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United States v. Knox: Protecting Children From Sexual Exploitation Through the Federal Child Portonography Laws

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COMMENT

United States v. Knox: Protecting Children from Sexual Exploitation Through the Federal Child Pornography Laws

INTRODUCTION

A new type of child pornography has emerged in the past few years.[1] Pornographers, seeking to avoid prosecution under a federal criminal statute, are now using children to produce "panty-flashing" videotapes which do not feature nudity or explicit sexual acts but depict fully or partially clothed children posing while the camera zooms in and focuses for extended periods of time on their covered genital and pubic areas.[2] These exploitative materials are then marketed to pedophiles[3] who view these materials for their sexual gratification.[4] Catalogues advertising such tapes pander to pedophiles with film descriptions such as "girls between the ages of 11 and 17 showing so much panty and ass you'll get dizzy" and "bathing suits on girls as young as 15 that are so revealing it's

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1. *See infra* notes 347-348 and accompanying text. Child pornography is currently defined under federal legislation as visual depictions of children engaging in sexually explicit conduct. 18 U.S.C. § 2252(a) (1988 & Supp. IV 1992). "Sexually explicit conduct" is defined by statute as including "lascivious exhibitions of the genitals or pubic area." 18 U.S.C. § 2256(2)(E) (1988 & Supp. IV 1992). The materials are not required to be considered obscene. *See infra* note 101 and accompanying text. Furthermore, the Attorney General's Office has stated that what is commonly referred to as child pornography is not so much a form of pornography as it is a form of sexual exploitation of children. 1 ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, U.S. DEPT. OF JUSTICE, FINAL REPORT 405 (1986) [hereinafter FINAL REPORT].

2. *See, e.g.*, United States v. Knox, 977 F.2d 815, 817 (3d Cir. 1992), *cert. granted*, 113 S. Ct. 2926, *vacated and remanded*, 114 S. Ct. 375 (1993), *aff'd*, 32 F.3d 733 (3d Cir. 1994), *cert. denied*, 1994 WL 512613 (U.S. Jan. 17, 1995).

3. The Attorney General's Commission on Pornography defined a pedophile as a person who has "a clear sexual preference for children." FINAL REPORT, *supra* note 1, at 609.

4. *Knox*, 977 F.2d at 818.

almost like seeing them naked (some say even better)."[5]

United States v. Knox[6] addresses the issue of whether Congress intended to prohibit these sorts of visual depictions when it enacted the federal child pornography laws. In *Knox*, federal prosecutors successfully argued that the federal child pornography laws prohibited such depictions when they prosecuted Stephen A. Knox for knowingly receiving and possessing child pornography in violation of the Protection of Children Against Sexual Exploitation Act of 1977, as amended by the Child Protection Act of 1984 ("Act").[7] The United States District Court for the Middle District of Pennsylvania rejected Knox's claim that the videotapes in his possession did not depict a "lascivious exhibition of the genitals or pubic area" of a minor, a form of "sexually explicit conduct" which is proscribed by the Act.[8]

In 1992, the United States Court of Appeals for the Third Circuit upheld Knox's conviction.[9] Knox subsequently appealed the conviction to the United States Supreme Court.[10] In March 1993, the Acting Solicitor General, William C. Bryson, filed a Supreme Court brief on behalf of the U.S. Justice Department, seeking to uphold the conviction.[11] The Justice Department argued that Knox's conviction should stand because the videotapes confiscated from Knox's apartment were found by the court of appeals to contain "lascivious exhibitions" and because nudity of the child is not a requirement under the Act.[12]

In September 1993, President Clinton's newly appointed Solicitor General, Drew S. Days, III, filed a different brief, which re-

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5. *Id.*

6. 776 F. Supp. 174 (M.D. Pa. 1991), *aff'd*, 977 F.2d 815 (3d Cir. 1992), *cert. granted*, 113 S. Ct. 2926 (1993), *vacated and remanded*, 114 S. Ct. 375 (1993), *aff'd*, 32 F.3d 733 (3d Cir. 1994), *cert. denied*, 1994 WL 512613 (U.S. Jan. 17, 1995).

7. 18 U.S.C. §§ 2251-2257 (1988 & Supp. IV 1992).

8. *Knox*, 776 F. Supp. at 174, 180. These terms are defined in 18 U.S.C. §§ 2252(a), 2256(2)(E) (1988 & Supp. IV 1992). *See also infra* part I.A.5.

9. *Knox*, 977 F.2d at 817.

10. Knox v. United States, 113 S. Ct. 2926 (1993).

11. Brief for the United States in Opposition, *Knox* (No. 92-1183) [hereinafter United States' Brief (Bryson)].

12. United States' Brief (Bryson) at 6-10. *See infra* part II.B.2.

versed the Justice Department's earlier position.[13] The new brief contended that the Third Circuit used "an impermissibly broad standard" in interpreting and applying the Act and that the conviction of Knox should be vacated.[14] The Justice Department's new position was that a prohibited depiction must contain two elements:

> (a) the material must include a *visible* depiction of the genitals or pubic area of the body (as distinguished from a depiction of the clothing covering those areas); and
>
> (b) the material must depict a child lasciviously engaging in sexual conduct (as distinguished from lasciviousness on the part of the photographer or consumer).[15]

In light of the Justice Department's new position, the Supreme Court vacated the Third Circuit's decision and remanded the case to the Third Circuit for further consideration.[16]

Anti-pornography groups and members of Congress criticized the Clinton Administration for the Justice Department's reversal.[17] President Clinton then personally directed Attorney General Janet Reno to draft an amendment to expand the reach of the federal child pornography laws.[18] Although Reno drafted a proposed amendment to the Act,[19] no member of Congress sponsored or promoted its passage since many House and Senate members be-

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13. Brief for the United States, *Knox* (No. 92-1183) [hereinafter United States' Brief (Days)]. William C. Bryson, appointed by President George Bush, was serving as the Acting Solicitor General under the Clinton Administration when the Justice Department filed its first United States Supreme Court brief in *Knox*. Drew S. Days, III, the present Solicitor General, was subsequently appointed by President Clinton. Days then filed a second Supreme Court brief in *Knox*, which reversed the earlier position taken by the government. United States' Brief (Days).

On March 17, 1994, Attorney General Janet Reno named Bryson to become the acting Associate Attorney General to replace Webster L. Hubbell, who had recently resigned from that position. *No. 3 Justice Official to Step Down Today*, N.Y. TIMES, Apr. 18, 1994, at A16.

14. United States' Brief (Days) at 8-9. *See infra* part II.B.3.

15. United States' Brief (Days) at 9.

16. United States v. Knox, 114 S. Ct. 375 (1993).

17. *Top Court Agrees to Hear Porn Case*, PLAIN DEALER, Mar. 1, 1994, at 11A.

18. Neil A. Lewis, *Clinton to Widen Law on Child Smut*, N.Y. TIMES, Nov. 16, 1993, at A24.

19. *See infra* text accompanying note 288.

lieved that the material in Knox's possession was already covered under the present statute.[20]

The shifting theories of the Justice Department divided commentators and lawyers into two camps. Those in support of the Justice Department's new position stated that this interpretation of the statute was an attempt to keep it from being declared unconstitutionally overbroad.[21] They voiced their concerns that a broader interpretation of the statute would infringe upon First Amendment rights, especially with regard to advertisements.[22] Those against the new position argued that the Justice Department's interpretation set forth in its second Supreme Court brief was narrower than it was under the Bush and Reagan administrations and that it did not adequately interpret the statute or protect children from sexual exploitation.[23]

On June 9, 1994, the Third Circuit, on remand, reaffirmed Knox's conviction and rejected the Justice Department's new standard.[24] The court held that nudity or discernibility of the child's pubic area is not a requirement under the statute, and that a "lascivious exhibition" of a child's pubic area "requires only that the material depict some 'sexually explicit conduct' by the minor subject which appeals to the lascivious interest of the intended audience."[25] Knox again appealed his conviction to the United States Supreme

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20. Martin Dyckman, *Politics and Pornography*, ST. PETERSBURG TIMES, Nov. 23, 1993, at 9A. Furthermore, the Senate passed a resolution authorizing members of Congress to file an amicus brief to the Third Circuit to argue that the Justice Department's new standard misinterpreted the Act. 140 CONG. REC. S354-01 (daily ed. Jan. 28, 1994) (statement of Sen. Grassley). Two hundred and thirty-four members of Congress were granted amicus status in the case. United States v. Knox, 32 F.3d 733, 741 n.7 (3d Cir. 1994), *cert. denied*, 1994 WL 512613 (U.S. Jan. 17, 1995).

21. *See* Lewis, *supra* note 18, at A24.

22. *Id. See* Lawrence A. Stanley, *The Child Porn Storm: How One Curious Legal Case Caused a Capitol Hill Stampede*, WASH. POST, Jan. 30, 1994, at C3 (asserting that finding Knox guilty on the basis of interpretations developed expressly for his case is a clear injustice driven by political imperatives).

23. *See* 140 CONG. REC. S354-01 (daily ed. Jan. 28, 1994) (statement of Sen. Grassley); *see also* William V. Roth, *Protecting the Child Victims of Porn*, WASH. POST, Mar. 2, 1994, at A17.

24. United States v. Knox, 32 F.3d 733, 747 (3d Cir. 1994), *cert. denied*, 1994 WL 512613 (U.S. Jan. 17, 1995).

25. *Id.* at 747.

Court. However, on January 17, 1995, the Supreme Court denied certiorari.[26] The Justice Department's most recent brief rejected its interpretation of the Act set forth in its second brief that nudity or discernability is required for a conviction.[27] The latest brief stated that "neither nudity nor discernibility of the genitals through clothing is a requirement of the offense."[28]

The extended controversy surrounding the *Knox* case highlights the difficulties encountered when legislators attempt to define child pornography and underscores the consequences of imprecise legislative drafting. It also demonstrates the creativity of child pornographers in attempting to evade such legislation. Additionally, the controversy confronts a factual situation which the framers of the Act may not have fully contemplated at the time of drafting: the sexual exploitation of children where the children are clothed and their genitals and pubic areas are fully covered.

Another issue raised in *Knox* is whether the rule of lenity should apply in this situation. The rule of lenity requires that an ambiguous criminal statute be interpreted in favor of the defendant.[29] However, the rule of lenity is reserved for those situations in which "reasonable doubt persists about a statute's intended scope even after resort to 'the language and structure, legislative history, and motivating policies' of the statute."[30] This Comment demonstrates that, after an examination of these elements, the Act undoubtedly covers Knox's conduct. It argues that the courts must continue to apply the interpretation of the Third Circuit on remand to fulfill the Act's congressional aim.[31] To do otherwise would pro-

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26. Linda Greenhouse, *Court Rejects Appeal of Man Convicted in Child Smut Case with Political Overtones*, N.Y. TIMES, Jan. 18, 1995, at D20.

27. Linda Greenhouse, *U.S. Changes Stance in Case on Obscenity: Conservative Views in High Court Brief*, N.Y. TIMES, Nov. 11, 1994, at A15.

28. *Id.*

29. *See* Liparota v. United States, 471 U.S. 419, 427 (1985).

30. Moskal v. United States, 498 U.S. 103, 108 (1990) (quoting Bifulco v. United States, 477 U.S. 381, 387 (1980)); *see also* United States v. Bass, 404 U.S. 336, 347 (1971) (the Court should rely on the rule of lenity only if, "[a]fter 'seiz[ing] everything from which aid can be derived,'" it is "left with an ambiguous statute." (quoting United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall, C.J.))).

31. *See infra* notes 350-353 and accompanying text. The author agrees with the

vide a significant loophole in the Act, allowing imaginative child pornographers to carry on their business with impunity, and thereby frustrate the Act's intended purpose.

This Comment will demonstrate that the Third Circuit's most recent decision is consistent with the Act. The language chosen by Congress in formulating the Act, although never before applied to "lascivious exhibitions" of children whose genitals are covered, does protect against this type of sexual exploitation of children and is consistent with the aim and purpose intended by Congress for this legislation. The interpretation of the Act adopted in the Justice Department's second brief, on the other hand, deviates from the standards for child pornography set forth in case law and frustrates the Act's intended purpose: to eradicate the business of child pornography and to protect children from harmful sexual exploitation. Faced with this new type of child pornography, the courts should continue to uphold the legislative aim of the Act in a manner similar to the Third Circuit's decision on remand, and thereby utilize the proper, albeit expansive, interpretation of the Act which prohibits the type of pornographic materials at issue in *Knox*.

Part I of this Comment provides an overview of the legislative history of the Act and its recent amendments, particularly the sections defining "sexually explicit conduct" and the case law that has interpreted these sections. Part II first discusses the factual setting and procedural history of *United States v. Knox* and presents the arguments of the parties. It then examines the reactions and comments of members of the Senate and House to the Justice Department's second brief and the Clinton Administration's proposed amendment. Finally, Part II sets forth the Third Circuit's decision on remand. Part III analyzes the Third Circuit's decision on remand, as well as the intent and purpose of the Act, focusing on the conflicting theories present in the *Knox* case. It argues that, given the congressional intent behind the Act and in light of recent case

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decision of the United States Court of Appeals for the Third Circuit on remand that the rule of lenity does not apply in *Knox*. *See infra* notes 343, 361-362 and accompanying text. A more detailed discussion of the rule of lenity and why it would not apply in this case falls outside the scope of this Comment.

law, the Third Circuit's rejection of the Justice Department's new standard was proper, and that the court's interpretation and analysis of the Act was essentially correct. It explains that such conflicting interpretations of the Act are due to the imprecise language of the Act, the unique situation in the *Knox* case, and the difficulty that courts have had in defining what constitutes child pornography. Part III also contends that there are further indicia, not considered by the Third Circuit's decision on remand, to support an interpretation of the Act that covers the types of exploitative materials at issue in *Knox*. This Comment concludes that Knox's conviction was proper and that the courts should continue to apply the Third Circuit's interpretation of the statute, which effectively reaches pornographers who create sexually exploitative depictions of children that are purposely designed to escape liability under the Act. Such an interpretation fulfills the congressional intent behind the Act and is supported by case law on the Act and on child pornography generally.[32]

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32. The author recognizes that constitutional issues may be raised when an expansive interpretation is applied to facts different from those in the *Knox* case. For example, an expansive interpretation may raise questions as to whether the Act would then also prohibit innocuous photos of children taken by family members which inadvertently focus on a child's covered pubic area. The author believes that such depictions would not constitute a violation of the Act because there would be no finding of lasciviousness by a reasonable court or jury using the factors enunciated in *United States v. Dost*. 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub nom.* United States v. Weigand, 812 F.2d 1239 (9th Cir.), *cert. denied*, 484 U.S. 856 (1987). *See* discussion *infra* part I.B.

Furthermore, photographs taken surreptitiously of a clothed child by a pedophile using a zoom lens which are reproduced, marketed and distributed as child pornography may also sexually exploit a child depending on the nature and circumstances of the depictions. Although the interest in protecting the child from psychological trauma may not be as compelling as if the child was aware of the photographer, it is fair to say that such exploitative depictions may cause future psychological harm to the child if he or she discovers the existence of such depictions.

The author does not attempt to address all of the constitutional issues raised by interpreting the federal child pornography statute to prohibit "lascivious exhibitions" of clothed children. Rather, this Comment is primarily concerned with exploitative depictions of clothed children who are not engaged in sexual acts, but are being directed in some fashion and obviously portrayed as sexual objects, and which can fairly be said to "lasciviously exhibit" the genitals or pubic areas of children.

I. LEGISLATIVE HISTORY AND CASE LAW OF THE ACT

A. *Overview of the Federal Child Pornography Laws*

1. The Protection of Children Against Sexual Exploitation Act of 1977

Until 1977, there was no federal statute prohibiting the use of children in the production of materials that depicted explicit sexual conduct.[33] Prior to the mid-1970s, prosecutors "had relied upon state rape, incest and child welfare statutes to punish those who sexually exploited children."[34] Despite these laws, the child pornography industry flourished.[35] During the 1970s, however, the public became more aware of the nationwide child pornography problem when law enforcement authorities exposed several child pornography rings[36] and author-researcher Robin Lloyd published a book about prostitution among young boys in the United States.[37]

As a result of increased public concern, the House and Senate Judiciary Committees in 1977 began to investigate the child pornography industry.[38] Based upon these investigations, the Commit-

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33. Todd J. Weiss, Note, *The Child Protection Act of 1984: Child Pornography and the First Amendment*, 9 SETON HALL LEGIS. J. 327, 334 (1985). The apparent reason for a lack of attention to child pornography prior to the 1970s was that it only began to surface as a national concern at that time. *Id.* at 331. For a detailed discussion of the history and effectiveness of the first federal child pornography law, see generally David P. Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535 (1981).

34. Shouvlin, *supra* note 33, at 537-38.

35. *Id.* The increase in sexual exploitation of children was attributed to "the lack of legislative prohibitions, the failure of law enforcement and the courts, and the breakdown of the family unit." *Id.* at 537 (citing NATIONAL COMM'N FOR PREVENTION OF CHILD ABUSE, BASIC FACTS ABOUT SEXUAL CHILD ABUSE (1978)).

36. In 1973, police discovered the sexually sadistic murders of twenty-seven young boys by Dean Corll, who ran one of several call-boy rings exposed that year. Lisa S. Smith, *Private Possession of Child Pornography: Narrowing At-Home Privacy Rights*, 1991 ANN. SURV. AM. L. 1011, 1013 n.19 (citing FINAL REPORT, *supra* note 1, at 599 n.398). During the next few years, reporters and investigators discovered many instances of child sexual exploitation, including child pornography. *Id.* In 1976, two employees of a publisher of sexually-oriented materials were convicted of pandering, because they paid a fourteen-year-old girl to be photographed performing sexual intercourse. *Id.*

37. Shouvlin, *supra* note 33, at 537-38 (citing ROBIN LLOYD, FOR MONEY OR LOVE: BOY PROSTITUTION IN AMERICA (1976)).

38. Hearings were held from May to September 1977 by the House Subcommittee

tee concluded:

> (1) That child pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale.
>
> (2) That the use of children as prostitutes or as the subjects of pornographic materials is very harmful to both the children and to society as a whole.
>
> (3) That such prostitution and the sale and distribution of such pornographic materials are carried on to a substantial extent through the mails and other instrumentalities of interstate and foreign commerce, and
>
> (4) That existing federal laws dealing with prostitution and pornography do not protect against the use of children in these activities, and that specific legislation in this area is both advisable and needed.[39]

The Senate Judiciary Committee conducted hearings ("1977 Hearings") to examine the need for federal child pornography legislation and the specific language to be used in the new federal legislation criminalizing the production of child pornography.[40] Al-

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on the Judiciary, the Subcommittee on Select Education of the House Committee on Education and Labor, and the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary. FINAL REPORT, *supra* note 1, at 600 & n.403.

