here because the New Jersey statute applies to essentially *any* depiction of a child so long as the purpose of the image is the "sexual stimulation or gratification of any person who may view the depiction." The statute exempts only depictions with "serious literary, artistic, political, or scientific value." Nudity is not required.[55]

An example may help to illustrate how broad this statute is, and how heavily it relies on subjective intent. Imagine an individual who is sexually attracted to children, and who finds photographs of children bundled up in

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50. *Id.* at 94.

51. *Id.* at 95.

52. *See* United States v. Stevens, 130 S. Ct. 1577, 1586 (2010) (explaining that *Ferber* recognized the exception for child pornography because "[t]he market for child pornography was 'intrinsically related' to the underlying abuse, and was therefore 'an integral part of the production of such materials, an activity illegal throughout the Nation'") (internal citations omitted).

53. Obstruction of justice, for example, has often been thought to criminalize otherwise legal behavior, such as shredding documents, if done with "corrupt intent." *See* Arthur Anderson LLP v. United States, 544 U.S. 696 (2005) (holding that document shredded, if done without corrupt intent, is legal).

54. *Cf.* United States v. X-Citement Video, 513 U.S. 64, 78 (1994) (presuming a scienter requirement for a statutory element that distinguished between illegal activity and constitutionally protected activity because, *inter alia*, a statute without such a scienter requirement would raise "serious constitutional doubts").

55. Although there is reason to doubt that the Supreme Court would approve of a child pornography definition that included clothed children, there are several lower court cases saying that nudity is not constitutionally required. *See* Adler, *supra* note 30, at 86 & n.42.

winter coats to be sexually stimulating.[56] If that individual takes a picture of a child walking down the street who is wearing a coat, then the New Jersey statute would classify that picture as child pornography. All that matters is whether the image "depict[s] a child," whether the individual who created the image had "the purpose of sexual stimulation," and whether the resulting image had no "serious literary, artistic, political, or scientific value." All three of those factors are met by the example.

As the winter coat example illustrates, the New Jersey statute criminalizes the viewpoint of the individual who took the picture. It does not matter that the child was not harmed in the creation of the image or that the child will suffer no privacy invasion or reputational harm if the image is shared with others.[57] All that matters is how the potential defendant views the image of the child.

B. Texas

While New Jersey's recent expansion of child pornography law came from the legislature, Texas's expansion came from the courts. In 2017, the Texas Court of Criminal Appeals upheld a conviction for an individual based on his possession of a portion of a Robert Mapplethorpe photograph.[58] The Texas court relied on the *Dost* factors, rather than any concept of harm to the child depicted, to affirm a conviction that was clearly the result of a prosecution based on suspicion that the defendant was sexually attracted to children, rather than any harmful content of the images he possessed.

On Valentine's Day, 2014, a librarian saw Mark Bolles using a library computer to view what appeared to be "partially clothed" children on the internet.[59] The library alerted the FBI.[60] The FBI sent an agent to the library, where the agent observed Bolles taking photographs on his cell phone of images on the computer.[61] The FBI agent convinced Bolles to

56. *See* United States v. Steen, 634 F.3d 822, 829 (5th Cir. 2011) (Higgenbotham, J., concurring) ("A pedophile may be aroused by photos of children at a bus stop wearing winter coats, but these are not pornographic."); *see also* Adler, *Inverting*, *supra* note 45, at 943 n.99 (documenting pedophilic interest in children wearing winter coats).

57. These are the two reasons that the Supreme Court has given for why child pornography is exempted from First Amendment protection. *See generally* Hessick, *Limits*, *supra* note 19.

58. State v. Bolles, __ S.W.3d __, 2017 WL 4675659 (Tex. Crim. App. Oct. 18, 2017).

59. *Id.* at *1.

