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THE PERVERSE LAW OF CHILD PORNOGRAPHY

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INTRODUCTION

But most of us carry in our hearts the Jocasta who begs Oedipus for God's sake not to enquire further.

—letter of Schopenhauer to Goethe, Nov. 11, 1815 [1]¹

Child pornography law is the least contested area of First Amendment jurisprudence. In a way, this should come as no surprise. There is not an acceptable “liberal” position when it comes to the sexual victimization of children. What could possibly be controversial about laws that prohibit pictures of children forced into sex acts? [2]² Even mentioning the First Amendment as a problem in this context seems inappropriate and cold. In fact, if you mention the First Amendment in this context, someone might accuse you of being a pedophile. As a lawyer who represents abused children put it:

In truth, when it comes to child pornography, any discussion of censorship is a sham, typical of the sleight of hand used by organized pedophiles as part of their ongoing attempt to raise their sexual predations to the level of civil rights.[3]³

In spite of such attacks, in this Article I raise questions about the censorship imposed by child pornography laws. I argue that these laws, intended to protect children from sexual exploitation, threaten to reinforce the very problem they attack. The legal tool that we designed to liberate children from sexual abuse threatens to enslave us all, by constructing a world in which we are enthralled - anguished, enticed, bombarded - by the spectacle of the sexual child.

Child pornography law is a remarkably recent invention. Not until 1982 did the Supreme Court consider the distinct problem of child pornography, create it as a special category of

¹ [1]Quoted in Sandor Ferenczi, *First Contributions to Psycho-Analysis* 254(1980).

² [2]The Ferber case, for example, involved two films of young boys masturbating that were sold at a Manhattan adult bookstore. *New York v. Ferber*, 458 U.S. 747, 751-53 (1982).

³ [3] Andrew Vachss, *Age of Innocence*, *Guardian* (London), April 17, 1994, at 14.

constitutional inquiry, and expel it from the protection of the First Amendment. [4]⁴ Since its conception, legal scholars have largely ignored it as an area of inquiry. [5]⁵ Unlike [*211] the burgeoning academic discourse that has grown up around obscenity law and adult pornography, the law of child pornography has been left alone to occupy its own peculiar and unpleasant realm.

⁴ [4] *Ferber*, 458 U.S. at 756, 764 (holding that "states are entitled to greater leeway in the regulation of pornographic depictions of children" and that "child pornography ... is unprotected by the First Amendment").

⁵ [5] Compared to other areas of First Amendment law, child pornography has been largely unexamined. Few law review articles have been written on the subject of child pornography and the First Amendment. The following articles discuss the issue in depth: Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 *Harv. J. on Legis.* 439 (1997); L. Steven Grasz & Patrick J. Pfaltzgraff, *Child Pornography and Child Nudity: Why and How States May Constitutionally Regulate the Production, Possession, and Distribution of Nude Visual Depictions Of Children*, 71 *Temp. L. Rev.* 609, 611-12 (1998); Josephine R. Potuto, *Stanley + Ferber = The Constitutional Crime of At-Home Child Pornography Possession*, 76 *Ky. L.J.* 15, 80 (1987-1988); John Quigley, *Child Pornography and the Right to Privacy*, 43 *Fla. L. Rev.* 347, 348 (1991); Frederick Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 *Sup. Ct. Rev.* 285, 317; Ronald W. Adelman, *The Constitutionality Of Congressional Efforts To Ban Computer-Generated Child Pornography: A First Amendment Assessment Of S.1237*, 14 *J. Marshall J. Computer & Info. L.* 483 (1996); Sandra Zunker Brown, *First Amendment - Nonobscene Child Pornography and Its Categorical Exclusion from Constitutional Protection: New York v. Ferber*, 102 *S. Ct.* 3348 (1982), 73 *J. Crim. L. & Criminology* 1337 (1982); Lisa S. Smith, *Private Possession of Child Pornography: Narrowing At-Home Privacy Rights*, 1991 *Ann. Surv. Am. L.* 1011; David T. Cox, *Litigating Child Pornography and Obscenity Cases in the Internet Age*, 4.2 *J. Tech. L. & Pol'y* 1 (1999), at <http://journal.law.ufl.edu/techlaw/4-2/cox.html>.

In contrast to the limited number of articles, there has been a significant number of student notes, particularly on the subject of child pornography on the Internet. Even so, the number of notes about child pornography is dramatically smaller than for notes addressing obscenity or adult pornography. Several articles and notes have analyzed child pornography laws in order to consider mens rea requirements. Others have examined the issues of statutory interpretation and scienter based on the case *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994).

One further explanation for the relative absence of interest by legal scholars in this field is that it has to do with children. As an art historian writes, "My own academic field dismisses the subject of the child as being trivial and sentimental, good only for second-rate minds and perhaps for women." Anne Higonnet, *Pictures of Innocence: The History and Crisis of Ideal Childhood* 13 (1998).