39. S. REP. NO. 438, 95th Cong., 1st Sess. 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 40, 42-43 (numerals added). The Senate Judiciary Committee also examined the profile of the typical sexually exploited child. Investigations revealed that the child victims are usually runaways who came to urban areas with little or no money. *Id.* at 8, *reprinted in* 1978 U.S.C.C.A.N. at 45. The Committee estimated that there were between seven hundred thousand and one million children who ran away from home each year; thus, it was not difficult for pedophiles to find child models or prostitutes. *Id.* Pedophiles and/or pornographers would offer the children money or drugs—or, in the case of small children, candy or a meal—in return for participation in sexual activity or pornography. *Id.* However, the Committee also found that not all exploited children were runaways; many lived with their families and attended school. *Id.* In many instances, their parents did not provide emotional support or stable environments. *Id.* In some of the worst cases, the parents themselves sold their own children for sexual purposes. *Id.* at 8, *reprinted in* 1978 U.S.C.C.A.N. at 46. For additional discussion on the profile of sexually exploited children, see Shouvlin, *supra* note 33, at 545.

40. *See generally Protection of Children Against Sexual Exploitation: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the*

though four bills were introduced in the Senate, only two of these bills were seriously considered during the 1977 Hearings: one by Senator William V. Roth ("Roth Bill")[41] and another by Senators Charles McC. Mathias, Jr. and John C. Culver ("Mathias-Culver Bill").[42] The Roth Bill criminalized depictions of children engaged in "prohibited sexual acts."[43] The definition of "prohibited sexual acts" included nudity, "if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction."[44] The Mathias-Culver Bill criminalized depictions of a minor engaging in "sexually explicit conduct."[45] The definition of "sexually explicit conduct," however, did not contain a nudity provision, but did include the phrase "lewd exhibition of the genitals or pubic area."[46]

The Roth Bill's nudity provision was criticized by lawyers and government officials who testified at the 1977 Hearings.[47] For instance, Assistant Attorney General Patricia Wald, in a letter dated June 14, 1977, to Senator James O. Eastland, Chairman of the Committee on the Judiciary, recommended that:

> The term "nudity . . . depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction" is also troublesome. This definition differs from the "average person" test for obscene material set forth in *Miller v. California*, [ ] and it would be difficult to determine by what standard the "sexual stimulation or gratification" could be assessed. We would suggest as an alternative definition "lewd exhibitions of the genitals," a phrase used by the Chief Justice in *Miller v. California*, [ ] to de-

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Judiciary, 95th Cong., 1st Sess. (1977) [hereinafter *1977 Hearings*].

41. S. 1011, 95th Cong., 1st Sess. (1977), *quoted in 1977 Hearings*, *supra* note 40, at 75-76.

42. S. 1585, 95th Cong., 1st Sess. (1977), *quoted in* S. CONF. REP. NO. 811, 95th Cong., 1st Sess. 1-2 (1977). The other two bills introduced were Senate Bills 1499 and 1040. S. REP. NO. 438, *supra* note 39, at 3, *reprinted in* 1978 U.S.C.C.A.N. at 40.

43. S. 1011, *supra* note 41, at 75.

44. *Id.* at 76.

45. S. 1585, *supra* note 42, at 1-2.

46. S. CONF. REP. NO. 811, *supra* note 42, at 3.

47. *See 1977 Hearings*, *supra* note 40, at 77-78, 103.

> scribe one of a variety of types of conduct which could be prohibited under state obscenity statutes. Congress could make clear in the legislative history of the bill *what types of nude portrayals of children were intended* to be encompassed within this definition.[48]

Wald and others were evidently concerned about the potential overbreadth of the Roth Bill.[49] They believed that only child pornography which was considered obscene could constitutionally be banned.[50] They therefore suggested limiting the proscription against nude portrayals to those that satisfied the qualification of lewdness.[51] Professor Paul Bender, former general counsel to the President's Commission on Obscenity and Pornography in 1970, also criticized the Roth Bill, noting, in particular, the difficulties inherent in the application of a sexual gratification test.[52] After the

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48. *1977 Hearings*, *supra* note 40, at 77-78 (quoting letter from Wald, Assistant Attorney General, to Sen. Eastland, Chairman, Senate Judiciary Committee (June 14, 1977)) (emphasis added).

49. Congressman Edward I. Koch, for example, warned that he would not endorse a proposal which banned mere nudity because he was "concerned about the breadth of [that] term." 123 CONG. REC. H17,227 (1977) (statement of Rep. Koch).

50. *1977 Hearings*, *supra* note 40, at 77-78. There was concern that those materials that did not satisfy the obscenity test enunciated by the United States Supreme Court in Miller v. California, 413 U.S. 15 (1973), would be struck down as unconstitutional. In *Miller*, the Court dealt with adult pornography and in order for materials to be found obscene under *Miller*, the trier of fact must find that:

> (1) the "'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest;"
> (2) that "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;" and
> (3) that "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

413 U.S. at 24 (citations omitted).

Despite the test enunciated in *Miller*, the difficulties of determining what constitutes obscenity are still present. A detailed discussion of obscenity and adult pornography, however, falls outside the scope of this Comment.

51. *1977 Hearings*, *supra* note 40, at 77-78.

52. *Id.* at 103. Professor Bender's views echoed, in part, those of the Justice Department. He stated:

> Most importantly [sic], is the definitional section of the Roth bill. It uses the conduct which it prohibits as having children engage in prohibited sexual acts and then it defines prohibited sexual acts in a number of ways. Most of these definitions are okay. *But some of them strike me as vague and so vague as to perhaps be unconstitutional.*

Roth Bill was criticized, Senators Mathias and Culver eschewed the broad language of the Roth Bill in favor of the term "lewd exhibition of the genitals or pubic area" in their proposal.[53] Congress ultimately adopted the language of the Mathias-Culver Bill[54] when Congress enacted the first federal child pornography statute, The Protection of Children Against Sexual Exploitation Act of 1977 ("1977 Act").[55] Section 2251(a) of the 1977 Act prohibited employing children under the age of sixteen in the production of sexually explicit material which was to be mailed or transported in interstate commerce.[56] Section 2252(a) prohibited the knowing receipt, transportation, or mailing in interstate or foreign commerce, for the purpose of sale or distribution for sale, of any obscene ma-

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. . . .

> The nudity provision is a little bit troublesome also. It says,*"nudity: if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction." I have a problem with that in knowing whose purpose they are talking about and when that has to be the purpose.* Is the notion of this that the person taking the picture has to take the picture for the purpose of stimulating or gratifying someone else sexually, or is it enough if the picture is simply used that way for that purpose by somebody later[,] even if that was not the purpose of the person who took the picture?
>
> Nudity generally, I think, may be a bit overbroad in terms of the purposes of the legislation. *I would not want to qualify as child abuse anyone who takes a picture of a child without any clothes on.* Lots of people do that of their children. They send it to the child's grandparents in interstate commerce. I don't think you would want to cover that. *So I think it's right to qualify "nudity." But this qualification [in the Roth bill] strikes me as vague.*

Id. (emphasis added). Professor Bender did not address the issue of a "sexual gratification" test further, and the federal courts were the first to address this issue. *See* discussion *infra* part I.B.

53. *See supra* note 46 and accompanying text.

54. *See* 18 U.S.C. §§ 2252, 2256 (1988 & Supp. IV 1992).

55. Pub. L. No. 95-225, §§ 2251-2253, 2423, 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. §§ 2251-2257 (1988 & Supp. IV 1992)).

56. 18 U.S.C. § 2251(a) (Supp. II 1978). This section provided:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor or who has any minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct, shall be punished . . . if such person knows or has reason to know that such visual or print medium has actually been transported in interstate or foreign commerce or mailed.

18 U.S.C. § 2251(a).

terial depicting a minor engaging in sexually explicit conduct.[57] A "minor" was defined as "any person under the age of sixteen."[58] Congress adopted the definitions of "sexually explicit conduct" included in the Mathias-Culver Bill in the enacted law.[59]

2. The Child Protection Act of 1984 and the Removal of the Obscenity Requirement

a. The *Ferber* Decision

In 1984, Congress reevaluated the 1977 Act in light of the United States Supreme Court's decision in *New York v. Ferber*.[60] *Ferber* involved a New York child pornography statute that forbade producing, selling, lending, exhibiting, or distributing materials depicting a child under sixteen engaged in sexual conduct.[61] The statute did not require that such materials be obscene in order to

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57. 18 U.S.C. § 2252(a) (Supp. II 1978). This section provided that any person who:

> (1) knowingly transports or ships in interstate or foreign commerce or mails, for the purpose of sale or distribution for sale, any obscene or visual print medium, if (A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and (B) such visual or print medium depicts such conduct; or
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> (2) knowingly receives for the purpose of sale or distribution for sale or knowingly sells or distributes for sale any obscene visual or print medium that has been transported or shipped in interstate or foreign commerce or mailed if (A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and (B) such visual or print medium depicts such conduct; shall be punished . . . .

18 U.S.C. § 2252(a).

58. 18 U.S.C. § 2253(1) (Supp. II 1978).

59. *Compare* S. CONF. REP. NO. 811, *supra* note 42, at 2-3 *with* 18 U.S.C. § 2253(2) (Supp. II 1978). Section 2253(2) defined "sexually explicit conduct" as actual or simulated—(A) sexual intercourse; (B) bestiality; (C) masturbation; (D) sado-masochistic abuse (for the purpose of sexual stimulation); (E) lewd exhibition of the genitals or pubic area of any person. 18 U.S.C. § 2253(2) (Supp. II 1978).

60. 458 U.S. 747 (1982).

61. *See* N.Y. PENAL LAW § 263.15 (McKinney 1980). Because the *Miller* obscenity standard frustrated the legislative attack on child pornography, some states began to adopt different tests for pornography involving children. *See* FINAL REPORT, *supra* note 1, at 607; *Ferber*, 458 U.S. at 749 n.2 (listing the nineteen state statutes in addition to New York's that prohibited the dissemination of material depicting a child engaged in sexual conduct regardless of whether the material was obscene); *see also* Weiss, *supra* note 33, at 336.

hold the defendant liable.[62] Ferber, a bookstore owner who sold child pornography which could not be classified as obscene under the *Miller* test, was convicted of violating New York's child pornography statute.[63] Ferber challenged the statute on grounds that it was unconstitutional because it banned both obscene and non-obscene child pornography.[64]

The Supreme Court in *Ferber* upheld the constitutionality of the New York statute.[65] The Court reasoned that the overwhelming state interest in protecting minors from physical and psychological harm allowed the state greater latitude in regulating child pornography than in regulating other forms of expression.[66] The Court also found that the prevention of sexual exploitation and abuse of children constituted a governmental objective of surpassing importance which clearly outweighed any slight value this type of expression might have.[67] Thus, the Court "created a new category of unprotected speech[68]—child pornography—a development that led [commentators] to conclude that the first amendment was becoming 'codified' and ever more complex."[69]

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62. *Ferber*, 458 U.S. at 752.

63. *Id.*

64. Child pornography may be classified as obscene, i.e., that which meets the three-pronged *Miller* test, *see supra* note 50, or non-obscene, i.e., materials illegal under the applicable state or federal statute but that do not necessarily meet the *Miller* test for obscenity. The depictions at issue in *Ferber* were films of young boys masturbating. These films were not found to be patently offensive and appealing to the prurient interests of the average person, as the *Miller* test requires to find obscenity. *Ferber*, 458 U.S. at 761; *see supra* note 50. However, the films did constitute a "sexual performance" of a child under the applicable state law, and therefore, the defendant was convicted. *Ferber*, 458 U.S. at 752.

65. 458 U.S. at 774.

66. *Id.* at 756-57.

67. *See id.* at 762 ("[t]he value of permitting live performances . . . of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*").

68. Additional categories of unprotected speech include: obscenity, as defined in Miller v. California, 413 U.S. 15, 24 (1973); dangerous forms of incitement, as defined in Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); and fighting words, as defined in Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

69. *See* Jörn Axel Holl, Comment, *Judges, Congress, and the Sixteen-Year-Old Porn Star: Questions on the Proper Role of the First Amendment*, 75 IOWA L. REV. 1355, 1362 (1990) (citing Frederick Schauer, *Codifying the First Amendment:* New York v. Ferber, 1982 SUP. CT. REV. 285, 309); *see also* Schauer, *supra*, at 299 ("In sorting out

In *Ferber*, the Court made several other findings that were crucial to the decision. The Court found that the distribution of photographs and films depicting sexual activity by minors was intrinsically related to the sexual abuse of children in two ways: (1) the materials were a permanent record of the child's participation and the harm to the child is increased by its distribution;[70] and (2) a halt to the distribution of child pornography was needed in order to effectively control the production of materials that featured the sexual exploitation of children.[71] The Court also found that "[t]he advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation."[72] The Court explained that "[t]he act of selling these materials is guaranteeing that there will be additional abuse of children,"[73] and speech is rarely protected when it is "used as an integral part of conduct in violation of a valid criminal statute."[74] Finally, the Court concluded that "[r]ecognizing and classifying child pornography as a category of material outside the protection of the First Amendment [was] not, incompatible with [its] earlier decisions."[75]

The Court set limits, however, on the extent to which child pornography is unprotected by the First Amendment: (1) "the conduct to be prohibited must be adequately defined by the [statute]"; (2) the "offense [must] be limited to works that visually depict sexual conduct by children below a specified age"; and (3) "[t]he category of 'sexual conduct' proscribed must also be suitably limited and described."[76]

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these multiple paths to nonprotection, we may make major progress toward understanding both *Ferber* and the increasingly complex nature of the First Amendment").

70. *Ferber*, 458 U.S. at 759.

71. *Id.* at 759-60.

72. *Id.* at 761.

73. *Id.* at 761-62 n.13 (citation omitted).

74. *Id.* at 762 (citation omitted).

75. *Id.* at 763 (citing Young v. American Mini Theatres, Inc., 427 U.S. 50, 66 (1976) (stating that "[t]he question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech") and FCC v. Pacifica Found., 438 U.S. 726, 742-48 (1978) (stating that speech may not be entitled to absolute constitutional protection under all circumstances depending on its context and content)).

76. *Id.* at 764.

b. Congressional Review of the 1977 Act

In response to the Supreme Court's decision in *Ferber*, which allowed states to regulate non-obscene child pornography, the House and Senate Judiciary Committees commenced a review of the effectiveness of the 1977 Act.[77] Loopholes present in the 1977 Act were evident. The House Judiciary Committee noted that prosecutions under the 1977 Act were few[78] and that the utilization of the 1977 Act had been inhibited by that statute's limited application to the commercial distribution of child pornography because many of these materials were distributed by gift and exchange.[79] The Committee also noted that the purpose of the 1977 Act had been frustrated by the obscenity requirement[80] because it limited the types of depictions which could be banned under the statute.[81]

The Committee also found that the harm to children exists whether or not those who initiate pornography schemes are motivated by profit, and therefore decided that the "commercial pur-

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77. H.R. REP. NO. 536, 98th Cong., 2d Sess. 2 (1983), *reprinted in* 1984 U.S.C.C.A.N. 492, 493. This Comment discusses the House Report because Congress ultimately enacted the new child pornography laws based on a proposal by the House, not the Senate. The Senate took action first and approved Senate Bill 1469. *See* 129 CONG. REC. 10,208 (1983). The House, however, deliberated for a considerable amount of time and gleaned various provisions from each House proposal before passing a bill. *See infra* note 87 and accompanying text.

78. H.R. REP. NO. 536, *supra* note 77, at 2, *reprinted in* 1984 U.S.C.C.A.N. at 493. At the time of the hearings, the number of indictments under § 2252 since May 1977 was only twenty-eight. *Id.*

79. *Id.*; *see also* Susan G. Caughlan, *Private Possession of Child Pornography: The Tensions Between* Stanley v. Georgia *and* New York v. Ferber, 29 WM. & MARY L. REV. 187, 192 (1987) (noting that the commercial purpose requirement was a major flaw in the 1977 Act); FINAL REPORT, *supra* note 1, at 604.

80. *See supra* note 50.

81. *See* H.R. REP. NO. 536, *supra* note 77, at 2, *reprinted in* 1984 U.S.C.C.A.N. at 493. "The Protection of Children Against Sexual Exploitation Act of 1977 was based on First Amendment case law requiring a showing of obscenity as a condition precedent to a legislative interest in banning child pornography." *Id.* at 1-2, *reprinted in* 1984 U.S.C.C.A.N. at 492-93. The obscenity requirement posed significant hurdles to prosecution because of its complexity and its narrow scope of application. *See* Weiss, *supra* note 33, at 336 (discussing how the Supreme Court had not yet drawn a distinction between adult and child pornography and Congress was forced to assume that only one standard existed for all pornography). For further discussion of the practical effects of the obscenity requirement, see *id.* at 336-39.

pose" language should be struck from the 1977 Act.[82] Additionally, the Committee concluded that the age of minors encompassed by the 1977 Act[83] should be increased from sixteen years to eighteen years because, in most cases, prosecutions are based on the pictures alone and it was difficult to show that the child was under sixteen.[84] Thus, by raising the age of the minor to eighteen, the statute would better enable prosecutors to proceed against violators with materials involving fifteen-and sixteen-year-olds.[85] Finally, the Committee noted that there was a "need to prosecute the producer who pirates photos from other publications or who purchases photos for reproduction" and that a reproduction offense would be effective to enable prosecutions.[86]

The Committee held further hearings on the issue and examined four bills which were proposed as amendments to the 1977 Act.[87] All of the bills had two common elements: (1) the elimination of the obscenity requirement; and (2) the elimination of the requirement that distribution of the materials be for commercial purposes.[88] Three of these bills provided an affirmative defense to prosecutions if the material had literary, scientific, artistic, or social value.[89] The Committee considered the bills before it and proposed

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82. H.R. REP. NO. 536, *supra* note 77, at 2-3, *reprinted in* 1984 U.S.C.C.A.N. at 493-94. The 1977 Act specified that the depictions had to be distributed or received for the purpose of sale in order to obtain a conviction. *See supra* note 57.

83. *See supra* note 58 and accompanying text.