60. Bolles v. State, 512 S.W.3d 456, 458 (Tex. App. 2016).

61. 512 S.W.3d at 458.

surrender his phone to him, and a subsequent inspection revealed several nude or partially nude pictures, including what appeared to be a picture of Bolles' genitalia, that led to his indictment.[62]

Bolles was indicted on three counts of possession of child pornography. Count 3 was dismissed by the state before trial, after prosecutors concluded that the photo in question depicted an adult, rather than a minor.[63] Count 2 was for an image of a young nude girl touching her breast. The defendant was acquitted on this count at trial.[64] And Count 1 was based on a cropped portion of the Mapplethorpe photo. Bolles was convicted only of Count 1, the count associated with the partial Mapplethorpe photo, and he appealed his conviction on this count.[65]

Before addressing the arguments raised on appeal, it is worth describing, in detail, the Mapplethorpe photograph and the cropped image that Bolles created. The Mapplethorpe photograph, which is titled "Rosie," shows a young girl sitting on a stone bench.[66] The girl is wearing a dress, but because her knees are bent and her feet propped up on the bench in front of her, the viewer can see that she is not wearing underwear. A portion of her labia majora is visible in the shadow of her dress. Bolles cropped the Mapplethorpe photograph to create a close up image of the girl's labia.[67]

Bolles convinced the intermediate appellate court to reverse his conviction on Count 1.[68] The intermediate appellate court may have sided with Bolles because the government argued not only that Bolles' cropped portion of the Mapplethorpe photo was illegal child pornography, but also that the original Mapplethorpe photograph, in its entirety, depicted a lewd exhibition of the

62. 512 S.W.3d at 459. The Texas Court of Criminal Appeals stated that there were "several images of what appeared to be [Bolles's] own penis" on the cell phone. State v. Bolles, __ S.W.3d __, 2017 WL 4675659, at *2. But the intermediate court state that there was "one image of appellant's face and penis." 512 S.W.3d at 459. I can find no explanation for the discrepancy.

63. __ S.W.3d __-, 2017 WL 4675659, at *2.

64. __ S.W.3d __, 2017 WL 4675659, at *2.

65. __ S.W.3d __, 2017 WL 4675659, at *1.

66. The image can be viewed here: http://archive.is/kjUer.

67. State v. Bolles, __S.W.3d __, 2017 WL 4675659, at *2. In its description of the photography, the trial court said that the child's "vagina is visible." *Id.* at *1. That description is anatomically inaccurate.

68. Bolles v. State, 512 S.W.3d 456 (Tex. App. 2016).

genitals.[69] In other words, the state argued that the original Mapplethorpe photograph, which hangs in the Guggenheim museum,[70] is child pornography. The intermediate appellate court rejected this argument.

The state made another remarkable argument before the intermediate appellate court. The state argued that, if the court concluded the full photograph was not lewd, then "an issue arises regarding when the cropped image was 'made.'" More specifically, the state argued that if only the new, cropped image is lewd, then the cropped image might not fall within the statute's prohibition. The statute prohibits certain material depicting "a child younger than 18 years of age *at the time the image of the child was made*."[71] The child depicted in the 1976 Mapplethorpe photograph was doubtlessly older than 18 when the cropped image was "made" in 2014, and thus the state appears to have argued that the original Mapplethorpe photograph was lewd in order to avoid a possible argument that the new, cropped image fell outside the text of the statute. Oddly, the defendant doesn't appear to have made this argument; the state volunteered it.[72] And although the state also argued to the intermediate appellate court "that the better argument is that the cropped image was also 'made' in 1976 when the photograph was taken,"[73] the state didn't offer any support for what it claimed was the "better" reading of the statute.[74] And, having raised an argument against its own interest, the state inadvertently convinced the intermediate appellate court that the cropped image fell outside of the statutory prohibition. The intermediate appellate court reversed the conviction on Count 1 on the grounds that the child depicted in the cropped photo was not under 18 when Bolles created the cropped image. Because it found that the cropped image fell outside the statute, the intermediate appellate court did not discuss whether the image was lewd.[75]

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69. 512 S.W.3d at 463–65. Not only did the State argue that the Mapplethorpe picture was lewd under the *Dost* factors, but it also encouraged the court to conclude "that Mapplethorpe intended to invoke a sexual response of some kind" when he created the image, and that Mapplethorpe "coached" the little girl in the image to expose her gentiles for the photograph. *Id.* at 463.

70. Bolles v. State, 512 S.W.3d 456, 459 (Tex. App. 2016).

71. Tex. Penal Code Ann 43.26(a) (emphasis added).

72. Bolles v. State, 512 S.W.3d 456, 466 (Tex. App. 2016).

73. 512 S.W.3d at 466.