Yet, left to its own devices, child pornography has spawned an extraordinary and troubling body of case law. [6] ⁶ As legal scholars occupy themselves with more tasteful topics - and ones that may appear to present more serious challenges to free speech jurisprudence - the law of child pornography has undergone a significant expansion, largely unchecked by critical inquiry. From its relatively recent birth, the law of child pornography has come into adulthood,[7] ⁷ and an ungainly creature it is.

The dramatic expansion of child pornography law has not occurred in a vacuum. Rather, it has been caught up in a cultural maelstrom. As I document below, since the late 1970s, the problem of child sexual abuse has been “discovered” as a malignant cultural secret, wrenched out of its silent hiding place, and elevated to the level of a “national emergency.” [8] ⁸ At the center of this dark secret lurks child pornography, constituting both a hideous product - and some would say cause - of child molestation. [9] ⁹

Child pornography law presents the opportunity for a case study of how censorship law responds to and shapes a cultural crisis. We have two [*212] corresponding events. On the one hand, we have the “discovery” in the late 1970s of the twin problems of child sexual abuse and child pornography, and the continuation of the problems to the point where they have reached the level of an ongoing, “ever-widening” crisis. [10] ¹⁰ On the other hand, we have child pornography law. Born in the same period, created to solve the problem of child sexual abuse, child pornography law too has grown dramatically in the past two decades,

⁶ [6] Amy Adler, *Inverting the First Amendment*, 149 U. Pa. L. Rev (forthcoming April, 2001) [hereinafter Adler, *Inverting the First Amendment*]. In this separate article, I argue that the developments in child pornography law are of serious and unappreciated doctrinal significance. As both the definition of child pornography and the rationales for banning it have expanded, they have mutually undermined one another. These twin developments have had a synergistic effect: The result is that child pornography law has drifted quite far from its original purpose, to protect children from sexual abuse. And in doing so, child pornography law has introduced into the First Amendment a radical view of speech, how it works and why we restrict it.

⁷ [7] Perhaps only adolescence.

⁸ [8] Vikki Bell, *Interrogating Incest: Feminism, Foucault, and the Law* 2 (1993); Ian Hacking, *The Making and Molding of Child Abuse*, 17 *Critical Inquiry* 253 (1991) [hereinafter Hacking, *Making and Molding*]; see also Florence Rush, *The Best Kept Secret: Sexual Abuse of Children* (1980).

⁹ [9] *Infra* notes 28-43 and accompanying text.

¹⁰ [10] Philip Jenkins, *Moral Panic: Changing Concepts of the Child Molester in Modern America* 147 (1998) (quoting Ernest Volkman & Howard L. Rosenberg, *The Shame of the Nation*, *Fam. Wkly.*, June 2, 1985, at 4).

expanding and proliferating along with the underlying problem that it targets. Yet, curiously, the law's expansion has not solved the problem, but only presided over its escalation. As child pornography law has expanded since the late 1970s, so has a "culture of child abuse," [11]¹¹ a growing "panic" [12]¹² about the threat to children.

What, if any, is the relationship between these two concurrent phenomena - the expansion of child pornography law and the growing problem of child sexual abuse, including child pornography? Does their correlative temporal connection allow us to draw any conclusions about a possible causal relationship?

There is a standard, conventional explanation for this correlation. This account casts law in a reactive stance: As the sexual exploitation of children, or at least our awareness of the problem, [13]¹³ has risen, legislatures and courts have responded by passing and upholding tougher child pornography laws. As the crisis has surged, so has the law. In this view, cultural horror drives law to play a game of catch-up. Law is always a step behind the problem, racing to keep pace with a burgeoning social crisis.

I am sure that is at least part of what is going on. But in this Article, I propose two alternative readings - readings that do not exclude the conventional account described above, but supplement it. In the first reading, I explore the possibility that certain sexual prohibitions invite their own violation by increasing the sexual allure of what they forbid. I suggest that child pornography law and the eroticization of children exist in a dialectic of transgression and taboo: The dramatic expansion of child pornography law may have unwittingly heightened pedophilic desire.

I then turn to a second reading, which reveals the previous one to be an only partially satisfactory account. In the second reading, I view law and the culture it regulates not as dialectical opposites, but as intermingled. Child pornography law may represent only another symptom of and not a solution to the problem of child abuse or the cultural fascination with sexual children. The cross purposes of law and culture that I describe above (law as prohibition, which both halts and incites desire) [*213] may mask a deeper harmony between them: The legal discourse on prohibiting child pornography may represent yet another way in which our culture drenches itself in sexualized children.

¹¹ [11] Richard Goldstein, *The Girl in the Fun Bubble*, Village Voice, June 10, 1997 at 41 [hereinafter Goldstein, *The Girl in the Fun Bubble*].

¹² [12] *Infra* note 36 and accompanying text.

¹³ [13] *Infra* Part I.B.1.

Child pornography law explicitly requires us to take on the gaze of the pedophile in order to root out pictures of children that harbor secret pedophilic appeal.[14] ¹⁴

The growth of child pornography law has opened up a whole arena for the elaborate exploration of children as sexual creatures. Cases require courts to engage in long, detailed analyses of the “sexual coyness” or playfulness of children, and of their potential to arouse. [15] ¹⁵ Courts have undertaken Talmudic discussions of the meaning of “pubic area” and “discernibility” of a child’s genitals in a picture at issue. [16] ¹⁶ But even when a child is pictured as a sexual victim rather than a sexual siren, the child is still pictured as sexual. Child pornography law becomes in this view a vast realm of discourse in which the image of the child as sexual is preserved and multiplied.