84. H.R. REP. NO. 536, *supra* note 77, at 3, *reprinted in* 1984 U.S.C.C.A.N. at 494.

85. *Id.*

86. *Id.*

87. H.R. 2106, 98th Cong., 1st Sess. (1983); H.R. 2432, 98th Cong., 1st Sess. (1983); H.R. 3062, 98th Cong., 1st Sess. (1983); H.R. 3298, 98th Cong., 1st Sess. (1983). For a more detailed discussion of these bills, see H.R. REP. NO. 536, *supra* note 77, at 5, *reprinted in* 1984 U.S.C.C.A.N. at 496.

88. H.R. REP. NO. 536, *supra* note 77, at 5, *reprinted in* 1984 U.S.C.C.A.N. at 496.

89. *See* H.R. 2432, *supra* note 87 (proposing to raise the age of protection to eighteen if there was an affirmative defense to a prosecution where the depiction in question portrayed masturbation or lewd exhibition of the genitals and the material had serious literary, artistic, scientific, social, or educational value, and also making these offenses subject to RICO actions); H.R. 3062, *supra* note 87 (proposing an exception for the visual depiction of "simulated" sexual conduct by minors if the material, taken as a whole, has a serious literary, artistic, scientific, social, or political or educational value); H.R. 3298, *supra* note 87 (proposing an exception for visual depiction of "simulated" sexual conduct by minors if the possibility of harm to the child was outweighed by redeeming social,

a compromise which would provide an affirmative defense allowing "simulation[s]" of "explicit sexual conduct" only if there was no possibility of harm to the minor.[90] This provision, however, was criticized as providing a loophole within the statute. Deputy Assistant Attorney General Mark M. Richard expressed concern on behalf of the Justice Department that such an affirmative defense would create an "appealing loophole" allowing child pornographers to frustrate the purpose of the statute by placing otherwise proscribed child pornography materials within a legitimate literary or scientific work.[91]

Additionally, one of the proposals considered by the House would have defined the word "simulated" in the statute for the first time.[92] This bill defined "simulated" as "the explicit depiction of any ['sexually explicit conduct' as defined], which creates the appearance of such conduct and which exhibits any uncovered portion of the genitals or buttocks."[93] Concerned that the narrow definition of simulated conduct could prove to be a significant loophole to imaginative pornographers, Deputy Assistant Attorney General Richard recommended that the term "simulated" should not be defined or that the definition should not require the exhibition of any uncovered portion of the genitals or buttocks.[94] Other individuals who testified before Congress, such as Senator David D. Marriott, from the Select Committee on Children, Youth, and Families, also agreed that defining "simulated" conduct would leave potential loopholes in the law:

> Some may argue that if it is only simulation, there is no harm to the child or children. But one of the evils of child pornography is that children are permanently recorded as

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literary, scientific, or artistic value of the material).

90. H.R. REP. NO. 536, *supra* note 77, at 6, *reprinted in* 1984 U.S.C.C.A.N. at 497.

91. *Id.* at 13, *reprinted in* 1984 U.S.C.C.A.N. at 504.

92. H.R. 2432, *supra* note 87, *quoted in* H.R. REP. NO. 536, *supra* note 77, at 13, *reprinted in* 1984 U.S.C.C.A.N. at 504. The term "simulated," used in the definition of "sexually explicit conduct," was not defined in the 1977 Act. *See supra* note 59. It remains undefined in the present version of the statute. *See* 18 U.S.C. § 2256(2) (1988 and Supp. IV 1992).

93. H.R. 2432, *supra* note 87.

94. H.R. REP. NO. 536, *supra* note 77, at 13, *reprinted in* 1984 U.S.C.C.A.N. at 504.

> engaging in despicable acts. *Simulation is no different in this respect because it still creates the appearance that they are engaged in the acts.* The children will have to live with that knowledge if these images are out there. We need to protect them from that and also from the psychological damage that may occur to the child. . . .
>
> Now, I realize that to some this is a small loophole in the law, but I also realize that *those who would stoop to exploiting children in the production of pornography would be very willing to take advantage of any loophole they thought might be available to avoid prosecution.*[95]

Senator Grassley testified that an amendment should not define "simulated" conduct, but should instead "preserve the current law as it relates to simulations of sexual conduct."[96] He explained that "sexually explicit conduct" is defined as "actual or simulated conduct that utilizes any of the prohibited depictions delineated in section 2252(a)(2)."[97] Senator Grassley also stated that this preservation of the term "simulated" would discourage imaginative pornographers from discovering loopholes.[98]

c. The Child Protection Act of 1984

Congress enacted the Child Protection Act of 1984[99] to remedy the weaknesses in the 1977 Act and to account for the *Ferber* decision.[100] The Child Protection Act of 1984 amended the 1977 Act by: (1) eliminating the obscenity requirement;[101] (2) eliminating the commercial purpose and sale requirements;[102] (3) creating a

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95. 129 CONG. REC. 32,461-62 (1983) (emphasis added).

96. 130 CONG. REC. 7198 (1984).

97. *Id.*

98. *Id.*

99. Pub. L. No. 98-292, §§ 2-9, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. §§ 2251-2254 (1988 & Supp. IV 1992)).

100. For further discussion of this revision, see Sharilyn E. Christiansen, *The Child Protection Act: A Blanket Prohibition Smothering Constitutionally Protected Expression*, 9 LOY. ENT. L.J. 301 (1989); Weiss, *supra* note 33, at 342-43.

101. Pub. L. No. 98-292, § 4(3), 98 Stat. at 204 (1984). The 1984 amendment deleted the term "obscenity" from each place it appeared in the statute. *Id.*

102. *Id.* § 4(1)-(2), 98 Stat. at 204. The 1984 amendment deleted "for the purpose of sale or distribution for sale" where it appeared in § 2252. *Id.*

new offense for knowingly reproducing any visual depiction of a child engaging in sexually explicit conduct for distribution through the mails;[103] (4) raising the age of protection of children under the statute from those under sixteen to those under eighteen;[104] and (5) replacing the word "lewd" with the word "lascivious" where "sexually explicit conduct" was defined as, *inter alia*, "lewd exhibition of the genitals."[105] Congress replaced "lewd" with "lascivious" because "lewd" had been associated with obscenity and Congress wanted to make it clear that an exhibition of the genitals or pubic area did not have to meet the obscenity standard to be unlawful.[106] Pursuant to the recommendations of Senator Grassley and others,[107] no change was made to existing statutory prohibitions regarding "simulated" sexual conduct[108] and no affirmative defense for literary, artistic, scientific, social, political, or educational value was included.[109]

3. Post-1984 Amendments

As a result of the 1984 revisions, federal prosecutions increased dramatically.[110] Nevertheless, the House Judiciary Committee continued to examine the seriousness of the problem of child pornography.[111] The Committee concluded there was a need to ban adver-

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103. *Id.* § 4(7), 98 Stat. at 204. Congress inserted the following in § 2252 after the term "mailed": "or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails." *Id.*

104. *Id.* § 5(1), 98 Stat. at 205.

105. *Id.* § 5(4), 98 Stat. at 205.

106. 130 CONG. REC. 7196 (1984); *see infra* note 144 and accompanying text.

107. *See supra* notes 94-98 and accompanying text.

108. *See* 18 U.S.C. § 2256 (1988).

109. *See* 18 U.S.C. §§ 2252-2257 (1988 & Supp. IV 1992).

110. *See* Caughlan, *supra* note 79, at 190.

111. *See* H.R. REP. NO. 910, 99th Cong., 2d Sess. 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5952-59; *Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary on Implementation of the Child Protection Act*, 99th Cong., 2d Sess. (1986).

In 1984 and 1985, Senator Roth chaired hearings before the Permanent Subcommittee on Investigations of the Senate Committee on Government Affairs ("Permanent Subcommittee") on the topic of child pornography and pedophilia. H.R. REP. NO. 910, *supra*, at 3, *reprinted in* 1986 U.S.C.C.A.N. 5953. He then testified before the Subcommittee on Crime that there may have been as many as one-half million children and adolescents

tisements related to the sexual exploitation of children and a need for greater enforcement of laws that prohibit the transportation of minors for purposes of sexual exploitation.[112] The Committee also concluded that the Act's reference to "visual depictions" needed to be clarified to include undeveloped film and that the legislation prohibiting the transportation of females for illegal sexual activity, the Mann Act,[113] should be amended so as to be gender-neutral.[114] In 1986, Congress passed amendments relating to all of the Committee's recommendations,[115] and in 1988, Congress again amended the statute by clarifying that transportation of child pornography by interstate or foreign commerce means "by any means, including by computer."[116]

4. State Legislation Prohibiting the Private Possession of Child Pornography and *Osborne v. Ohio*

Although Congress extensively amended the federal child pornography laws in 1984, it did not prohibit the private possession of child pornography without proof that the pornography crossed state boundaries. This is necessary to trigger invocation of federal subject matter jurisdiction under the Commerce Clause of the U.S. Constitution.[117] States, however, did not have this obstacle to the

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who are the victims of sexual abuse annually. *Id.* He offered the Judicial Committee a seventy-six page Draft Report of the Permanent Subcommittee on Investigations on "Child Pornography and Pedophilia" which demonstrated the continuation of the widespread distribution of child pornography and which included conclusions and recommendations of the Subcommittee. *Id.*

112. H.R. REP. NO. 910, *supra* note 111, at 5-6, *reprinted in* 1986 U.S.C.C.A.N. at 5955-56.

113. 18 U.S.C. §§ 2421-22, 2424 (1988 & Supp. IV 1992).

114. H.R. REP. NO. 910, *supra* note 111, at 7-8, *reprinted in* 1986 U.S.C.C.A.N. at 5957-58.

115. Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, §§ 2-5, 100 Stat. 3510, 3510-12 (1986) (codified as amended at 18 U.S.C. §§ 2251, 2255, 2421-24 (1988 & Supp. IV 1992)).

116. Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, § 7511(a)-(c), 102 Stat. 4181, 4485 (1988) (codified as amended at 18 U.S.C. §§ 2251(c), 2252(a), 2256 (1988 & Supp. IV 1992)).

117. The Commerce Clause provides in pertinent part: "Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several states . . . ."

regulation of at-home possession of obscene materials and child pornography, and as a result, by 1990, nineteen states had criminalized the possession of child pornography.[118] In fact, the Attorney General's Commission on Pornography encouraged state legislatures to make the knowing possession of child pornography a felony.[119]

Several state courts upheld the constitutionality of state statutes criminalizing the possession of child pornography.[120] However, some commentators argued that criminalizing the private possession of child pornography violated the right to privacy and conflicted with the Supreme Court's 1969 decision in *Stanley v. Georgia*,[121] in which the Court held that the government may not regulate the private possession of obscene materials by an individual at home.[122]

Nevertheless, in 1990, the Supreme Court decided in *Osborne v. Ohio*[123] that the state's interest in regulating the possession of

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U.S. CONST. art. I, § 8, cl. 3.

118. Smith, *supra* note 36, at 1013. The states that had criminalized the possession of child pornography were the following: Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Illinois, Kansas, Minnesota, Missouri, Nebraska, Nevada, Ohio, Oklahoma, South Dakota, Texas, Utah, Washington, and West Virginia. *See* Osborne v. Ohio, 495 U.S. 103, 111 n.6 (1990). As of January 1992, twelve other states had followed suit: California, Delaware, Indiana, Louisiana, New Hampshire, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, Tennessee, and Wisconsin. Smith, *supra* note 36, at 1114 n.106.

119. FINAL REPORT, *supra* note 1, at 648.

120. *See, e.g.*, Illinois v. Geever, 522 N.E.2d 1200 (Ill. 1988), *appeal dismissed*, 488 U.S. 920 (1988); Ohio v. Meadows, 503 N.E.2d 697 (Ohio 1986), *cert. denied*, 480 U.S. 936 (1987).

121. 394 U.S. 557 (1969).

122. *See, e.g.*, Caughlan, *supra* note 79 (analyzing the tensions between *Ferber* and *Stanley*); John Quigley, *Child Pornography and the Right to Privacy*, 43 FLA. L. REV. 347 (1991) (arguing against criminalizing mere possession of child pornography); Mark J. Oberstaedt, Comment, *Constitutional Law—First Amendment—States May Proscribe the Possession of Non-Obscene Child Pornography*—Osborne v. Ohio, 21 SETON HALL L. REV. 419 (1991).

123. 495 U.S. 103 (1990). For further discussion of *Osborne v. Ohio*, see generally Susan Daniel, Osborne v. Ohio: *Does It Mean the End of Protection Afforded by* Stanley?, 69 WASH. L. Q. 981 (1991); Kari Beth Kipf, *Ohio Statute Prohibiting In-Home Possession of Child Pornography Upheld Against First Amendment Interest*—Osborne v. Ohio, *110 S. Ct. 1691*, 25 SUFFOLK U. L. REV. 262 (1991); JoEllen Lane, *Section 2907.3-23(A)(3) of the Ohio Code, Which Prohibits the Private Possession and Viewing of Child*

child pornography outweighed any individual rights to privacy and the possession of child pornography. Osborne had been convicted under an Ohio statute for possessing four photographs of nude minors.[124] Unlike other state child pornography statutes which defined proscribed material as anything involving sexual conduct or lewd depictions of minors,[125] in *Osborne*, the state law prohibited, with certain exceptions, the possession of depictions of minors "in a state of nudity."[126] The Ohio Supreme Court, therefore, had narrowly construed the statute's language to cover only "lewd" depictions or those "involving a . . . graphic focus on a minor's genitals"[127] because of the Supreme Court's statements in *New York v. Ferber*[128] and *Erznoznik v. Jacksonville*[129] that depictions of nudity alone constitute protected speech under the First Amendment, and therefore cannot be proscribed.[130] Thus, the Ohio Supreme Court upheld Osborne's conviction.

On appeal, the United States Supreme Court upheld the statute because the Ohio Supreme Court construed the law to prohibit only the possession of materials which included either a vivid focus on

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Pornography, is Not Unconstitutional Given the Compelling State Interest in Protecting the Psychological and Physical Well-Being of Minors and Preventing Their Exploitation, 68 U. DET. L. REV. 427 (1991); Christopher P. Lu, *The Role of State Courts in Narrowing Overbroad Speech Laws After* Osborne v. Ohio, 28 HARV. J. ON LEGIS. 253 (1991); Smith, *supra* note 36.

124. *Osborne*, 495 U.S. at 106.

125. *See* ARIZ. REV. STAT. ANN. § 13-3553 (1989); COLO. REV. STAT. ANN. § 18-6-403 (West 1990); FLA. STAT. ch. § 827.171 (1989); GA. CODE ANN. § 16-12-100 (Michie 1988); IDAHO CODE § 18-1507A (1987); ILL. ANN. STAT. ch. 38, para. 11-20.1 (Smith-Hurd Supp. 1991); KAN. STAT. ANN. § 21-3516 (Supp. 1992); MINN. STAT. ANN. § 617.247 (West 1987); MO. ANN. STAT. § 573.037 (Vernon Supp. 1991); NEB. REV. STAT. § 28-813.01 (1989); NEV. REV. STAT. ANN. § 200.730 (Michie Supp. 1989); OKLA. STAT. ANN. tit. 21, § 1021.2 (West Supp. 1991); S.D. CODIFIED LAWS ANN. § 22-22-23.1 (Supp. 1991); TEX. PENAL CODE ANN. § 43.26 (West Supp. 1991); UTAH CODE ANN. § 76-5a-3 (1990); WASH. REV. CODE ANN. § 9.68.070 (West Supp. 1991); W. VA. CODE §§ 61-8C-3, 61-8D-6 (1989).

126. OHIO REV. CODE ANN. § 2907.323(A)(3) (Anderson Supp. 1990).

127. *Osborne*, 495 U.S. at 107.

128. 458 U.S. 747, 764-66 (1982) (upholding statute prohibiting non-obscene child pornography).

129. 422 U.S. 205, 212-14 (1975) (holding that some nudity is not obscene even to minors and that a sweeping ban on all nudity featured in drive-in movies is unconstitutional).

130. *Id.* at 213.

the minor's genitals or a lewd display of nudity.[131] The *Osborne* Court based its decision on several factors. Primarily, the Court rejected Osborne's First Amendment argument by finding that Ohio had a compelling interest in "safeguarding the physical and psychological well-being of a minor."[132] The Court emphasized that its holding in *Stanley v. Georgia*,[133] should be construed narrowly because Georgia's justification for its law, "that obscenity would poison the minds of its viewers," was found to be inadequate.[134] On the other hand, the Court found the statute at issue in *Osborne* to contain a proper purpose—to protect the victims of child pornography by destroying a market for the exploitative use of children.[135] The Court found further support for the *Osborne* decision in *Ferber*, where the Court characterized the value of permitting child pornography as "exceedingly modest, if not *de minimis*."[136]

The Court also considered other factors: (1) the anti-possession prohibitions may decrease the demand for child pornography and thus may have a subsequent chilling effect on production; (2) the child pornography market had become an underground network and so it was now difficult, if not impossible, to destroy the industry by only attacking production and distribution; (3) the materials produced by child pornographers permanently record the victim's abuse and can haunt the child in years to come; and (4) the destruction of these materials is desirable because evidence suggests that pedophiles use child pornography "to seduce other children into sexual activity."[137] The Attorney General's Commission on Pornography reported that "[c]hild 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

131. Osborne v. Ohio, 495 U.S. 103, 113 (1990).
132. *Id.* at 109 (quoting *Ferber*, 458 U.S. at 756-58 (1982)).
133. 394 U.S. 557 (1969).
134. *Osborne*, 495 U.S. at 108, 109 (citing *Stanley*, 394 U.S. at 564-68).
135. *Id.* at 109.
136. *Id.* at 108 (citing *Ferber*, 458 U.S. at 762).
137. *Id.* at 110-111.

children having 'fun' participating in the activity."[138] Based on these prevailing state interests, the *Osborne* Court concluded that Ohio may constitutionally prohibit the possession and viewing of child pornography.[139]

5. The Current Federal Statute

In response to the *Osborne* decision, Congress amended the federal child pornography laws again in 1990 by, *inter alia*, banning the mere possession of child pornography.[140] The present version of the federal child pornography laws, pertinent in *Knox*, prohibits an individual from knowingly receiving or possessing three or more books or films that have been mailed and contain visual depictions of a child under the age of eighteen engaging in sexually explicit conduct.[141] "Sexually explicit conduct" is defined in 18 U.S.C. § 2256(2) and includes the actual or simulated "lascivious exhibition

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138. FINAL REPORT, *supra* note 1, at 649 (footnotes omitted).