74. *Id.*

75. Bolles v. State, 512 S.W.3d 456, 466 (Tex. App. 2016) ("Whether or not the cropped image depicts a lewd exhibition of the genitals—an issue we express no opinion on—

The Texas Court of Criminal Appeals reversed.[76] First, the Court of Criminal Appeals concluded that the conviction on Court 1 "was based only on Appellant's possession of the zoomed-in cropped image of the child's genitals."[77] Thus, the Court of Criminal Appeals did not revisit the intermediate appellate court's analysis about whether the original Mapplethorpe photograph was lewd. Instead the Court of Criminal Appeals focused on the argument that the girl depicted was older that 18 when Bolles "made" the cropped image. It concluded that the cropping of the Mapplethorpe photograph did not change the age of the child depicted for statutory purposes, and it then conducted a *Dost* analysis and held that the cropped image was lewd.[78]

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a reasonable jury could not conclude that it depicts a person who was under the age of 18 'at the time the image was made.'").

76. State v. Bolles, __S.W.3d __, 2017 WL 4675659 (Tex. Crim. App. Oct. 18, 2017). The Texas Court of Criminal Appeals is the court of last resort for criminal defendants in Texas.

77. *Id.* at *2.

78. The *Dost* analysis was relatively perfunctory. It analyzed only the cropped image, and clearly indicated that the cropped image was quite different than and separate from, the original Mapplethorpe:

> First, the child's genital area is the focal point of the cropped image. There is very little else in the image to view except the child's genitals. Regarding the second and third factors, since the image is of only the child's genital area, it could be viewed as unnatural and sexually suggestive. The genitals are exposed and the child's legs are clearly apart. Creating an image of only the child's genitals in this pose is definitely sexually suggestive. Fourth, since the image is a close-up of the child's genitals, it is an image depicting a child who is at least partially nude. The fifth factor, whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity, can be presumed because of how the image was manipulated—although little can be seen of the child's legs, they appear to be spread apart. Finally, the visual depiction created by Appellant appears to have been intended and designed by Appellant to elicit a sexual response in the viewer.
>
> As the court stated in *United States v. McCall*, "it is the *depiction*—not the minor—that must bring forth the genitals or pubic area to excite or stimulate." Thus, the context of the making of the cropped image and the composition of the image, as cropped, can factor into this evaluation. The magnified cropped image is not a work of art hanging in a museum or depicted in books containing Robert Mapplethorpe's work. The magnified and cropped image is a picture of a child's genitals, legs spread open. We find that this image constitutes a "lewd exhibition" of her genitals. It would be difficult to conclude otherwise since all six *Dost* factors have been satisfied.

State v. Bolles, No. PD-0791-16, 2017 WL 4675659, at *12 (Tex. Crim. App. Oct. 18, 2017).

Importantly, the Texas Court of Criminal Appeals did not disturb the intermediate court's finding that the original Mapplethorpe photograph was not lewd. Implicit in this decision is that the child depicted was not subject to sexual abuse or exploitation when Mapplethorpe took the photograph in 1976. The child depicted was not suddenly subject to abuse or exploitation when Bolles cropped the photograph in 2014. Nor was she subject to any additional privacy harm when the image was cropped. The original Mapplethorpe photograph included a depiction of her genitalia because of how she was sitting on the bench and because she was not wearing underwear. It is true that the cropped image showed only her genitalia, and not the other portions of the original Mapplethorpe photograph. But it is entirely unclear how cropping the image changes the privacy interests of the child depicted. The cropped image does not show anything more than the original photograph shows. And one could achieve the same effect that Bolles did in cropping the image by using a magnifying glass to look at the original photograph.

To be sure, *Bolles* is not the first case to hold that a defendant's cropping of an image could create child pornography, even when the original image did not constitute child pornography.[79] For example, in *United States v. Stewart*,[80] the defendant cropped pictures in such a way as to make the child's genitalia the "focal point of the images."[81] Although the government conceded that the initial, larger images (photographs of young girls swimming naked at a beach) did not meet the definition of child pornography,[82] the court held that the defendant's decision to crop the photographs rendered the new photographs lascivious and thus child pornography.[83] But *Bolles* may be the most striking of these decisions as it involves an actual work of art.