139. Osborne v. Ohio, 495 U.S. 111 (1990).

140. Child Protection and Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, 104 Stat. 4808 (1990) (codified as amended in scattered sections of 18 U.S.C.).

141. 18 U.S.C. § 2252(a)(2), and (a)(4)(B) provide in pertinent part that any person who:

> (2) knowingly receives . . . any visual depiction that has been mailed . . . in interstate or foreign commerce, or which contains materials which have been mailed . . . if—
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
> and
> (B) such visual depiction is of such conduct;
>
> . . . .
>
> (4) either—
>
> . . . .
>
> (B) knowingly possesses 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed . . . in interstate . . . commerce, or which was produced using materials which have been mailed . . . if—
> (i) the producing of such visual depiction involves the use of a minor engaged in sexually explicit conduct; and
> (ii) such visual depiction is of such conduct.

18 U.S.C. § 2252(a)(2)(A)-(B), (4)(B)(i)-(ii) (1988 & Supp. IV 1992).

of the genitals or pubic area of any person."[142]

B. *"Lascivious Exhibitions":* Dost *and its Progeny*

Although pornographic depictions of clothed children had never, before *Knox*, been examined by the courts,[143] several courts have addressed the issue of determining whether a depiction qualifies as a "lascivious exhibition."[144] In *United States v. Dost*,[145] defendants Dost and Wiegand photographed two children: (1) a nude fourteen-year-old girl, posed in a variety of positions, many

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142. 18 U.S.C. § 2256(2) provides in pertinent part:
"For the purposes of this chapter, the term 'sexually explicit conduct' means actual or simulated—(A) sexual intercourse . . . ; (B) bestiality; (C) masturbation; (D) sadistic or masochistic abuse; or (E) lascivious exhibition of the genitals or pubic area of any person."
18 U.S.C. § 2256(2) (1988 & Supp. 1992).

143. That is, the courts have never before been faced with a case in which the children were depicted with fully covered genitals. Nevertheless, the rationale of several recent court decisions, applied analogously to the facts in *Knox*, support a finding that Knox's conduct was illegal.

144. *See* United States v. Wolf, 890 F.2d 241 (10th Cir. 1989); United States v. Villard, 885 F.2d 117 (3d Cir. 1989); United States v. Dost, 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub nom.* United States v. Weigand, 812 F.2d 1239 (9th Cir.), *cert. denied*, 484 U.S. 856 (1987).

The 1984 amendment that changed the definition of sexually explicit conduct to include lascivious exhibition of the genitals or pubic area and not mere lewd exhibition was intended to broaden the reach of the statute. *Dost*, 636 F. Supp. at 831; *see also supra* note 106 and accompanying text. The courts, however, have often used the terms "lewd" and "lascivious" interchangeably. *See, e.g.*, *Weigand*, 812 F.2d at 1243 (holding that the term "'lascivious' is no different in its meaning than 'lewd,' a commonsensical term whose constitutionality was specifically upheld in *Miller* and *Ferber*." (citations omitted)).

Because the term lascivious is not defined in the statute, defendants have often challenged the constitutionality of the phrase, "lascivious exhibitions of the genitals or pubic area." *See, e.g.*, *Wolf*, 890 F.2d 241; *Villard*, 885 F.2d 117; *Weigand*, 812 F.2d at 1239. The courts have consistently held that the term "lascivious exhibition" is neither vague nor overbroad. United States v. Ferber, 485 U.S. 747, 773 (1982); *Wolf*, 890 F.2d at 246; *Villard*, 885 F.2d 117; United States v. O'Malley, 854 F.2d 1085, 1087 (8th Cir. 1988); United States v. Reedy, 845 F.2d 239, 241 (10th Cir. 1988); United States v. Freeman, 808 F.2d 1290, 1292 (8th Cir.), *cert. denied*, 480 U.S. 922 (1987); *Weigand*, 812 F.2d at 1239.

145. 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub nom.* United States v. Weigand, 812 F.2d 1239 (9th Cir.), *cert. denied*, 484 U.S. 856 (1987).

of which displayed her pubic area "to be the prominent focal point of the photograph"; and (2) a nude ten-year-old girl, displaying little, if any, signs of "sexual coyness" but photographed in an unusual position with her legs open displaying her pubic area.[146] The court stated that it "would not presume to create a comprehensive definition of either lewdness or lasciviousness, a definition with which legal scholars have struggled for years," but that a "'lascivious exhibition' determination must be made on a case-by-case basis using general principles as guides for analysis."[147]

The *Dost* court also stated that what constitutes a "lascivious exhibition" of a child's genitals is different from that of a lascivious exhibition of an adult's genitals because of the sexual innocence of children.[148] The court emphasized that because a child of tender years is innocent in sexual matters, the child is presumably incapable of exuding sexual coyness, and thus, lascivious behavior is outside the scope of a young child's range of experience.[149] The *Dost* court outlined six factors to be considered in making an overall judgment of lasciviousness, taking into consideration the age of the child:[150]

> (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

146. *Id.* at 833.
147. *Id.* at 832.
148. *Id.*
149. *Id.*
150. *Id.*

a sexual response in the viewer.[151]

The *Dost* court noted that "a visual depiction need not involve all of these factors to be a 'lascivious exhibition of the genitals or pubic area,'" but "[t]he determination will have to be made based on the overall content of the visual depiction, taking into account the age of the minor."[152]

On appeal, the United States Court of Appeals for the Ninth Circuit approved the district court's list of factors established in *Dost* for determining what may be deemed a lascivious exhibition, and affirmed the conviction.[153] However, the court of appeals stated that the standard applied by the district court was "over-generous" because it implied that the pictures of the older nude child would not be lascivious "unless they showed sexual activity or the willingness to engage in it."[154] The court of appeals then explained why the depictions of the older child were "lascivious exhibition[s] of the genitals":

> The offense defined by the statute is [a] depiction of the lascivious exhibition of the genitals. Plainly the pictures were an exhibition. The exhibition was of the genitals. It was a lascivious exhibition because the photographer arrayed it to suit his peculiar lust. Each of the pictures featured the child photographed as a sexual object.[155]

The court of appeals determined that "[i]n the context of the statute applied to the conduct of children, lasciviousness is not a characteristic of the child photographed but of the exhibition which the photographer sets up for an audience that consists of himself or like-minded pedophiles."[156] The court of appeals noted, however, that the conduct punished by the Act "does not consist in the cravings of the person posing the child or in the cravings of his audi-

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151. *Id.*
152. *Id.*
153. United States v. Wiegand, 812 F.2d 1239, 1244 (9th Cir.), *cert. denied*, 484 U.S. 856 (1987).
154. *Id.*
155. *Id.*
156. *Id.*

ence."[157] The crime is the offense against the child—the harms to the child's "physiological, emotional, and mental health" that flow from the trespass against the dignity of the child.[158]

The *Dost* factors have been cited by the D.C. Circuit,[159] and the First,[160] Third,[161] Fifth,[162] Ninth,[163] and Tenth[164] Circuits, as appropriate when determining whether a depiction is a "lascivious exhibition." In *United States v. Villard*,[165] the Third Circuit adopted the *Dost* factors because they provided a "specific, sensible meaning" to the term lascivious, a term whose meaning was "less than crystal clear."[166] Citing the district court, the *Villard* court stated, however, that child pornography is not created when a pedophile derives sexual gratification from an otherwise innocuous photograph.[167]

In *United States v. Wolf*,[168] the Tenth Circuit applied the *Dost* factors in a case involving photographs of a sleeping five-year-old girl, who was an overnight guest of the defendant.[169] The photograph showed the child dressed in a nightshirt pulled up above her waist exposing the lower half of her nude body.[170] Her legs were

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157. *Id.* at 1245.

158. *Id.* (citing New York v. Ferber, 458 U.S. 747, 758 (1982)).

159. *See* American Library Ass'n v. Thornburgh, 713 F. Supp. 469, 474 (D.D.C. 1989) (citing the *Dost* factors as the accepted means of determining whether a depiction is a "lascivious exhibition"), *judgment vacated*, 956 F.2d 1178 (D.C. Cir. 1992).

160. *See* United States v. Nolan, 818 F.2d 1015, 1019 (1st Cir. 1987) (rejecting defendant's argument that the government did not prove that the children depicted were actual children, applying the *Dost* factors, and affirming defendant's conviction).

161. *See* United States v. Villard, 885 F.2d 117, 122 (3d Cir. 1989); United States v. Knox, 977 F.2d 815, 822 (3d Cir. 1992), *vacated and remanded*, 114 S. Ct. 375 (1993), *aff'd*, 32 F.3d 733 (3d Cir. 1994), *cert. denied*, 1994 WL 512613 (U.S. Jan. 17, 1995).

162. *See* United States v. Rubio, 834 F.2d 442, 448 (5th Cir. 1987) (holding *Dost* factors were appropriate to use in jury instructions to determine whether there was a "lascivious exhibition").

163. *See* United States v. Arvin, 900 F.2d 1385, 1389 (9th Cir. 1990) (following the *Dost* court's holding that the child depicted need not be engaging in or showing a willingness to engage in sexual activity).

164. *See* United States v. Wolf, 890 F.2d 241, 244 (10th Cir. 1989).

165. 885 F.2d 117 (3d Cir. 1989).

166. *Id.* at 122.

167. *Id.* at 125 (citing United States v. Villard, 700 F. Supp. 803, 812 (D.N.J. 1988)).

168. 890 F.2d 241 (10th Cir. 1989).

169. *Id.* at 242, 244.

170. *Id.* at 243.

spread apart and one leg appeared to be propped up with bedding.[171] The court in *Wolf* applied the *Dost* factors and found that the depictions violated the Act.[172] The court agreed with *Dost* that all of the factors need not be present to find a "lascivious exhibition."[173] However, unlike *Dost*, the court in *Wolf* stated that its holding did not require that more than one factor be present to constitute a violation of the Act.[174]

In addition, in *United States v. Mr. A.*,[175] the United States District Court for the Eastern District of Michigan applied the *Dost* factors to photographs taken by Mr. and Mrs. A. of their young children, nieces and nephews, and a neighbor's child, who were all, for the most part, in a state of nudity and in no unnatural positions.[176] The judge, as the trier of fact, stated that, in addition to the *Dost* factors, any other factors deemed appropriate may be used by the court, and that the apparent motive of the photographer and intended response of the viewer were relevant.[177] The judge noted that more was needed for a conviction than distastefulness in the photos.[178] Since he could not find beyond a reasonable doubt that Mr. and Mrs. A. had photographed their children "in a manner intended . . . to arouse or satisfy the sexual cravings" of a viewer or "for the purposes of their own sexual gratification," the judge acquitted the defendants.[179]

Two state courts have also adopted the *Dost* factors as a general guide for determining whether a depiction involves a child engaged in sexually explicit conduct.[180] Moreover, in *United States*

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171. *Id.*

172. *Id.* at 246.

173. *Id.* at 245.

174. *Id.* at 245 n.6.

175. 756 F. Supp. 326 (E.D. Mich. 1991).

176. *Id.* at 327-28. The court did not mention whether there was any unnatural focus.

177. *Id.* at 329 (citing United States v. Arvin, 900 F.2d 1385, 1389 (9th Cir. 1990)).

178. *Id.* at 329.

179. *Id.*

180. *See* Illinois v. Hebel, 527 N.E.2d 1367, 1379 (Ill. 1988), *cert. denied*, 489 U.S. 1085 (1989) (finding *Dost* factors relevant and "helpful" in determining that defendant's photographs of nude children, some of which show an adult hand touching the child's genitals, violated the Act); Nebraska v. Saulsbury, 498 N.W.2d 338, 344 (1993) (finding the *Dost* factors relevant in determining whether the depiction was proscribed by a state

v. Freeman,[181] a case decided before *Dost*, the Eighth Circuit addressed the issue of whether the term "lascivious exhibition of the genitals" reasonably gave notice "that it was illegal to video tape a sixteen year old girl, wearing nothing but a see-through orange scarf, and to zoom in for close up shots of her genitals."[182] The court noted that comprehensive definitions are not required to appear in every criminal statute.[183] "[A]ll that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .'"[184] The court could not see "how men of reasonable intelligence, guided by common understanding and practices, would believe such conduct was permissible," and thus concluded that defendants had notice that their activity was illegal.[185]

Thus, the *Dost* factors have been widely accepted as the method for determining whether certain depictions of nude children are considered "lascivious exhibitions." The cases that have utilized the *Dost* factors demonstrate that courts commonly apply a reasonable interpretation of the language of the term "lascivious exhibition" on a case-by-case basis, using general principles as guides for analysis.

II. *UNITED STATES V. KNOX*

A. *Procedural History*

1. Factual Setting

In March 1991, the U.S. Customs Service intercepted two mailings[186] sent from Europe to Stephen A. Knox.[187] These mailings,

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statute similar to the federal statute).

181. 808 F.2d 1290 (8th Cir.), *cert. denied*, 480 U.S. 922 (1987).

182. *Id.* at 1292.

183. *Id.*

184. *Id.* (citations omitted).

185. *Id.*

186. The postal workers followed routine procedures used to examine international mail for the purposes of collecting taxes and duties and of preventing the introduction of contraband into the country. United States v. Knox, 776 F. Supp. 174, 177 (M.D. Pa. 1991). Postal workers may open mail based on a reasonable suspicion that the mail may contain something more than correspondence. *Id. Cf.* Jacobson v. United States, 112 S.

addressed to an alias used by Knox, contained a catalogue advertising the sale of videotapes of nude, semi-clothed, and clothed minors as well as a returned check that Knox had sent to a company with a request for videotapes.[188] Customs investigators, aware that Knox had previously been convicted of receiving child pornography through the mail, obtained a search warrant and conducted a search of Knox's apartment for child pornography.[189] During the search of Knox's apartment, investigators seized three videotapes that Knox had compiled from about fifteen videotapes sold by the Nather Company of Las Vegas, Nevada ("Nather"),[190] as well as a Nather advertising catalogue ("Nather catalogue"), which contained checkmarks next to several videotape selections.[191]

Ct. 1535 (1992). In *Jacobson*, the United States Supreme Court found entrapment as a matter of law where postal authorities, over a period of twenty-six months, sent Jacobson materials from five different fictitious organizations soliciting and promoting child prostitution and child pornography, to which he responded. *Jacobson*, 112 S. Ct. at 1537. The Court based its conclusion on the fact that the government could not prove he had a predisposition to act illegally. *Id.* For further discussion of *Jacobson* and entrapment in general, see Brian Thomas Feeney, Note, *Scrutiny for the Serpent: The Court Refines Entrapment Law in* Jacobson v. United States, 42 CATH. U. L. REV. 1027 (1993); Elena Luisa Garella, Note, *Reshaping the Federal Entrapment Defense:* Jacobson v. United States, 68 WASH. L. REV. 185 (1993); Jack B. Harrison, Case Note, *The Government As Pornographer: Government Sting Operations and Entrapment:* United States v. Jacobson, 61 U. CIN. L. REV. 1067 (1993); J. Patrick Sullivan, Note, *The Evolution of the Federal Law of Entrapment: A Need for a New Approach*, 58 MO. L. REV. 403 (1993).

187. United States' Brief (Bryson) at 2.

188. *Id.* Knox had mailed the check to a company in France as a request for two videos, *Little Girl Bottoms (Underside)* and *Little Blondes*. United States v. Knox, 977 F.2d 815, 817 (3d Cir. 1992); United States' Brief (Bryson) at 3. The company returned the check, advising Knox to determine whether the videos he had ordered were legal in the United States. United States' Brief (Days) at 3.

189. *Knox*, 977 F.2d at 815, 817.

190. *Id.*

191. *Id.* at 824. The videotapes seized were compiled by Knox from videotapes sold by Nather which had titles such as *Ripe and Tender*, *Young Flashers*, and *Sweet Young Things*. The Nather catalogue described *Young and Tight*, one of the films from which Knox made his videotapes, as "featuring about 20 young beauties, ages 8-14, performing baton twirling, majorette and gymnastics routines, plus our usual panty flashing shots and tight young butts in short-shorts and bikinis." With respect to *Lollipops*, which is also excerpted on one of Knox's tapes, the Nather catalogue stated that there is "an enchanting scene showing dark haired beauty of 11 letting us have a long, slow look up her dress to view her snow-white panties." United States' Brief (Days) at 3-4. In addition, *Lollipops* features "scenes of a thirteen-year-old in a leopard skin bikini with a magnificent ass that

Each of the three tapes seized ("Nather tapes") featured various females between the ages of ten and seventeen dressed in "bikini bathing suits, leotards, underwear or other abbreviated attire."[192] The children were "striking provocative poses for the camera" and "were obviously being directed by someone off-camera."[193] In the course of each vignette, the photographer zoomed in on the child's pubic area, which was covered by underwear or other abbreviated clothing, and spent "more than a substantial amount of time focusing . . . on these areas."[194] The tapes contained numerous sequences during which all that was visible on the screen was the clothed portion of a young girl from her navel to her thigh.[195] "The girls [were] typically wearing bathing suits or leotards, or spreading their legs so that their panties [were] visible under a short skirt."[196]

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she puts on display as she walks back and forth slowly and teasingly." *Id.* at 4. Furthermore, according to the Nather catalogue, *Early Adolescence*, which Knox also reproduced on to one of his own tapes, was made in response "to the many requests we have been receiving for exclusively candid panty shots." *Id.* The catalogue advised that, "if you like undies on girls between the ages of 8 and 16, we suggest you order this rare tape today." *Id.*

The catalogue also commented:

> 'Sassy Sylphs' will blow your mind so completely you'll be begging for mercy. Just look at what we have in this incredible tape: about 14 girls between the ages of 11 and 17 showing so much panty and ass you'll get dizzy. . . . [T]here are boobs galore and T-back (thong) bathing suits on girls as young as 15 that are so revealing it's almost like seeing them naked (some say even better).

Knox, 977 F.2d at 818. Investigators also retrieved envelopes addressed to Nather, mail order forms from Nather, and a carbon copy of a money order payable to the Nather Company for an amount equal to the price of a single video. *Id.* at 817, 824.

192. *Knox*, 977 F.2d at 817.

193. *Id.* At one point in one of the Nather tapes, one child said to someone off-camera, "I don't know what to do." Supreme Court Brief of National Law Center for Children and Families, et al., as *Amici Curie* in Support of the Respondent at 10, *Knox* (No. 92-1183), *vacated and remanded*, 114 S. Ct. 375 (1993) [hereinafter Brief of National Law Center for Children]. Then, someone off-camera asked the child to push up her knees. *Id.* The female child complied, and the camera focused directly on her panties. *Id.* Another person off-camera responded, "We love it." *Id.*

194. United States v. Knox, 776 F. Supp. 174, 179 (M.D. Pa. 1991), *aff'd*, 977 F.2d 815 (3d Cir. 1992), *cert. granted*, 113 S. Ct. 2926, *vacated and remanded*, 114 S. Ct. 375 (1993), *aff'd*, 32 F.3d 733 (1994), *cert. denied*, 1994 WL 512613 (U.S. Jan. 17, 1995); United States' Brief (Days) at 4-5.

195. United States' Brief (Days) at 5.

196. *Id.* The Brief of National Law Center for Children provides further detail on

2. District Court Proceedings

Based on the three videotapes seized from his apartment, Knox was charged with receiving and possessing child pornography in violation of 18 U.S.C. § 2252(a)(2) and (4).[197] In a pretrial motion to dismiss the indictment, Knox claimed that nudity was a prerequisite to a finding of a proscribed "exhibition" and that, since there was no nudity depicted in the videotapes, the videotapes did not contain an "exhibition" of the genitals or pubic area as proscribed by the Act.[198] The United States District Court for the Middle District of Pennsylvania denied the motion[199] and on November 15, 1991, convicted Knox for knowingly receiving visual depictions of minors engaged in sexually explicit conduct through the mail and knowingly possessing such visual depictions in violation of 18 U.S.C. §§ 2252(a)(2), (4), and 2256.[200] The district court reasoned that because the "uppermost portion of the inner thigh" was in close proximity to the genitals, it may be included in the definition of "pubic area" under 18 U.S.C. § 2256.[201]

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the content and nature of the Nather tapes:

> [A] pre-teen female is depicted in a tree holding a squirming younger female; both are clothed. . . . The camera focuses on the panties of the older child numerous times. The younger child remarks, "My friend did a video and she got five dollars."
>
> Later . . . a bikini-clad female is hanging upside down and her bikini top falls down exposing her nipple. . . . The camera quickly focuses on the exposed nipple [and then] focuses on the female's pubic area numerous times.

Brief of National Law Center for Children at 10.

197. *Knox*, 776 F. Supp. 174, 175 (M.D. Pa. 1991).

198. *Id.* at 179-80.

199. *Id.* at 180. Prior to trial, Knox, by stipulation, waived his right to a jury trial in return for the government's declining to prosecute based on hard-core videotapes seized from Knox's apartment. Stephen A. Knox's Response in Opposition to the Government's Motion to Remand at 2, *Knox* (No. 92-1183). These more sexually explicit tapes are not discussed in the *Knox* case or in any of the briefs.

200. Brief of Petitioner (No. 92-1183) [hereinafter Petitioner's Brief].

201. *Knox*, 776 F. Supp. at 180. Knox was sentenced to concurrent terms of five years imprisonment for both counts. *Knox*, 977 F.2d at 818. Knox subsequently filed a motion for judgment of acquittal, submitting with it an affidavit of Dr. Todd Olsen, Director of Human Gross Anatomy at the Albert Einstein College of Medicine in New York. The affidavit stated that a definition of the "pubic area" that includes the uppermost portion of the inner thigh is anatomically incorrect. *Id.*; *Knox*, 776 F. Supp. at 180. The district court, however, denied this motion, filed three months after entry of the

3. Court of Appeals Decision

On appeal, the United States Court of Appeals for the Third Circuit affirmed the conviction.[202] Although it concluded that the district court's broad definition of pubic area was erroneous,[203] the court of appeals held that the statute's proscription against "lascivious exhibition of the genitals or pubic area" did not require a finding of nudity.[204] Conforming to standards of statutory construction, the court first considered the language of the statute itself.[205] The court noted that the dictionary defined the verb "exhibit" as "to present to view: show, display . . . to show publicly: put on display in order to attract notice to what is interesting or instructive,"[206] and found that the genitals and pubic area of the young girls in the videotapes were "'on display' as the camera focused for prolonged time intervals on close-up views" of these areas.[207] The court further stated that the "obvious purpose and inevitable effect of the videotape was to 'attract notice' specifically to the genitalia and pubic area."[208] Applying the plain meaning of the word "exhibition," the court held that there was no nudity requirement in the statute and that Knox's actions constituted a violation of the statute.[209]

The court of appeals also found that the legislative history of the Act supported its interpretation.[210] Although the language of one of the four bills introduced in 1977 criminalized depictions of "nudity,"[211] Congress ultimately failed to adopt such language in

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verdict, as untimely. *Knox*, 977 F.2d at 818.

202. *Knox*, 977 F.2d 815, 825-26 (3d Cir. 1992), *cert. granted*, 113 S. Ct. 2926, *vacated and remanded*, 114 S. Ct. 375 (1993), *aff'd*, 32 F.3d 733 (3d Cir. 1994), *cert. denied*, 1994 WL 512613 (U.S. Jan. 17, 1995).

203. *Id.* at 819.

204. *Id.* at 820.

205. *Id.*

206. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 796 (1976)).

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 820-21.

211. *See supra* notes 40-44 and accompanying text.

the 1977 Act.[212] Thus, since the proscription against "lewd exhibition of the genitals or pubic area of any person" did not contain any language limiting its scope to nude displays, the court of appeals concluded that Congress intended "to criminalize both clothed and unclothed visual images of a child's genitalia if they were lewd."[213]

The court of appeals also examined the underlying rationale behind the federal child pornography laws,[214] the Supreme Court's decision in *New York v. Ferber*,[215] and the compelling governmental interest in protecting the "physical and psychological well-being" of children.[216] The court noted that "the psychological effect of visually recording the sexual exploitation of a child is devastating" and that the elimination of the child pornography industry was of "surpassing importance."[217] Thus, the court found its interpretation of the statute consistent with the purpose of the Act and concluded that "[t]he rationale underlying the statute's proscription applies equally to *any lascivious* exhibition of the genitals or pubic area whether these areas are clad or completely exposed."[218]

Finally, the court of appeals held that its interpretation of an "exhibition" of the genitals or pubic area "[did] not render the statute unconstitutionally overbroad" because "[o]nly a minuscule fraction of all pictures of minor children will be sufficiently sexually suggestive and unnaturally focused on the genitalia to qualify as lascivious."[219] The court emphasized that the limiting principle in the statute is the requirement of lasciviousness,[220] and further stated that whether a depiction is lascivious or not is a "subjective inquiry

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212. *See supra* notes 44-54 and accompanying text.

213. *Knox*, 977 F.2d 815, 820 (3d Cir. 1992), *cert. granted*, 113 S. Ct. 2926, *vacated and remanded*, 114 S. Ct. 375 (1993), *aff'd*, 32 F.3d 733 (3d Cir. 1994), *cert. denied*, 1994 WL 512613 (U.S. Jan. 17, 1995).

214. *Id.* at 821-23 (noting that the Act's purpose is to protect children from the harmful effects of being used by pornographers as subjects in sexually exploitative depictions).

215. 458 U.S. 747, 756-57 (1982).

216. *Id.* at 756-57; *see supra* notes 66-75 and accompanying text.

217. *Knox*, 977 F.2d at 821 (citing *Ferber*, 458 U.S. at 757).

218. *Id.* at 822.

219. *Id.* at 823.

220. *Id.*

into whether or not the material is intended to elicit a sexual response from the viewer."[221]

B. *Briefs Submitted to the United States Supreme Court*

Stephen Knox appealed his conviction to the United States Supreme Court. Prior to Knox's arrest in 1991, no one had been prosecuted under 18 U.S.C. §§ 2252(a)(2), (4) and 2256(2)(E) for materials which portrayed clothed children. The Solicitor General's office had urged the Court not to take the *Knox* case,[222] but the Supreme Court granted certiorari to decide whether, *inter alia*, the statute includes a nudity requirement and whether such an interpretation renders the statute unconstitutionally overbroad.[223]

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221. *Id.* (citing United States v. Villard, 885 F.2d 117, 122 (3d Cir. 1989)). This standard was challenged by the Justice Department. *See infra* notes 262-265 and accompanying text.

Furthermore, the Court of Appeals rejected Knox's contention that there was insufficient evidence to show (1) that the tapes had travelled through the mail and (2) that he had the requisite mental state to violate the statute because he claimed that he believed Nather's assertions that the tapes were "completely legal." *Knox*, 977 F.2d at 824-25. Noting that the mere awareness of the general nature and character of the material was sufficient to fulfill the knowledge requirement of § 2252, the court concluded that there was no doubt that Knox knew the nature of the materials Nather sold. *Id.* at 825; *see also* Hamling v. United States, 418 U.S. 87, 123 (1974) (holding that defendant need only know of the general nature of the materials, not that they are illegal); United States v. Moncini, 882 F.2d 401, 405 (9th Cir. 1989) (even assuming defendant was ignorant of the child pornography laws, "he must bear the risk of the potential illegality of his conduct"). Knox's handwritten descriptive notations on the outside of the boxes containing each of the Nather tapes further supported the Court of Appeals' conclusion that Knox was fully aware of the nature of the videotapes. *Knox*, 977 F.2d at 825. For example, on one tape box, Knox wrote "13-year-old flashes" followed by "hot." *Id.* Knox characterized the second vignette as "15 year-old shows nipple." *Id.* The court of appeals concluded that these descriptions along with the Nather catalogue "clearly demonstrate that Knox was aware that the videotapes contained sexually oriented materials designed to sexually arouse a pedophile." *Id.*

For further discussion on the issue of scienter, see *infra* note 259.

222. Linda Greenhouse, *U.S. Shifts Stance in Court of Appeals: Clinton Team at Justice Dept. Rejects Bush Positions on Rights and Smut Law*, N.Y. TIMES, Sept. 28, 1993, at A22.

223. United States v Knox, 113 S. Ct. 2926, *vacated and remanded*, 114 S. Ct. 375 (1993), *aff'd*, 32 F.3d 733 (1994), *cert. denied*, 1994 WL 512613 (U.S. Jan. 17, 1995). The United States Supreme Court granted certiorari to determine:

(1) [Whether] there can be an "exhibition of genitals or pubic area" under Section 2256(2)(E) under circumstances in which genitals and pubic area are fully covered

Briefs were submitted to the Supreme Court by Knox and by the Justice Department. The Justice Department filed one brief which argued to affirm the conviction.[224] It later filed a second brief, advocating a new standard to be applied in *Knox* and requesting remand of the case.[225] Several organizations also filed briefs and motions for leave to participate in oral argument as amici curiae.[226]

1. Stephen Knox's Arguments

In his Supreme Court brief, Knox contended that the videotapes did not depict "sexually explicit conduct" as defined in 18 U.S.C. § 2256(2) because there could be no exhibition of the genitals without nudity.[227] He also argued that if nudity is not required under the statute, then the statute should be rendered unconstitutionally vague and overbroad.[228] Finally, Knox argued that the rule of lenity[229] required the reversal of his conviction because the Third

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by an article of clothing . . . .

. . . .

(4) Assuming that there can be "exhibition of the genitals or pubic area" under Section 2256(2)(E) when genitals and pubic area are fully covered by clothing, is [the] statute unconstitutionally vague and overbroad?

62 U.S.L.W. 3, 46 (U.S. July 20, 1993).

224. *See infra* part II.B.2.

225. *See infra* part II.B.3.

226. Several groups organized two amici briefs which argued to uphold Knox's conviction: (1) Brief of National Law Center for Children and Families et al. as Amici Curiae in Support of the Respondent, *Knox* (No. 92-1183); and (2) Brief of Amicus Curiae National Family Legal Foundation in Support of the United States, *Knox* (No. 92-1183). The Brief of National Law Center for Children provided specific details about the Nather tapes that were not discussed at length in either the Supreme Court briefs or in the Third Circuit's decision in *Knox*. *See supra* notes 193-196 and accompanying text.

Several other groups organized a brief which argued that Knox's conviction should be reversed: Brief of American Booksellers Foundation For Free Expression, Council For Periodical Distributors Associations, National Association of Artists' Organizations, Periodical and Book Association of America, Inc., Aperture Foundation, Inc., Freedom to Read Foundation, Magazine Publishers of America, American Civil Liberties Union and Law & Humanities Institute, as Amici Curiae in Support of Petitioner, *Knox* (No. 92-1183).

227. Petitioner's Brief at 15.

228. *Id.* at 35-36.

229. For an explanation of the Rule of Lenity, see *infra* notes 343, 361-362 and

Circuit's expansive interpretation of the child pornography statute could not have been reasonably foreseen.[230]

Knox first argued that "exhibit" means "to offer or expose to view." He stated that "to expose" means "to uncover" or "to bare to the air, cold, etc."[231] He claimed that under these definitions, it was clear that the plain meaning of the statute proscribes only nude depictions of children.[232] He also argued that the garments worn by the children in the videotapes, including skirts, school uniforms, leotards, and bathing suits, are generally socially acceptable and age-appropriate.[233]

Knox further contended that the legislative history of the Act indicates that the statute contains a nudity requirement by pointing to a June 14, 1977 letter drafted by then Assistant Attorney General Wald[234] and testimony given during the 1977 Hearings by Congressman Koch[235] and Professor Bender.[236] Essentially, Knox contended that since the legislative history indicated a concern by some lawyers to limit the types of nude portrayals only to those that are lascivious, and not the type to be found in a grandparent's photo album, the statute is limited to proscribing lascivious depictions of nude minors and, therefore, his videotapes did not consti-

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accompanying text.

230. Petitioner's Brief at 28-29. Knox also claimed that a reasonable mistake as to legality of the materials is a defense. *Id.* at 34-35. Knox claimed that he relied on the Nather catalogues, which not only stated that the videotapes were not child pornography, but also explained in a believable fashion why they were not. *Id.* The Nather catalogue claimed that because there was no sex or nudity, the tapes were completely legal. *See Knox*, 776 F. Supp. 174, 179 (M.D. Pa. 1991), 977 F.2d 815 (3d Cir. 1992), *cert. granted*, 113 S. Ct. 2926, *vacated and remanded*, 114 S. Ct. 375 (1993), *aff'd*, 32 F.3d 733 (3d Cir. 1994), *cert. denied*, 1994 WL 512613 (U.S. Jan. 17, 1995).

231. Petitioner's Brief at 16 (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (1979)).

232. *Id.*

233. *Id.* at 15, 17 n.11.

234. *See supra* note 48 and accompanying text.

235. *See supra* note 49 and accompanying text.

236. *See supra* note 52 and accompanying text. Knox also argued that Professor Bender testified before Congress that he believed the Mathias-Culver Bill was preferable to the Roth Bill because nudity, in general, seemed overbroad in terms of the purpose of the statute and that nudity should be qualified as in the Mathias-Culver Bill. Petitioner's Brief at 19-20.

tute illegal material.[237]

Knox's brief discussed other portions of hearing testimony which he claimed supported his argument that the statute includes a nudity requirement.[238] For example, Knox discussed testimony heard in 1982, when Congress was considering amending the child pornography statute in light of the decision in *New York v. Ferber*,[239] to remove the requirement that depictions be obscene in order to be proscribed.[240] Senator Specter proposed that such depictions continue to be protected if they possess literary, artistic or scientific merit.[241] Knox also pointed to the suggestion made by Bruce Rich, on behalf of the Association of American Publishers, that the exemption for literary, artistic, or scientific merit should apply to the entire range of "sexually explicit conduct," and "not merely to 'lewd exhibitions of the genitals.'"[242] Knox argued that Rich's testimony assumed that the phrase described a type of nudity:

> [I]t is not enough to merely tag on the literary, etc., exception to exhibitions of nudity, as Senator Specter's own proposal would suggest. . . . We would suggest having the literary, artistic, etc. exemption to modify the entire range of conduct which would be otherwise prohibited.[243]

Therefore, according to Knox, this statement indicates an understanding that "exhibitions" require a state of nudity.[244] In addition,

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237. *See* Petitioner's Brief at 18-21.

238. *Id.* at 20-21.

239. 458 U.S. 747 (1982).

240. Petitioner's Brief at 21.

241. *Id.*

242. *Id.* at 22.

243. *Id.* (quoting *Child Pornography: Hearing on J-97-152 Before the Subcomm. on Juvenile Justice of the Comm. on the Judiciary*, 97th Cong., 2d Sess. 19-20 (1982)).

244. *Id.* at 22. Knox also pointed to comments made by Robert Pitler, Bureau Chief, Appeals Bureau, District Attorney's Office for New York County, who argued the *Ferber* case before the United States Supreme Court and afterwards on remand to the New York Court of Appeals. *Id.* During the Congressional hearings, Pitler criticized the arguments of amici publishers in the *Ferber* case and commented that "'lewd exhibition of the genitals' means more than mere nudity and describes a patently offensive, lascivious, lustful or obscene display . . . . [A]mici publishers, for the most part, based their conclusion on a misunderstanding of the term 'lewd exhibition of the genitals,' which, as noted, does not include mere nudity." *Id.* at 22-23.

Knox contended that if 18 U.S.C. § 2256(2)(E) could be interpreted to include depictions of children whose genitals and pubic area are fully covered by clothing, then the statute is unconstitutionally vague and overbroad.[245] Finally, Knox argued that since Congress used the term "lascivious exhibition of the genitals" in the context of the phrase "sexually explicit conduct," Congress did not intend for the statute to be all-encompassing.[246] He explained that because sexually explicit conduct is defined in 18 U.S.C. § 2256 to also include sexual intercourse, bestiality, masturbation, and sadistic and masochistic abuse, the types of materials covered under the statute were of a specific, well-defined nature, and thus, could not also include materials depicting clothed children performing no sexual acts.[247]

2. Justice Department's First Supreme Court Brief

The Justice Department's first Supreme Court brief, filed in March 1993 by Acting Solicitor General William C. Bryson ("Bryson Brief"), relied on the Third Circuit's reasoning that an "exhibition" of the genitals or pubic area does not require nudity of the area.[248] The Bryson Brief stated that the court of appeals correctly found that "exhibition" means to "put on display" and that "[t]he genitals and pubic area of the young girls in the Nather tapes were certainly 'on display' as the camera focused for prolonged time intervals on close-up views of these body parts."[249] In addition, the Bryson Brief argued that "[j]ust as a foot or hand could be 'exhib-

245. *Id.* at 35-36. Knox explained why he believed such an interpretation would render the statute overbroad:

> If an "exhibition of the genitals or pubic area" can be satisfied by depictions of minors whose genitals are completely covered by an article of clothing, the chilling effect of the federal statute will be enormous. Anyone who has photographed a minor at a dance recital, swim or gymnastics meet, at the beach, or at home, will immediately understand the danger of photographing a minor in a pose which could ultimately be deemed to be lascivious under the law.