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79. There are a number of lower court decisions stating that the cropping of images or focusing in on a specific area may be appropriately considered in the question of lasciviousness. *E.g.*, United States v. Brown, 579 F.3d 681 (6th Cir. 2009); United States v. Freeman, 808 F.2d 1290, 1292 (8th Cir. 1987); United States v. Dauray, 76 F. Supp. 2d 191, 196–97 (D. Conn. 1999).

80. 839 F. Supp. 2d 914 (E.D. Mich. 2012).

81. *Id.* at 923.

82. *Id.* at 922.

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

III. A CRITICAL VIEW OF EXPANSION

The New Jersey statute and the *Bolles* case from Texas share an important similarity—both focus on a defendant's sexual interest in children, rather than harm to children. Indeed, much of the modern approach to child pornography law can be said to do the same. Not only has the definition of child pornography changed to include images that were created without any harm to the child depicted, but enforcement efforts also appear disproportionately to target those who consume child pornography, rather than those who create child pornography or otherwise sexually abuse children. This section explains why the harm to children ought to be the primary focus of child pornography law, and of law enforcement efforts more generally.

A. The Shift from Harm to Sexual Interest

In creating the child pornography exception to the First Amendment, the Supreme Court stressed that child pornography harms children. In particular, it stressed that children are harmed in the creation of child pornography,[84] and that harm is exacerbated by the circulation of the images, which serve as a "permanent record" of the abuse the child suffered in the image's creation.[85] For example, the *Ferber* Court framed the harms of child pornography in terms of an "intrinsic relationship" between the distribution of child pornography and child sex exploitation and abuse. This relationship led the Court to conclude that the only effective way to end the harm of creation was to shut down the distribution network of child pornography.[86] And in *Ashcroft*, the Court characterized its decisions to allow child pornography prosecutions as a judgement "based on how [child pornography] was made, not on what it communicated."[87]

Neither the New Jersey statute nor the Texas Court of Criminal Appeals decision in *Bolles* can be justified based on harm to children. The New Jersey statute does not require that the child be engaged in any particular

84. *Osborne*, 495 U.S. at 109; *Ferber*, 458 U.S. at 758.

85. *Osborne*, 495 U.S. at 111; *Ferber*, 458 U.S. at 759

86. "[T]he distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled." *Ferber*, 458 U.S. at 759.

87. *Ashcroft*, 535 U.S. 234, 250–51 (2002).

activity or even appear nude; all that matters is how others view the image—namely, whether a defendant views the child depicted as a source of "sexual stimulation or gratification."[88] Nor is the *Bolles* decision predicated on any type of harm to the child depicted. The young girl was not harmed by Mapplethorpe's original photography; and Bolles' subsequent decision to zoom in on one portion of that photograph does not retroactively cause any harm to her.

Changing child pornography law so that it is no longer predicated on harm to children may cause constitutional problems. It expands the definition of child pornography "in a way that makes the category less and less connected to the problem [of] child abuse as the Supreme Court envisioned."[89] The Supreme Court has said child pornography falls outside of the First Amendment only because of the harm it causes to children.[90] Images that cause no harm thus may be entitled to constitutional protection.[91]

In addition to the fact that the New Jersey images and the image from *Bolles* cause no harm, they appear to punish based on whether defendants are sexually attracted to children, rather than the content of the images themselves. The New Jersey statute is quite explicit about this: What separates images of children that are permitted from those that are prohibited is the subjective reaction the image is meant to evoke.[92]

The *Bolles* Court purported to base its punishment decision on more than just subjective factors—it found that the cropped image satisfied several objective *Dost* factors, as well as the subjective factor.[93] But there is little doubt that the initial investigation and prosecution of Mark Bolles was based on his perceived sexual interest in children, rather than the content of the images he possessed. He came to the attention of law

88. N.J. Stat. Ann. § 2C:24-4(b)(1).

89. Adler, *supra* note 30, at 85.

90. *See supra* notes 19–27, 84–87, and accompanying text.

91. *See generally* Hessick, *Limits*, *supra* note 19. *See also* Adler, *supra* note 30, at 95 ("[I]t is in my view an open constitutional question whether such harm standing along would suffice to deem an image 'child pornography' as a constitutional matter. The Court's jurisprudence is simply unclear on this point and there are significant reasons to suspect that the kind of harm caused by these images is simply too far afield from the abuse-in-production harm that is the foundation of child pornography law.")