Id. at 36.

246. *Id.* at 39.

247. *Id.* at 39-40.

248. United States' Brief (Bryson) at 7.

249. *Id.* at 6-7.

ited' while covered with a sock or a glove, so here the genitals and pubic area were 'put on display in order to attract notice' to those areas."[250] The Bryson Brief relied on the Third Circuit's conclusion that the legislative history of 18 U.S.C. § 2256(2)(E) provides no indication of a nudity requirement.[251] The Bryson Brief stated that, "[a]s the court of appeals pointed out . . . the fact that Congress dropped any mention of the word 'nudity' in the law as enacted indicates that Congress 'repudiated its earlier intention to confine the statute's coverage to nude exhibitions.'"[252]

The Bryson Brief also argued that subsequent legislative history supports the court of appeals' interpretation that the term "exhibition" does not require the areas exhibited to be nude.[253] It explained that an early proposal for the 1984 amendments, narrowly defining the word "simulated" in the statute,[254] was criticized by several lawyers and congressmen.[255] They suggested that the term "simulated" should be left undefined within the Act because it would provide an appealing loophole for imaginative photographers.[256] The Bryson Brief argued that since the language defining simulated was not included in the amendments that were enacted, Congress intended no nudity requirement in the statute.[257]

The Bryson Brief contended that the court of appeals' interpretation of 18 U.S.C. § 2256(2)(E) was not vague or overbroad.[258] The Bryson Brief pointed to the court's reasoning that "[o]nly a minuscule fraction of all pictures of minor children will be sufficiently sexually suggestive and unnaturally focused on the genitalia to qualify as lascivious."[259]

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250. *Id.* at 7.

251. *Id.*

252. *Id.* (quoting United States v. Knox, 977 F.2d 815, 821 (3d Cir. 1992)).

253. United States' Brief (Bryson) at 7-8.

254. *See supra* note 93 and accompanying text.

255. United States' Brief (Bryson) at 8.

256. *Id.* (quoting statement of Deputy Assistant Attorney General Richard, Criminal Division). *See supra* notes 92-98 and accompanying text.

257. United States' Brief (Bryson) at 8.

258. *Id.* at 8-9.

259. *Id.* (quoting United States v. Knox, 977 F.2d 815, 823 (3d Cir. 1992)). The Bryson Brief also argued that the court of appeals correctly held that Knox had the requisite mental state to violate the statute. *Id.* at 9-10 (quotations omitted). The Bryson

3. Justice Department's Second Brief

On September 15, 1993, the newly-appointed Solicitor Drew S. Days, III, submitted a second Supreme Court brief ("Days Brief") outlining a different standard for determining what constitutes a "lascivious exhibition."[260] The Days Brief asked the Court to vacate Knox's conviction and to remand *Knox* to the Third Circuit for reconsideration under this proposed standard.[261]

The Days Brief stated that, while nudity is not an absolute requirement for coverage under 18 U.S.C. §§ 2252 and 2256, "the court of appeals nevertheless utilized an impermissibly broad standard for determining whether a videotape [could] be considered to be a lascivious 'exhibition' of the genitals or pubic area of a child,"[262] and that "neither the statutory language nor the legislative history [would] bear such an interpretation."[263] The Days Brief argued that a "[lascivious] exhibition requires *both* that the depiction [at issue] *focus on those body parts and that it render them*

Brief stated that, "[i]n light of the explicit descriptions of the materials [Knox] ordered and the finding of the courts below that he was aware of the nature of the materials, 'he must bear the risk of the potential illegality of his conduct.'" *Id.* at 10. (quoting United States v. Moncini, 882 F.2d 401, 405 (9th Cir. 1989)). The Bryson Brief pointed out that the Supreme Court said in Hamling v. United States, 418 U.S. 87, 123 (1974), in the context of an obscenity statute, that it was sufficient to show that the defendant had knowledge of the nature and contents of the materials, and that he need not be shown to have known that they were illegal. United States' Brief (Bryson) at 10.

The Bryson Brief correctly noted that the Ninth Circuit recently held 18 U.S.C. § 2252 unconstitutional on its face because of that court's finding that the statute contains no requirement that the defendant have knowledge that the persons depicted in the materials are children. United States' Brief (Bryson) at 10-11 (citing United States v. X-Citement Video, Inc., 982 F.2d 1285, 1291-92 (9th Cir. 1992)). However, every other circuit that has considered this issue has held to the contrary. United States' Brief (Bryson) at 11 (citing Rodriguez v. Clark Color Lab., 921 F.2d 347, 349 (1st Cir. 1990); United States v. Petrov, 747 F.2d 824, 828-29 (2d Cir. 1984), *cert. denied*, 471 U.S. 1025 (1985)). The United States Supreme Court recently reversed the Ninth Circuit's decision and the majority of the justices held that the term "knowingly" used in the Act extends a scienter requirement to both the sexually explicit nature of the material and to the age of the performers. United States v. X-Citement Video, Inc., 1994 WL 662620 at *7-*8 (U.S. Nov. 29, 1994). The age of the performers is not at issue in *Knox* and, therefore, further discussion of *X-Citement Video* falls outside the scope of this Comment.

260. United States' Brief (Days) at 8-9.

261. *Id.* at 20.

262. *Id.* at 8.

263. *Id.*

visible in some fashion,"[264] and also that the child be posing or acting lasciviously.[265] The Days Brief contended that visibility did not require full visual exposure, but "it require[d] at least that the body parts themselves be discernible either through or beneath the clothing so that it can fairly be said that the depiction is an 'exhibition' of the body parts rather than a depiction of clothed areas of the body."[266]

The Days Brief pointed to legislative history for support of the proposed standard. Ironically, it discussed the same Congressional hearings that Knox used to support his argument that nudity is required, and that the Justice Department used in its first Supreme Court brief to support the court of appeals' "expansive" interpretation.[267] The Days Brief argued that the phrase "lewd exhibition of the genitals or pubic area" was substituted by Congress, on the suggestion of the Justice Department, in place of the phrase "nudity, which nudity is to be depicted for the purpose of sexual stimulation or gratification . . ."[268] in order to delineate more clearly "what *types of nude portrayals* of children were intended to be encompassed within this definition."[269]

According to the Days Brief, the visibility of the body necessary for a prohibited exhibition could be found if a child is depicted dressed in garments which are "transparent or nearly transparent," or "so thin and tight as to reveal completely the contours of the genitals."[270] "[T]he Justice Department's reference to 'nude portrayals' during the drafting of this statute," the Days Brief stated, "does not preclude interpreting it in this limited fashion, although it rules out the court of appeals' more expansive construc-

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264. *Id.* at 10 (emphasis added).

265. *Id.* at 13.

266. *Id.* at 10.

267. *See 1977 Hearings*, *supra* note 40, and accompanying text.

268. United States' Brief (Days) at 10-11 (citing S. 1011, *supra* note 41). This language differs slightly from the actual language used in the bill, which read "nudity, if such nudity . . . . " *See supra* notes 44-52 and accompanying text.

269. United States' Brief (Days) at 11 (quoting *1977 Hearings*, *supra* note 40, at 77-78) (emphasis in Days Brief).

270. *Id.* at 12.

tion."[271]

In addition to the requirement of visibility of the genitals or pubic area, the Days Brief argued that because 18 U.S.C. § 2252(a)(2) proscribes depictions involving "the use of *a minor engaging in* sexually explicit conduct" and § 2256(2), in turn, defines the 'sexually explicit conduct' of minors as including "lascivious exhibition[s] of the genitals or pubic area," the statute applies to depictions "only if they show minors engaged in the conduct of lasciviously exhibiting their (or someone else's) genitals or pubic areas."[272] Although concluding that the court of appeals applied an incorrect standard, the Days Brief argued that the materials found in Knox's possession still may have fallen within the purview of the statute under its proposed standard.[273] Thus, the Days Brief recommended that the Court remand the case for reconsideration under the new statutory standard it advocated.[274]

The Days Brief also argued that its interpretation of the Act did not render the statute unconstitutionally vague or overbroad.[275] It stated that since there was no showing that these "arguably impermissible applications of the statute amount to, at most, no more than 'a tiny fraction of the materials within the statute's reach,'" the statute did not suffer from substantial overbreadth.[276] The Days

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271. *Id.*

272. *Id.* at 12-13 (emphasis added); *cf.* United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff'd sub nom.* United States v. Weigand, 812 F.2d. 1239 (9th Cir. 1987) (finding that a violation of the Act was not dependent on the child's sexual coyness).

273. United States' Brief (Days) at 13. *Cf.* 139 CONG. REC. S14,977 (daily ed. Nov. 4, 1993). Some Justice Department officials made off-the-record remarks to the *New York Times* which indicated that, under the Days Brief's newly suggested standard, Knox would be acquitted:

> The order that the Court issued today instructed the Third Circuit, which sits in Philadelphia, to reconsider the case in light of the Government's current position. Before the appeals court does that, however, Federal prosecutors are likely to drop the prosecution. Government lawyers who have seen the tapes at issue have said privately that they fall well below the standard for prosecution described in the Government's new definition.

139 CONG. REC. S14,977 (daily ed. Nov. 4, 1993).

274. United States' Brief (Days) at 13.

275. *Id.* at 14-17.

276. *Id.* at 16 (quoting New York v. Ferber, 458 U.S. 747, 773 (1982)). The Days Brief also argued that, under its new interpretation, 18 U.S.C. §§ 2252 and 2256 cannot

Brief also stated that the Supreme Court had already held in *Miller v. California*[277] and *New York v. Ferber*[278] that a "requirement of lewdness or lasciviousness [in the statute] does not introduce an element of unconstitutional vagueness."[279] The Supreme Court vacated Knox's conviction and remanded the case for further consideration in light of the Justice Department's new position.[280]

C. *Reaction to the Justice Department's Reversal and the Clinton Administration's Proposal*

In response to the Justice Department's reversal of its position in the *Knox* case, anti-pornography groups and conservative groups rushed to Capitol Hill and sent mass mailings to Congressional constituents rebuking the new standard[281] and accusing President Clinton of being soft on child pornography.[282] On November 4, 1993, the Senate unanimously passed a non-binding resolution ("Grassley-Roth Amendment") that child pornography laws should be applied more broadly.[283] In this resolution, Senator Grassley emphasized that the intended purpose of the federal child pornography laws was to outlaw sexually exploitative materials regardless of the nudity of the child and regardless of whether the child intended to act lasciviously.[284] Senator Roth denounced the Justice

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be found unconstitutionally vague because "[i]t will not . . . be difficult to determine whether pictures 'exhibit' the genitals or pubic areas if that term is restricted to visible depictions of those areas." *Id.* at 17.

277. 413 U.S. 15 (1973).

278. 458 U.S. 747 (1982).

279. United States' Brief (Days) at 17. The Justice Department's second brief is in accord with its first brief in stating that the court of appeals correctly found that the evidence was sufficient to show that Knox had the requisite criminal intent. *Id.* at 17-20. *Compare* United States' Brief (Bryson) at 8-9 *with* United States' Brief (Days) at 17-20; *see also supra* text accompanying note 259.

280. Knox v. United States, 114 S. Ct. 375 (1993), *aff'd on remand*, 32 F.3d 735 (3d Cir. 1994). The motions of National Law Center for Children and Families, et. al., and National Family Legal Foundation were dismissed by the Supreme Court as moot. *Id.*

281. Julie Cohen, *Child Porn Law A Political Mess For Clinton, Reno*, THE RECORDER, Nov. 22, 1993, at 1.

282. *See* Lewis, *supra* note 18 and accompanying text.

283. 139 CONG. REC. S14,976-78 (daily ed. Nov. 4, 1993).

284. *Id.* at S14,976.

Department's new brief, stating:

> It is a travesty in that it completely misrepresents congressional intent in passing the Child Protection Act of 1984. It is a tragedy because it creates a huge new loophole in our child pornography laws which will likely lead to a flood of child pornography and sexual abuse of children.[285]

In response to the Grassley-Roth Amendment, President Clinton sent a public letter, dated November 10, 1993, to Attorney General Reno, stating that he agreed with the Senate and ordering her to submit new legislation to clarify the law.[286] Reno quickly sent an amendment to the Senate for approval which would have permitted prosecution regardless of whether the child is clothed or unclothed.[287] The proposed amendment provided:

> An exhibition may be deemed lascivious if the depiction of the minor is *designed for the purpose of eliciting or attempting to elicit a sexual response in the intended viewer*; there shall be no requirement that the minor whose image is displayed in the material intend or understand that the depiction is designed for such a purpose.[288]

No member of Congress sponsored or proposed the amendment.[289] Members of the Senate, who believed the Reno bill was unnecessary, kept the Senate from incorporating the amendment into an omnibus crime bill, although Reno had urged it.[290] Members of the Senate stated that the existing law was sufficient and the problem was the Justice Department's departure from the wide-ranging interpretation of the law used under the Reagan and Bush Administrations.[291] Members of Congress were also concerned that child pornographers currently under prosecution or investigation would press for acquittals in their cases if the Justice Department

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285. *Id.* at S14,977.
286. Dyckman, *supra* note 20.
287. *Id.*
288. *Id.*
289. *Id.*
290. *See id.*
291. 139 CONG. REC. S15,837 (daily ed. Nov. 17, 1993); *see* Cohen, *supra* note 281; Timothy M. Phelps, *Child Porn: A Federal Case; Liberal View by Reno's Office Puts Clinton Administration on Defensive*, NEWSDAY, Nov. 21, 1993, at 21.

refused to revoke its new interpretation of the Act.[292]

On the other hand, the American Civil Liberties Union ("ACLU") supported the Days Brief, and Robert Peck, counsel to the ACLU, said that the new legislative proposal was nothing more than political posturing.[293] This group and other First Amendment advocates said that the Clinton Administration's proposal would enforce an overly broad definition of child pornography.[294] On April 20, 1994, the House of Representatives passed, by a vote of 425-3, a nonbinding resolution that "the Department of Justice has used its brief in the Knox case as a vehicle for reinterpretation of the child pornography laws in contravention to legislative history," and that "Congress specifically repudiated a nudity requirement for child pornography statutes."[295] The Third Circuit heard oral argument in *Knox* on April 28, 1994 and rendered its decision reaffirming Knox's conviction on June 9th, 1994.[296]

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292. 139 CONG. REC. S15,837 (daily ed. Nov. 17, 1993). Patrick Trueman, who headed the Justice Department's National Enforcement Unit during the Reagan and Bush administrations, and is now the chief lobbyist for the American Family Association, suggested that Deputy Solicitor General Paul Bender, a long-time crusader against pornography laws, had been the architect of the Justice Department's second brief in *Knox*. Cohen, *supra* note 281. Paul Bender gave testimony during the 1977 Congressional hearings that was relied upon by Knox to support his argument that nudity is required, as well as by the Days Brief to support the Justice Department's new position that visibility of the genitals was required. *See supra* note 52 and accompanying text. Bender admitted to having assisted in the drafting of the brief, but he denied playing a primary role in it. Cohen, *supra* note 281.

293. Cohen, *supra* note 281.

294. *Id.* The ACLU's position on regulating child pornography is as follows: "The sexually abusive acts committed against children should be criminalized, but once those acts are in the form of visual depictions, they are protected forms of expression." *Pornography and the First Amendment* (ACLU/Arts Censorship Project, New York, N.Y.), 1994.

295. 140 CONG. REC. H.2536 (daily ed. Apr. 20, 1994).

296. 32 F.3d 733 (3d Cir. 1994). Several additional motions were filed in the Third Circuit. The following text briefly explains the key motions but does not include every motion that was filed. The Justice Department made a motion to remand *Knox* to the district court for a retrial conducted according to the Days Brief's new standard. Government's Motion to Remand, *Knox* (No. 92-7089). That motion was denied by the Third Circuit. On January 5, 1994, the Third Circuit granted a motion on behalf of 104 amici Congressmen who wished to file a brief as amici curiae. Motion of Amici Members of Congress in Opposition to the Government's Motion to Remand at n.1, *Knox* (No. 92-7089).

D. *The Third Circuit's Decision on Remand*[297]

On remand, the United States Court of Appeals for the Third Circuit reaffirmed Knox's conviction.[298] The court of appeals concluded that the plain meaning of the term "exhibition" used in the Act does not require nudity.[299] The court addressed the government's argument that the term "exhibition," as used in the statute, contemplates that the genitals or pubic area of the child depicted must be visible or discernible.[300] Although the court agreed with Knox and the government that a piece of artwork may lose its meaning and value if it were completely covered,[301] the court rejected Knox's and the government's analogous argument that by scantily and barely covering the genitals of young girls, the displays of the girls in seductive poses destroys the value of the poses to the viewer of child pornography.[302] The court stated that, "[a]lthough the genitals are covered, the display and focus on the young girls' genitals or pubic area apparently still provides considerable interest and excitement for the pedophile observer, or else there

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In the Government's Motion to Remand, the Justice Department, to some extent, again shifted its position regarding the second part of its suggested standard—that the child be posing or acting lasciviously. *Id.* at 5. The Justice Department argued:

> This requirement . . . does not imply that the child must have any lascivious intent, but only that the statute is limited to depictions in which a minor is actually engaging in some "sexually explicit conduct"; in the case of a lascivious exhibition of the genitals or pubic area, this means that the conduct the minor was engaged in can be judged to constitute a "lascivious exhibition," i.e., the conduct appeals to the lascivious interest of some potential audience.

Id.

Thus, the Justice Department seemed to retreat from its earlier position. The shifting of standards by the Justice Department raises some suspicion as to the Clinton administration's policies regarding child pornography. It also emphasizes the problems associated with rigidly defining child pornography.

297. The Third Circuit first denied the Government's Motion to Remand. The court stated that an immediate remand to the district court for purposes of conducting a retrial without first deciding the legal issue presented would violate the Supreme Court's order. United States v. Knox, 32 F.3d 733, 743 (3d Cir. 1994), *cert. denied*, 1994 WL 512613 (U.S. Jan. 17, 1995).

298. *Id.* at 737.

299. *Id.* at 744.

300. *Id.* at 744-45.

301. *Id.* at 745.

302. *Id.*

would not be a market for [such] tapes . . . ."[303]

The court noted that, since its task was to decipher Congress' intent regarding the statutory phrase "lascivious exhibition of the genitals or pubic area" as used in the Child Protection Act, it was more meaningful to focus on the meaning of the statutory term "lascivious exhibition," rather than simply on the term "exhibition."[304] The court found that the term "lascivious" is defined as "[t]ending to excite lust; lewd; indecent; obscene; sexual impurity; tending to deprave the morals in respect to sexual relations; licentious."[305] The court stated that the term "lascivious exhibition" refers to a "depiction which displays or brings forth to view in order to attract notice to the genitals or pubic area of children, in order to excite lustfulness or sexual stimulation in the viewer."[306] Thus, the court concluded that this definition does not contain a nudity requirement and is consistent with the multi-factor *Dost* test.[307] The court further concluded that such a definition does not contain or suggest a requirement that the contours of the genitals or pubic area be discernible or otherwise visible through the child subject's clothing.[308]

The court next addressed the part of the Act which indicates that the proscribed materials must depict "the use of a child engaging in sexually explicit conduct" to consider whether it must be shown that the child displayed some lascivious intent, as argued in the Justice Department's second Supreme Court brief.[309] Noting that the government had receded somewhat from the view set forth in its second brief,[310] the court of appeals rejected "any contention,

303. *Id.*

304. *Id.*

305. *Id.* (quoting BLACK'S LAW DICTIONARY 882 (6th ed. 1990)).

306. *Id.*

307. United States v. Knox, 32 F.3d 733, 745-46 (3d Cir. 1994), *cert. denied*, 1994 WL 512613 (U.S. Jan. 17, 1995). For an explanation of the *Dost* factors, see *supra* notes 150-152 and accompanying text.

308. 32 F.3d at 746. The court indicated in a footnote that, even if it were to agree with the government that the correct statutory standard requires the genitals or pubic area of the child depicted to be discernible through his or her clothing, it would have no trouble in upholding Knox's conviction. *Id.* at 746 n.11.

309. *Id.* at 746.

310. *Id.* For a discussion of the government's concession on this point, see *supra* note 296.

whether implied by the government or not, that the child subject must be shown to have engaged in sexually explicit conduct with a lascivious intent."[311] The court relied on the Ninth Circuit's decision in *United States v. Weigand*,[312] where that court stated:

> In the context of the statute applied to the conduct of children, lasciviousness is not a characteristic of the child photographed but of the exhibition which the photographer sets up for an audience that consists of himself or like-minded pedophiles. . . . The picture of a child "engaged in sexually explicit conduct" within the meaning of 18 U.S.C. §§ 2251 and 2252 as defined by [§ 2256(2)(e)] is a picture of a child's sex organs displayed lasciviously—that is, so presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur.[313]

Thus, the court found that "lasciviousness" is an inquiry that the factfinder must make "using the *Dost* factors and any other relevant factors given the particularities of the case, which does not involve an inquiry concerning the intent of the child subject."[314]

The court stated that its interpretation of "lascivious" was consistent with the plain meaning of the statute and furthered Congress' intent to eradicate the pervasive harm in exploiting children in such depictions.[315] Thus, the court concluded that a "lascivious exhibition" under the Act requires "only that the material depict some 'sexually explicit conduct' by the minor subject which appeals to the lascivious interest of the intended audience."[316]

Applying this standard, the court found that the tapes in evidence violated the Act since, in some sequences, they showed the young girls, dressed in very tight leotards, bathing suits, or panties,

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311. 32 F.3d at 747.

312. 812 F.2d 1239, 1244-45 (9th Cir.), *cert. denied*, 484 U.S. 856 (1987).

313. United States v. Knox, 32 F.3d 733, 747 (3d Cir. 1994), *cert. denied*, 1994 WL 512613 (U.S. Jan. 17, 1995) (quoting *Weigand*, 812 F.2d 1239, 1244 (9th Cir.), *aff'g* United States v. Dost, 636 F. Supp. 828 (S.D. Cal. 1986), *cert. denied*, 484 U.S. 856 (1987)).

314. *Id.*

315. *Id.*

316. *Id.*

spreading their legs to allow full view of their pubic area, or "dancing or gyrating in a fashion indicative of adult sexual relations."[317] The court stated that the totality of the factors demonstrated that the minor subjects "were engaged in conduct—namely, the exhibition of their genitals or pubic area—which would appeal to the lascivious interest of an audience of pedophiles."[318]

The court then addressed an aspect of its prior decision in *Knox*. The court stated that, although it had previously concluded that the legislative history supported its interpretation of the statutory language, upon reconsideration, it now concluded that the legislative history is "wholly silent as to whether Congress intended the statutory term 'lascivious exhibition of the genitals or pubic area' to encompass non-nude depictions of these body parts."[319] The court of appeals explained that the controversial Wald letter,[320] relied upon in the court of appeals' prior opinion to support the conclusion that Congress intended non-nude depictions to be encompassed within the Act, and also relied upon by Knox to refute this conclusion, was open to two plausible interpretations.[321] Due to these two competing interpretations, the court of appeals stated that the legislative history is not helpful in determining Congress' intent.[322] The court, however, concluded that Knox did not meet

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317. *Id.*

318. *Id.*

319. *Id.* at 747-48.

320. *See supra* note 48 and accompanying text.

321. *Knox* 32 F.3d at 748. Under the first interpretation, Congress' elimination of the word "nudity" from the original statute proposal was deliberate and intended to repudiate the earlier intention to restrict the statute's coverage to only nude exhibitions. *Id.* On the other hand, the court found that it was "arguably significant that the language suggesting that Congress clarify what types of nude portrayals would be prohibited was contained in the very letter recommending the substitution of the phrase 'lewd exhibition of the genitals' for the original nudity language." *Id.*

322. *Id.* The court of appeals noted in a footnote that it also did not rely on recent legislative pronouncements regarding the statute and the case. *Id.* at 749 n.14 (citing 139 CONG. REC. S14,976 (daily ed. Nov. 4, 1993)); 140 CONG. REC. H.2536 (daily ed. Apr. 20, 1994). For a discussion of these resolutions, see *supra* notes 283-285, 295 and accompanying text. The court stated that since the language of the Act was enacted in 1977 and amended in 1984, "these resolutions are post-enactment legislation which should be given little weight, if any . . . ." *Knox*, 32 F.3d 733, 749 n.14, *cert. denied*, 1994 WL 512613 (U.S. Jan. 17, 1995).

his burden of proving that Congress intended the statute to reach only a nude "lascivious exhibition of the genitals or pubic area" and refused to read a nudity requirement into a statute that has none.[323]

The court of appeals also found that the underlying rationale for the federal child pornography laws supported its conclusion that clothed exhibitions of the genitals are proscribed under the Act.[324] The court of appeals noted that the Supreme Court's decision in *New York v. Ferber* "relaxe[d] the *Miller* obscenity standard when pornographic materials depict minors since the government's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'"[325] The court of appeals also stated that the "use of children as subjects in pornographic materials is harmful to the physiological, emotional, and mental health of the child," and that the psychological effect of visually recording such exploitation of the child is "devastating and its elimination is of 'surpassing importance.'"[326]

The court explained that, since the child's exploitation is permanently recorded, the pornography may haunt the child for a lifetime because he or she will be aware that the depiction is circulating throughout the masses.[327] The court also explained that the offense is committed against the privacy and dignity of the child and results in the exploitation of the child's vulnerability:

> Human dignity is offended by the pornographer. American Law does not protect all human dignity; legally, an adult can consent to its diminishment. When a child is made the target of the pornographer-photographer, the statute will not suffer the insult to the human spirit, that the child should be treated as a thing.[328]

The court of appeals noted that "controlling the production and

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323. *Knox*, 32 F.3d at 749.

324. *Id.*

325. *Id.* (quoting New York v. Ferber, 458 U.S. 747, 756-57 (1982)).

326. *Id.* at 749 (quoting *Ferber*, 458 U.S. at 757).

327. *Id.* (quoting *Ferber*, 458 U.S. at 759 n.10).

328. United States v. Knox, 32 F.3d 733, 750 (3d Cir. 1994) (quoting United States v. Weigand, 812 F.2d 1239, 1245 (9th Cir.), *cert. denied*, 484 U.S. 856 (1987)).

dissemination of child pornography is of paramount importance since pedophiles often use child pornography to seduce other children into performing sexual acts."[329] Furthermore, the court found that in order to vindicate the government's compelling interest in protecting children from exploitation through pornographic materials, the "arsenal of available enforcement mechanisms is more extensive" than when the subjects of pornographic materials are adults.[330] The court of appeals considered the facts of the *Knox* case, along with the rationale underlying the Act and concluded that the Act applies to the sorts of non-nude depictions of children at issue in *Knox*.[331]

The court of appeals next rejected Knox's argument that the Third Circuit's decision in *United States v. Villard*[332] mandated exposure of the genitals to find a violation of the Act. In *Villard*, the United States Court of Appeals for the Third Circuit stated that "more than mere nudity" is required for a violation of the Act.[333] In *Knox*, the court of appeals concluded that this requirement did not contemplate nudity as a prerequisite for a violation of the Act, but instead stated the "obvious principle that nudity alone is insuf-

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329. *Id.* at 750 (citing Osborne v. Ohio, 495 U.S. 103, 111 (1990)).

330. *Id.* at 750. *Compare* Stanley v. Georgia, 394 U.S. 557, 568 (1969) (statute prohibiting private possession of obscenity found unconstitutional) *with* Osborne v. Ohio, 495 U.S. 103, 108 (1990) (upheld statute criminalizing at-home possession of child pornography due to compelling interest to protect children).

331. *Knox*, 32 F.3d 733, 750 (3d Cir. 1994), *cert. denied*, 1994 WL 512613 (U.S. Jan. 17, 1995). The court of appeals stated:

> The harm Congress attempted to eradicate by enacting the child pornography laws is present when a photographer unnaturally focuses on a minor child's clothed genital area with the obvious intent to produce an image sexually arousing to pedophiles. The child is treated as a sexual object and the permanent record of this embarrassing and humiliating experience produces the same detrimental effects to the mental health of the child as a nude portrayal. The rationale underlying the statute's proscription applies equally to *any lascivious* exhibition of the genitals or pubic area whether these areas are clad or completely exposed.

Id. (emphasis added).

332. 885 F.2d 117 (3d Cir. 1989). The *Villard* case dealt with depictions of a male child whose genitals were sticking out and exposed through the leg of his shorts. *Id.*

333. *Id.* at 121.

ficient to constitute a *lascivious* exhibition."[334]

The court of appeals also addressed Knox's argument that the court's reliance on *Villard* in its prior opinion was misplaced.[335] Knox argued that the determination of whether a certain depiction visually displays a child's genitals is a threshold question, whereas evaluation of the *Dost* factors is relevant for the subsequent determination of whether such a depiction is lascivious.[336] The court noted its previous reliance on *Villard* and stated that it had concluded that the case was supportive of its interpretation in *Knox* because "inclusion of the fourth *Dost* factor, 'whether the child is fully or partially clothed, or nude,' seemed to 'rest[ ] on the implicit assumption that a clothed exhibition of the genitals is criminalized under the statute.'"[337] Upon reconsideration, the court of appeals agreed with Knox and the *Arvin* court[338] that the inquiry into whether the depiction visually exhibits the genitals is a "threshold determination not necessarily guided by the *Dost* factors."[339] However, the court concluded that the *Dost* factors were not completely irrelevant to this threshold determination.[340] The court also concluded that, although the fourth *Dost* factor might not provide support for its interpretation of the Act, it was "clearly not inconsistent with that interpretation."[341]

Based on the foregoing, the court of appeals concluded that the Act requires no nudity or discernability of the child's genitals or pubic area, and that the statutory language is clear and unambigu-

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334. *Knox*, 32 F.3d at 750.

335. *Id.*

336. *Id.* (quoting United States v. Arvin, 900 F.2d 1385, 1391 (9th Cir.), *cert. denied*, 498 U.S. 1024 (1991)).

337. *Id.* (citing United States v. Knox, 977 F.2d 815, 823 (3d Cir. 1992)).

338. In *United States v. Arvin*, the defendant was convicted of knowingly mailing photographs of young girls, shown nude with their genitals exposed. 900 F.2d 1385, 1387 (9th Cir.), *cert. denied*, 498 U.S. 1024 (1991). The court stated that the jury had to find that the pictures visually depicted the minors' genitals or pubic area as a threshold determination before considering whether they were lascivious. *Id.* at 1391.

339. United States v. Knox, 32 F.3d 733, 751 (3rd Cir. 1994), *cert. denied*, 1994 WL 512613 (U.S. Jan. 17, 1995).

340. *Id.*

341. *Id.*

ous.[342] The court also concluded that the rule of lenity should not apply in *Knox* in order "to defeat the clear intent of Congress to prohibit the possession of child pornography to the maximum extent allowable under the Constitution."[343]

The Justice Department recently filed a Supreme Court brief in response to Knox's request for appeal.[344] The brief, signed by Attorney General Janet Reno, rather than by any member of the Solicitor General's office, changed the position taken in the government's second brief.[345] In an accompanying statement, Reno "praised as sound and persuasive the interpretation [of the Act] adopted by the United States Court of Appeals for the Third Circuit."[346]

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342. *Id.*

343. *Id.* (citing National Org. for Women, Inc. v. Schiedler, 114 S. Ct. 798, 806 (1994)). *See also* Liparota v. United States, 471 U.S. 419, 427 (1985) ("the rule of lenity is not to be applied where to do so would conflict with the implied or expressed intent of Congress"). The court also rejected Knox's contention that, because his prosecution and conviction for violating the Act was the first involving materials containing no nudity, the rule of lenity must be applied. *Knox*, 32 F.3d at 751 n.15. The court explained that this contention misconceived the object of the rule and would produce an absurd result. *Id.* "First, the application of the rule of lenity is not dependent whatsoever on whether there have been successful prosecutions under the statute at issue." *Id.* (comparing Ratzlaf v. United States, 114 S. Ct. 655, 662-663 (1994)). Second, the court stated that, if it were to agree with Knox's argument, "then the government would never be able to successfully prosecute a person for violating a newly enacted criminal statute, nor would the government be able to successfully proceed under a theory different from that which has yielded convictions in the past." *Id.*

The court of appeals also concluded that its interpretation of the Act does not render the statute unconstitutionally overbroad. *Knox*, 32 F.3d at 751. The court's rationale concerning this issue is essentially identical to the rationale of its previous opinion. *See supra* notes 219-221 and accompanying text.

344. *See* Greenhouse, *supra* note 27, at A15.

345. *Id.*

346. *Id.*

III. AN ANALYSIS OF THE ACT AND ITS APPLICATION IN *KNOX*

A. *Congressional Intent, Legislative History, and Statutory Language Support Prosecutions of Certain Depictions of Clothed Children*

Knox is the first case to address instances of child pornography in which the children's pubic areas are opaquely covered. Apparently, the type of child exploitation found in the Nather tapes—films depicting clothed children—is a new trend.[347] A source close to the prosecutors who charged Knox in 1991 stated that these films were a type of new "pseudo-pornography," and, to some commentators, appeared to be legal under an interpretation of the existing statute.[348] As the United States Court of Appeals for the Third Circuit correctly affirmed, however, the statute's language, combined with its legislative history and the stated congressional intent to protect children from sexual exploitation, provide an interpretation of the Act which criminalizes the types of depictions at issue in *Knox*.

The court of appeals correctly concluded that the statutory term, "lascivious exhibition of the genitals or pubic area," does not explicitly state that prohibited depictions of child pornography require nudity or visibility of the genitals or pubic area. As the court noted, although it may be unclear from the legislative history whether in 1977 Congress addressed depictions which did not involve nudity or visibility,[349] there is no indication that Congress specifically limited the statute's applicability only to depictions involving nudity or visibility.

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347. Phelps, *supra* note 291, at 21. "[B]ecause of tough enforcement, commercial production of child pornography had been almost nonexistent for more than a decade, when [Nather] started making the pseudo-pornography in the *Knox* case." *Id.*

348. *Id.*

349. Presumably, this is because child pornographers were not as creative one or two decades ago, and they had no reason to be. Prior to the 1977 Act, explicit depictions of children engaged in a wide variety of sexual activities were readily available within more than 260 different publications catering to pedophiles. S. REP. NO. 438, *supra* note 39, at 5, *reprinted in* 1978 U.S.C.C.A.N. at 43. Even with the 1977 Act in effect, child pornographers were able to create child pornography with impunity provided they did not meet the *Miller* test for obscenity. *See supra* note 50. Only in 1984 did Congress amend the statute to remove the obscenity requirement. *See supra* note 101.

Although there may have been a lack of legislative clarity in drafting the statute, the congressional intent behind the federal child pornography laws undoubtedly was to prevent children from being sexually exploited by child pornographers.[350] Other indicia not utilized by the Third Circuit on remand concerning the legislative history and the language of the statute itself further support the court's interpretation of the Act. Although the court correctly refused to rely on recent legislative resolutions concerning the Act and the *Knox* case because of their unreliability,[351] the court could have considered the legislative history of the 1984 amendments contained in The Child Protection Act to bolster the analysis for its interpretation and rationale based on congressional aim. First, Congress' primary goal—to wipe out the child pornography industry in an effort to protect children—was emphasized by almost all of the members of Congress who testified at the 1977 Hearings and in support of the 1984 amendments.[352] Furthermore, it is important to recognize that "the main thrust of the Act is to protect children and punish child abuse; it is not so much a measure created to penalize pornography for its own sake."[353]

In addition, the language used in the Act clearly demonstrates Congress' intent to eradicate the child pornography industry by outlawing all forms of child pornography. The term "simulated" remains in the Act to modify each of the definitions of "sexually explicit conduct," including "lascivious exhibition of the genitals or pubic area."[354] During the congressional hearings for the 1984 amendments to the 1977 Act, two proposals suggested defining the term "simulated" in the 1984 amendments.[355] Several lawyers and members of Congress disagreed with these proposals and instead

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350. *See* 123 CONG. REC. 33,056 (1977) (the primary purpose of the child pornography laws is to protect children from exploitation).

351. *See supra* note 322.

352. *See, e.g., 1977 Hearings, supra* note 40, at 74-75; 123 CONG. REC. 33,043 (1977); 123 CONG. REC. 33,048-49 (1977); 129 CONG. REC. 7198 (1984).

353. Weiss, *supra* note 33, at 330-332. Representative Hughes of New Jersey, a sponsor of the 1984 Act, specifically stated that "this is a child protection law, a law which punishes child abuse, not pornography." 129 CONG. REC. H9780 (1983).

354. 18 U.S.C. § 2256(2)(E) (1988 & Supp. IV 1992).