92. *See supra* text accompanying notes 41–44.

93. *See supra* note 78.

enforcement because a librarian was concerned that Bolles was using a library computer to view images of "what looked like partially clothed individuals."[94] He was charged not only for possessing the cropped image, but also for possessing what ultimately proved to be an image of an adult and a non-pornographic image of a girl.[95] These other charges suggest that prosecutors were not particularly careful about the content of the images Bolles possessed. They were instead concerned about his interest in partially clothed children. And the court's inclusion of the fact that Bolles also had a picture of his penis on his cellphone[96]—a fact that is irrelevant to the legal question in the case—was presumably included in order to signal that Bolles found these images sexually stimulating.

Put simply, these two expansions shift child pornography law from a tool to prevent harm to children to a tool that punishes based on a defendant's thoughts towards children. As Amy Adler explains:

> Child pornography has become a thought crime. Quite simply, we do not like the way people think about certain pictures of children. This is evident in the ever-expanding definition of "lascivious exhibition of the genitals" and the attempt of courts and legislatures, . . . to police pictures that appeal to the sexual fantasies of pedophiles, regardless of how those pictures were produced.[97]

Adler explains why this focus on a defendant's fantasies is inconsistent with First Amendment principles.[98] A focus on fantasies rather than harm is also inconsistent with *Aschroft*'s rejection of protecting *future* victims of child sex abuse as a sufficient reason to criminalize child pornography.[99] But there are also practical reasons to oppose the shift in child pornography law from harm to sexual thoughts—namely, that it is unlikely to actually protect children from sexual abuse.

B. Child Pornography and Preventing Abuse

As the Supreme Court explained in *Osborne v. Ohio*, the criminalization of child pornography possession is justified because those who possess child

94. *Bolles*, 512 S.W.3d at 458.
95. *See supra* text accompanying notes 63–65.
96. *See supra* note 62.
97. Adler, *Inverting*, *supra* note 45, at 995.
98. *Id.* at 970–95.
99. *Ashcroft*, 535 U.S. 234, 250 (2002).

pornography create a market for its creation.[100] If no one sought to possess child pornography, so the argument goes, then children would not be abused in order to create it.[101] Modern law enforcement has taken this market theory seriously. Prosecutors have significantly increased the volume of child pornography possession cases that they bring.[102] In doing so, they have said that they are protecting children not only because they are drying up the market for child pornography, but also because those who possess child pornography are also like to have also molested a child[103] or are likely to do so in the future.[104]

There is no doubt that the possession of child pornography should be prohibited and punished. But we should not pretend that child pornography prosecutions are an effective means of protecting children from sexual abuse. That is because the market theory of child pornography does not hold up to scrutiny, and because the category of people who possess child pornography is both over- and under-inclusive of the group of individuals who actually pose a physical threat to children.

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100. Osborne v. Ohio, 495 U.S. 103, 110 (1990).

101. SUZANNE OST, CHILD PORNOGRAPHY AND SEXUAL GROOMING: LEGAL AND SOCIETAL RESPONSES 114–15 (2009) (collecting sources making this argument).

102. *See* Hessick, *Questioning*, *supra* note 2, at 148 tbl.1.

103. As I have previously documented:

> There are a number of examples where government officials tacitly acknowledge that child pornography laws are being used as a proxy for punishing child sex abusers. They often appear in the guise of statements that possessors of child pornography also have a history of contact offenses or statements noting how difficult it is to detect or prosecute child sex abuse cases. Such statements, when made in support of longer sentences for possession of child pornography, indicate that lawmakers are using pornography prosecutions as an alternative to sex abuse prosecutions. If possessors were being punished only for viewing these images, such statements would be irrelevant. Other public officials are more direct, making statements that refer to possessors of child pornography as "predators" or in other terms that suggest contact offenses.

Hessick, *Disentangling*, *supra* note 1, at 882.

104. *See, e.g.*, YAMAN AKDENIZ, INTERNET CHILD PORNOGRAPHY AND THE LAW: NATIONAL AND INTERNATIONAL RESPONSES 11 (2008) (quoting the Explanatory Memorandum of the Council of Europe's Cybercrime Convention 2001); WILLIAM A. STANMEYER, THE SEDUCTION OF SOCIETY: PORNOGRAPHY AND ITS IMPACT ON AMERICAN LIFE 81 (1984); Janis Wolak et al., National Center for Missing & Exploited Children, *Child-Pornography Possessors Arrested in Internet-Related Crimes: Findings from the National Juvenile Online Victimization Study* 34 (2005), available at http://unh.edu/ccrc/pdf/jvq/CV81.pdf.

There is significant reason to doubt the market theory argument. In particular, the market theory is problematic because the distribution channels for child pornography do not function as a commercial market: those who create and distribute child pornography do not make a profit, but instead appear to be motivated by a desire for status.[105] Because those who produce child pornography are not motivated by economic gain, the standard market theory that eliminating demand will eventually reduce the supply does not necessarily apply. Indeed, those who champion the market theory do not rely on any empirical evidence that arresting and prosecuting possessors has affected the production of child pornography; instead they simply rely on the logical appeal of the standard economic argument.[106]

The claim that defendants who possess child pornography are likely to have molested a child in the past or to do so in the future is similarly unsupported by available evidence. To be sure, some individuals who possess child pornography have also molested a child. But the population of individuals who possess child pornography includes large numbers of people who have never had sexual contact with a child, and many individuals who sexually molest children appear not to collect child pornography.[107] As Melissa Hamilton explains, "child molesters and child pornography offenders are two groups with occasional overlap in membership."[108]

Given that child pornography distribution does not function as a market, and given that child pornography prosecutions are not particularly likely to snare child molesters, an enforcement strategy focused on child pornography possession is unlikely to actually protect children from sexual abuse. Not only are child pornography cases unlikely to protect children from sexual abuse standing alone, but harsh child pornography laws also create perverse incentives for law enforcement to pursue pornography cases rather than sex abuse cases. That is because child sex abuse cases are more difficult to prosecute than possession of child pornography cases. For one thing, child

105. *See* PHILIP JENKINS, BEYOND TOLERANCE: CHILD PORNOGRAPHY ON THE INTERNET 91 (2001); OST, *supra* note 101, at 113.

106. *See* OST, *supra* note 101, at 116.

107. *See* Hessick, *Questioning*, *supra* note 2, at 152–54; Hessick, *Disentangling*, *supra* note 1, at 870-86.

108. Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 STAN. L. & POL'Y REV. 545, 580–81 (2011).

sex abuse is more difficult to detect than are child pornography crimes.[109] For another, once child sex abuse is detected, there are evidentiary problems associated with pursuing many child sex abuse cases. Prosecutors often lack physical evidence, worry about the credibility of child witnesses, or must overcome the unwillingness of the victim's family to have their child to suffer through the trauma of a trial.[110] Similar issues rarely arise in possession of child pornography cases; once law enforcement obtains a warrant and seizes an offender's computer, the prosecution essentially has all the evidence it needs to obtain a conviction.[111] There is no need to worry about victim credibility or about a victim's unwillingness to testify.

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109. *See* Bureau of Justice Statistics, Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics (2000), at 11, http://www.ojp.usdoj.gov/bjs/pub/pdf/saycrle.pdf [hereinafter, Sexual Assault of Young Children] (reporting a 27% arrest rate); Jim Tate, Child Pornography: An Investigation 109–10 (1990) (suggesting that only 1% of all child sex abusers are "caught and sentenced"). Child sex abuse is difficult to detect because it ordinarily occurs in private spaces, *see* Bureau of Justice Statistics, Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics 6 (2000), and because offenders threaten their victims into silence, *see, e.g.*, Tilman Furnis, the Multi-Professional Handbook of Child Sexual Abuse 24, 39 (1991). In contrast, law enforcement can detect those who possess child pornography by tracing IP addresses of those who visit pornographic sites, or by engaging in sting operations. *Cf.* Wolak et al., *supra* note 104 (reporting that 43% of U.S. child pornography possession cases in 2000 "originated with investigations by law enforcement").