355. *See supra* notes 92-93, 107.

stated that the term "simulated" should be left undefined in order to prevent loopholes that imaginative pornographers might find.[356] Senator Grassley agreed that the revised statute should preserve the term "simulated" without definition in order to thwart the efforts of child pornographers.[357] Senator Marriot also agreed that the term simulated should remain undefined and emphasized that those who would exploit children in the production of pornography "would be very willing to take advantage of any loophole they thought might be available to avoid prosecution."[358]

Congress heeded these warnings and refused to limit the term "simulated" to a precise definition when it enacted the 1984 amendments to the statute.[359] Concerned about potential loopholes within the statute and intent on creating stringent legislation to wipe out the child pornography industry, Congress also refused to provide an affirmative defense for materials with literary, artistic, scientific, social, or educational value.[360] Thus, the Act's proscription against depictions containing simulated lascivious exhibition of the genital or pubic area applies to certain panty-flashing videos, such as those at issue in *Knox*. Such videos, by their nature, contain simulated lascivious exhibitions of the genital or pubic areas of children and, therefore, sexually exploit children in violation of the Act.

The court of appeals properly rejected the application of the rule of lenity to *Knox*. Although Knox claimed that he did not have fair warning that his conduct was criminal and that the rule of lenity should have applied in his case, the rule of lenity is not applicable unless there is a "grievous ambiguity or uncertainty in the language and structure of the Act,"[361] such that even after a court has "seize[d] everything from which aid can be derived," including the language and structure, legislative history, and moti-

356. *See supra* note 94 and accompanying text.

357. *See supra* notes 96-98 and accompanying text.

358. *See supra* note 95 and accompanying text.

359. *See supra* notes 98-108 and accompanying text.

360. *See supra* note 109 and accompanying text.

361. Chapman v. United States, 500 U.S. 453, 463 (1991) (quoting Huddleston v. United States, 415 U.S. 814, 831 (1974)).

vating policies of the statute, it is still "left with an ambiguous statute."[362]

The Supreme Court has never required "that every permissible application of a statute be expressly referred to in its legislative history."[363] Rather, the Supreme Court has rejected narrow interpretations of statutes when they are found to be "inconsistent with Congress' general purpose" behind the Act.[364] Furthermore, the Supreme Court has stated that, "where Congress has manifested its intent, we may not manufacture ambiguity in order to defeat that intent."[365] As expressed above, the Third Circuit reasonably interpreted the term "lascivious exhibition" to apply to depictions of clothed children in certain instances. Although its drafters did not mention depictions of children who are not nude, the legislative history of the Child Protection Act contains numerous statements by members of Congress of their intention to close any loopholes that pornographers might find in order to evade the Act.[366] Moreover, as the court of appeals correctly concluded, Congress' general purpose and motivating policies in legislating against child pornography are consistent with the finding that Knox's conduct was a violation of the Act.

B. *The* Dost *Factors Apply When Determining "Lascivious Exhibitions" of Clothed Children*

1. The *Dost* Factors As Applied to the Facts in *Knox*

The court of appeals properly utilized the *Dost* factors in *Knox*. The court of appeals noted that the question of whether the depiction at issue visually exhibits the genitals or pubic area is a threshold determination under *Arvin*. It significantly concluded, however, that the *Dost* factors are not completely irrelevant to this threshold

362. United States v. Bass, 404 U.S. 336, 347 (1971) (quoting United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall, C.J.)).

363. Moskal v. United States, 498 U.S. 103, 111 (1990).

364. *Id.* at 113.

365. Bifulco v. United States, 447 U.S. 381, 387 (1980).

366. *See supra* notes 95-98 and accompanying text.

determination.[367] Consideration of the multi-factor *Dost* test is crucial to a complete analysis of the coverage of the Act, and *Dost* provides an interpretation that will effectively counteract the increasing creativity of child pornographers who attempt to betray Congress' intention of protecting children against sexual exploitation.

In the *Dost* case, the court set forth six factors to be considered when determining whether a depiction constitutes a lascivious exhibition.[368] The court of appeals properly applied these factors to *Knox* in conjunction with its newly articulated standard: that a "'lascivious exhibition of the genitals or pubic area' of a minor requires only that the material depict some 'sexually explicit conduct' by the minor subject which appeals to the lascivious interest of the intended audience."[369] This is an appropriate interpretation of the statute because very few images "where a minor's [pubic] area is not fully exposed will constitute a lascivious exhibition since the fact that the child is clothed is a factor militating against a finding of lascivious."[370] The totality of the factors present in the Nather tapes—the minor's abbreviated attire, the spreading and extending of their legs, their dancing or gyrating in a fashion indicative of adult sexual relations, and the tapes' appeal to the lascivious interest of an audience of pedophiles—demonstrated that they were prohibited child pornography under the Act.

Specific application of other *Dost* factors, as well as other relevant factors, to the Nather tapes also would have been appropriate. For instance, the focus of the depictions in the Nather tapes is obviously on the child's pubic area, despite its being covered by clothing. In addition, photographic or videotaped depictions of

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367. United States v. Knox, 32 F.3d 733, 751 (3d Cir. 1994), *cert. denied*, 1994 WL 512613 (U.S. Jan. 17, 1995).

368. United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff'd sub nom.* United States v. Weigand, 816 F.2d 1239 (9th Cir.), *cert. denied*, 484 U.S. 856 (1987); *see supra* note 151 and accompanying text.

369. *Knox*, 32 F.3d at 747.

370. United States v. Knox, 977 F.2d 815, 823 (3d Cir. 1992), *cert. granted*, 113 S. Ct. 2926, *vacated and remanded*, 114 S. Ct. 375 (1993), *aff'd*, 32 F.3d 733 (3d Cir. 1994), *cert. denied*, 1994 WL 512613 (U.S. Jan. 17, 1995).

children do not normally contain scenes consisting of focusing and zooming in on his or her clothed genital or pubic area for extended periods of time. These types of depictions may suggest a sexual coyness to the viewer, even without the child dancing in a sexual manner, since the child is allowing him- or herself to be filmed in such an unnatural manner. Moreover, in addition to the Nather brochures' assertions,[371] the fact that some parts of the tapes featured a female child's body from the navel to the thighs[372] demonstrates that these depictions were intended and designed to elicit a sexual response in the intended viewer.

This conclusion should also take into consideration other factors not mentioned by the court, but which seem relevant in this case as required under the *Dost* test. Such factors include: the time the photographer spent zooming up their skirts to view the children's pubic areas; and the overall content of the tapes, including the camera zooming in on the exposed nipple of one child. In addition, these children were apparently instructed by someone off-camera to lift up their knees to allow the camera full view of their panties.[373] The contents of Knox's videotapes, therefore, meet the *Dost* test and support a finding of a "lascivious exhibition."

2. The Third Circuit Properly Rejected the Justice Department's "Posing or Acting Lasciviously" Requirement as Inappropriate

The Justice Department's requirement in its second Supreme Court brief that the child must be posing or acting lasciviously would inappropriately limit the opportunities to prosecute child pornographers under the Act. Although the Act requires a finding of lasciviousness, a term to be applied by the courts but purposely left undefined,[374] the court of appeals correctly concluded that the *Dost* factors do not hinge on the intent of the child subject.[375]

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371. *See supra* note 191.

372. United States Brief (Days) at 5.

373. Supreme Court Brief of National Law Center for Children at 10; *see supra* note 193 and accompanying text.

374. *See supra* note 147 and accompanying text.

375. United States v. Knox, 32 F.3d 733, 747 (3d Cir. 1994), *cert. denied*, 1994 WL

In addition, there is case law interpreting the Act that the court of appeals could have utilized to further support its rationale that lasciviousness is not solely dependent on the sexual posing or acting of the child depicted.[376] For instance, a depiction of a child who is sleeping[377] or drugged can still be illegal under the Act if the camera is focused on the child's genital or pubic area or an adult or another child is touching those areas. The child depicted in this instance could not be said to have posed or acted for these pictures, yet the offense to the dignity and privacy rights of the child filmed in such a way is evident. Such depictions still constitute the sexual exploitation of the child under the Act. The Justice Department's new "posing" requirement would have wrongly undermined worthy prosecutions under the Act.

The court of appeals, however, seems to have failed to account for depictions of children who may be filmed for Nather- type tapes while sleeping or drugged. There may be a future issue raised as to whether such a depiction could meet the Third Circuit's newly-articulated requirement that the material "depict some 'sexually explicit conduct' by the minor which appeals to the lascivious interest of the intended audience."[378] Although a depiction of a clothed sleeping or drugged child which lasciviously exhibited that child genitals would be rare, future courts should recognize the possibility. The child in such a depiction is not engaged in any "sexually explicit conduct" intentionally or otherwise, but the courts could find that the material depicts the child in such a manner because of his or her position, setting, etc.

C. *Policy Considerations: Protecting Our Children*

The court of appeals correctly noted the significant policy reasons, recognized by the United States Supreme Court, for prohibit-

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512613 (U.S. Jan. 17, 1995).

376. *See supra* note 152 and accompanying text.

377. *See* United States v. Wolf, 890 F.2d 241, 242 (10th Cir. 1989) (depictions of sleeping child whose nude lower body was photographed constituted child pornography); *see supra* notes 169-174 and accompanying text.

378. *Knox*, 32 F.3d at 747.

ing the type of videotapes found in Knox's possession. The Supreme Court has traditionally afforded greater latitude to the regulation of pornographic depictions of children because of the compelling interest in safeguarding the physical and psychological well-being of minors, even in the area of constitutionally protected rights.[379] In *Osborne v. Ohio*, the Court noted that these materials are later used by pedophiles to seduce other children into sexual activity by a process known as "desensitizing."[380] Children who are reluctant to participate in sexual activity or pose for a pornographic picture can sometimes be convinced by viewing depictions of other children participating in it.[381]

The Third Circuit correctly recognized that children suffer guilt and emotional trauma from participating in depictions such as those contained in the Nather tapes. This trauma is exacerbated by the fear of knowing that the depictions are circulating throughout the masses.[382] Whether these children's genitals and pubic areas are covered or not, the children will suffer the psychological, mental, and emotional harms that the Act and the Court's conclusions in

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379. *See* New York v. Ferber, 458 U.S. 747, 756-57 (1982). In *Ferber*, the Court noted that "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens," in concluding that child pornography is a form of unprotected speech. *Id.* at 757 (quoting Prince v. Massachusetts, 321 U.S. 158, 168 (1944)). *See also* Ginsberg v. New York, 390 U.S. 629 (1968) (upheld New York Law protecting children from exposure to non-obscene literature); FCC v. Pacifica Found., 438 U.S. 726 (1978) (government's interest in the well-being of its youth justified special treatment of indecent broadcasting received by adults as well as children); Osborne v. Ohio, 495 U.S. 103 (1990) (prohibition against possession of child pornography complies with First Amendment and is not overbroad).

380. 495 U.S. 103, 111-12 (1990); *see also* FINAL REPORT, *supra* note 1, at 649 (discussing the desensitizing process used by pedophiles to seduce children into sexual activity with them or to pose for pictures). In *New York v. Ferber*, the Court noted that children who participate in the making of child pornography are often molested by adults in conjunction with the making of these materials and are unable to develop healthy relationships as they reach maturity. *Ferber*, 458 U.S. at 758-59 n.9.

381. FINAL REPORT, *supra* note 1, at 649.

382. "A child who has posed for a camera must go through life knowing that the recording is circulating with the mass distribution system for child pornography. . . .[h]e must carry with him the distressful feeling that his act has been recorded for all to see." Shouvlin, *supra* note 33, at 545. *See also* People v. Spargo, 431 N.E.2d 27, 31-32 (Ill. App. 1982) (noting that the continuing fear of exposure is as damaging as the initial sexual exploitation); FINAL REPORT, *supra* note 1, at 650. "Each time the pornography is exchanged the children involved are victimized again." *Id.* at 651.

Ferber and *Osborne* sought to prevent.[383]

A "lascivious exhibition" is difficult to define with clarity.[384] Thirty years ago Justice Stewart experienced similar difficulty when attempting to define obscenity.[385] In *Miller v. California*,[386] a majority of the Supreme Court finally agreed on a standard to be used to evaluate whether adult pornography is obscene and set forth a complex and restrictive test.[387] Such restrictiveness, however, need not exist when the sexual objects depicted are children.[388] The court of appeals' emphasis on *United States v. Weigand*,[389] and Judge Noonan's remarks regarding the privacy and dignity rights of the child[390] are significant in carrying out the congressional aim and motivating policies behind the Act. The Act was designed to protect children by prohibiting their sexual exploitation, and thus, the court's consideration of these dignity and privacy rights of the child was valid.[391]

Although the court in *Weigand* was concerned with a depiction of a nude child, the rationale applied in *Weigand* is also applicable

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383. *See* United States v. Knox, 977 F.2d 815, 821 (3d Cir. 1992), *cert. granted*, 113 S. Ct. 2926, *vacated and remanded*, 114 S. Ct. 375 (1993), *aff'd*, 32 F.3d 733 (3d Cir. 1994), *cert. denied*, 1994 WL 512613 (U.S. Jan. 17, 1995). Although the trauma and embarrassment experienced by a child when the child's genital and pubic areas are covered may be less than that of the child who is depicted nude in a "lascivious exhibition," the sexual exploitation of the child is still present in such a depiction. Thus, the governmental interest in protecting children from being used in such depictions is the same. *See supra* note 331 and accompanying text.

384. *See* United States v. Villard, 885 F.2d 117, 120-22 (3rd Cir. 1989).

385. Justice Stewart, in his concurring opinion in *Jacobellis v. Ohio*, stated, "I shall not today attempt further to define the kinds of material I understand to be embraced within [the Court's] shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it. . . ." *Jacobellis*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

386. 413 U.S. 15 (1973).

387. *See supra* note 50 and accompanying text.

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

389. 812 F.2d 1239 (9th Cir. 1987), *cert. denied*, 484 U.S. 856 (1987). The Ninth Circuit stated that the harms to the child—psychological, mental, and emotional—are collectively "the consequential damages that flow from the trespass against the dignity of the child." *Id.* at 1245.

390. *See supra* note 328 and accompanying text.

391. *See supra* note 328 and accompanying text.

to depictions of clothed children, such as those in the tapes at issue in *Knox*. The courts must address any depiction involving the sexual exploitation of children and should apply the Act to encompass Knox's tapes because the Act will not tolerate the offense to the child.

Additionally, reason and common sense mandate that such depictions be recognized as sexually exploitative. Children are made aware at a very early age that their genitals and pubic areas are private areas of the body and that such conduct is socially unacceptable. A child coerced by an adult photographer to engage in such depictions presumably will feel violated, ashamed, and victimized. Congress, in enacting the federal child pornography laws, and the Supreme Court, in *Ferber* and *Osborne*, sought to protect the child from this type of "invasion of the child's vulnerability."[392] Failure to hold the depictions at issue in *Knox* to fall within the parameters of the Act would, in effect, sanction the type of sexual exploitation evident in the Nather tapes, and would encourage producers and distributors to perpetuate the sexual abuse of children.[393]

Some argue that the Third Circuit's interpretation of the Act is overbroad and infringes on the First Amendment rights of advertisers, artists, film producers, and persons with innocuous photographs or videos of children.[394] However, the adoption of this interpretation in future cases does not appear to be as troublesome as some commentators presume. The Supreme Court has "insisted that the overbreadth involved be 'substantial' before the statute involved [is] invalidated on its face."[395] Parents and clothing advertisers do not, as a regular course of conduct, photograph or videotape the pubic area of their children or child models, respectively, so as to produce a depiction that can fairly be said to be a graphic and

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392. *See* United States v. Knox, 977 F.2d 815, 821 (3d Cir. 1992), *cert. granted*, 113 S. Ct. 2926, *vacated and remanded*, 114 S. Ct. 375 (1993), *aff'd*, 32 F.3d 733 (3d Cir. 1994), *cert. denied*, 1994 WL 512613 (U.S. Jan. 17, 1995) (citing *Weigand*, 812 F.2d at 1245).

393. *See* Supreme Court Brief of National Law Center for Children at 22-27.

394. *See supra* notes 293-294 and accompanying text.

395. *Ferber*, 458 U.S. at 769.

unnatural focus or close-up of these areas.[396] Film producers also will not be unduly burdened since using body doubles for scenes involving children engaged in "sexually explicit conduct" as defined by § 2256 is already an acceptable practice in the industry.[397]

In addition, as the court of appeals emphasized in its decision, the requirement of lasciviousness within the Act will always be the limiting principle when determining whether a particular depiction constitutes a "lascivious exhibition." The Act's prohibition against lascivious exhibitions of the genital or pubic areas of clothed children, when utilized on a case-by-case basis, has a legitimate reach which overshadows its arguably impermissible applications. It is the responsibility of future courts to protect children from the harmful effects of being sexually exploited by pornographers in accordance with the primary purpose underlying the Act. The Third Circuit has articulated the appropriate interpretation of the Act to combat this new wave in child pornography. Adoption of the Third Circuit's interpretation by future courts will stamp out the Nather-type of child pornography in its infancy, rather than permit pornographers and those who buy, reproduce, sell or exchange child pornography, such as Knox, to frustrate the intended purpose of the Act and sexually exploit countless children.

CONCLUSION

How can children whose pubic areas are covered be sexually exploited in visual depictions? The Nather tapes speak for themselves and illustrate just how inventive child pornographers can be in trying to evade federal child pornography laws. The United States Court of Appeals for the Third Circuit, however, has articulated the proper interpretation of the Act based on its' language,

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396. Supreme Court Brief of National Law Center for Children at 13.

397. Josephine R. Potuto, Stanley + Ferber = *The Constitutional Crime of At-Home Child Pornography Possession*, 76 KY. L.J. 15, 42 n.112 (1987-1988) (discussing the use of body doubles by major motion picture companies, particularly noting the use of a body double for Brooke Shields' role in *The Blue Lagoon*); *see also Ferber*, 458 U.S. at 763 & n.16. (stating that a person over the statutory age who perhaps looked younger could be utilized in the making of scenes which could be considered illegal under the Act).

legislative history, and motivating policies. These factors demonstrate that the Act prohibits the unnatural, extended close-up depictions of a child's clothed pubic area contained in the sexually exploitative Nather tapes, and it does so without unconstitutional overbreadth. Future courts should adopt the Third Circuit's interpretation of the Act to both protect children and curb this new child pornography. It is only by utilizing this interpretation of the Act that the courts will succeed in carrying out Congress' intent to protect children against sexual exploitation.

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