110. For example, in 2006 federal prosecutors declined to prosecute more than half of the child sex abuse cases that were referred to them, as opposed to only a 38% declination rate for child pornography referrals, Bureau of Justice Statistics, Federal Prosecution of Child Sex Exploitation Offenders, 2006, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fpcse06.pdf, at tbl. 2, and the reasons given for declining prosecution were more likely to be concerns about weak evidence in child sex abuse cases than in child pornography cases, *id.* at 3 ("More than half of sex abuse declinations were due to weak evidence. In comparison, weak evidence was stated as the reason for 24% of declinations for child pornography and 20% of declinations for sex transportation."). More recent federal reports no longer report child sex abuse offenses alongside child pornography data, so it is hard to tell the extent to which these patterns continue. *Compare id.* (reporting data for child pornography, child sex abuse, and child sex transportation), *with* Bureau of Justice Statistics, *supra* note 2 (reporting data for child pornography production, child pornography possession/receipt/distribution, and child sex trafficking).

111. *See* Dan Herbeck, *Child Porn Suspect Faces Risk with Trial*, the Buffalo News, Dec. 6, 2009 (reporting high levels of plea bargains for child pornography possession, and noting that the few defendants who proceed to trial are almost always convicted).

Importantly, the expansion of child pornography law in New Jersey and Texas may make child pornography prosecutions even more attractive to law enforcement than sex abuse prosecutions. By relaxing the definition of what qualifies as child pornography, these states have made it even easier for prosecutors to obtain a conviction for possession of child pornography.[112]

Because child sex abuse is a much more serious crime than possession of child pornography,[113] one might assume that law enforcement would never prioritize child pornography cases over cases involving actual child sex abuse. Unfortunately, that assumption is false. Arizona, which has the country's toughest child pornography laws, actively pursued harsh sentences against possessors of child pornography offenders while failing to investigate reports of child sex abuse. While prosecutors were seeking 200-year sentences for defendants accused of possessing child pornography,[114] law enforcement was failing to conduct even rudimentary investigations into dozens of child sex abuse allegations.[115] As the Associated Press reported in 2011, law enforcement failed to investigate 32 reported child molestations from one community despite the fact that "suspects were known in all but six cases."[116]

To be sure, the Arizona example does not prove that all law enforcement will necessarily prioritize child pornography offenses above child sex abuse cases. But it is far from the only example of law enforcement failing to investigate contact sex offenses, as opposed to proxy crimes like pornography. Child pornography prosecutions allow law enforcement to signal that they are working to protect children without having to take on messy contact cases. And as law enforcement increasingly reports enforcement

112. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519–20 (2001) (explaining that when legislatures create a new crime that is easier to prove than an existing crime, it allows prosecutors to engage in "informal adjudication" and use the new crime to punish those they suspect of the existing crime).

113. *See* Hessick, *Disentangling*, *supra* note 1, at 865–70.

114. *See* Arizona v. Berger, 134 P.3d 378 (Ariz. 2006) (affirming a 200-year sentence for possession of child pornography).

115. "[M]ore than 400 sex-crimes reported to Maricopa County Sheriff Joe Arpaio's office during a three-year period ending in 2007—including dozens of alleged child molestations—that were inadequately investigated and in some instances were not worked at all, according to current and former police officers familiar with the cases." Jacques Billeaud, *Critics: 'Tough' sheriff botched sex-crime cases*, ASSOCIATED PRESS, Dec. 4, 2011.

116. *Id.*

data in a way that aggregates child pornography possession with more serious crime,[117] the more likely another Arizona is to occur.

CONCLUSION

Many contributions to this Symposium highlight changes in laws that have benefitted sex offenders. For example, those who have been convicted of sex offenses have mounted some successful challenges to various registration and notification laws. But while challenges to sex offender laws have been successful in some areas, child pornography law challenges have not fared well. Although a small number of judges have expressed disagreement with the expansion of child pornography laws,[118] those judges are the exception rather than the rule. For now, the legal battle against child pornography rages on, despite the fact that current tactics do not appear well suited to actually protecting children from sexual abuse.

117. *See, e.g.*, Guy Hamilton-Smith, *New DOJ Report Demonstrates Stunning Disingenuity on cases Involving Sexual Exploitation of Children*, IN JUSTICE TODAY (Jan. 17, 2018), *available at* https://injusticetoday.com/new-doj-report-demonstrates-stunning-disingenuity-on-cases-involving-sexual-exploitation-of-b44a0c444e5d; *see also* Hessick, *Disentangling*, *supra* note 1, at 890–91 n.153–55 (collecting sources).

118. *See supra* notes 36, 38.