The point of this Article is that laws regulating child pornography may produce perverse, unintended consequences and that the legal battle we are waging may have unrecognized costs. [17] ¹⁷ I do not doubt, however, that child pornography law has substantial social benefits. In fact, I do not doubt that these benefits might outweigh the costs detailed. I nonetheless focus on these costs as a means to unsettle the confident assumption of most courts, legislators, and academics that the current approach to child pornography law is

¹⁴ [14] *Infra* Part IV.A.

¹⁵ [15] See, e.g., *United States v. Dost*, 636 F. Supp. 828, 833 (S.D. Cal. 1986) (observing that a 14-year-old girl in photograph has “sexually coy attitude, staring directly at the camera with her head slightly bent to the side”).

¹⁶ [16] *Knox v. United States*, 32 F.3d 733, 746 (3d Cir. 1994) (discussing the discernibility of young girl's genitals through “thin but opaque clothing”); *Knox v. United States*, 977 F.2d 815, 819 (3d Cir. 1992) (evaluating medical treatises to determine whether the inner thigh is part of the “pubic area”); see also *infra* notes 274-305 and accompanying text.

¹⁷ [17] For some of the burgeoning literature on the unintended consequences of legal regulation, see Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich. L. Rev. 338, 386-87 (1997) (discussing conflict between “group norms” and “societal norms”); Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 Mich. L. Rev. 936, 937-38 (1991) (suggesting that some public policies may have “unintended cultural consequences”); Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 Stan. L. Rev. 247, 261 (1996) (exploring “myopic approach” of some regulations that lead to bad unintended consequences); Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. Chi. L. Rev. 407, 412-29 (1990) (exploring unintended consequences of regulatory measures).

unequivocally sound. I question their conviction that the more regulation we impose the more harm we avert.¹⁸ Ultimately, I raise questions about the nature of censorship itself.

Part I of this Article sets out a cultural and historical claim. First, I establish that child pornography is a subset of the larger problem of child [*214] sexual abuse and that the two are inextricable. Second, I argue that our culture has become preoccupied with child sexual abuse and child pornography in a way that it did not used to be. The preoccupation is only a recent phenomenon, the product of a dramatic shift in the way we view children.

In Part II, I trace the historical development of the law of child pornography. Here I outline how the cultural transformation in our notion of childhood sexual vulnerability has coincided with the birth and dramatic expansion of the law.

In Part III, I explore the first of two causal accounts of the chronological correlation between the regulation of child pornography and the increase in the crisis of child sexual abuse. I present the argument that the burgeoning law of child pornography may invite its own violation.

In Part IV, I present the final reading of the relationship between child pornography law and culture: The law may perpetuate and escalate the sexual representation of children that it seeks to constrain.

In a sense, even to ask the questions I raise in this Article is to open a Pandora's Box. Ultimately, they challenge deeply held assumptions about the nature of censorship, and about the relationship between law and the culture it regulates. Not only do these questions suggest the possibility that some kinds of rules are inevitably counterproductive, but the questions also place law in a different light, as an institution that actively creates sexual culture rather than an institution that merely responds to it.

I will limit my discussion of these problems to the finite realm of the law of child pornography. Although I strongly suspect the discussion may point to more universal application, I use the law of child pornography as a case study through which to contemplate

¹⁸ [18] Cf. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *Yale L.J.* 1, 3-4 (1997) (describing a "perverse" relationship between criminal procedure and substantive criminal law).

the peculiar problems that present themselves when law attempts to govern representations of sexual desire.[19]¹⁹

¹⁹ [19] My focus is on child pornography law as opposed to other laws governing child abuse. Although I believe that an investigation of some of those laws would add weight to my argument, I focus on child pornography law exclusively for two reasons: First, a limited case study allows for closer analysis; and second, part of my analysis depends on problems of language and representation that are unique to censorship law.

I. THE CULTURAL CRISIS OF CHILD SEXUAL ABUSE [20]²⁰

Attempts to evaluate the threat posed by [speech] inevitably become involved with ... the relative confidence or paranoia of the age.

- John Hart Ely, *Democracy and Distrust* [21]²¹ [*215]

Once the "best kept secret" of our society, [22]²² the sexual abuse of children has now emerged into the light of day - a topic regularly recurring in movies of the week, [23]²³

²⁰ [20] I use the word "culture" against the backdrop of an enormous body of scholarship, too extensive to cite here, in which the meaning of the term "culture" is hotly contested. One significant meditation on the meaning of culture was offered by anthropologist Clifford Geertz. Geertz once described culture as "a set of control mechanisms - plans, recipes, rules, instructions ... for the governing of behavior." Clifford Geertz, *The Interpretation of Cultures* 44 (1973). For a recent summary of the historically contingent nature of the term "culture," see Sally Engle Merry, *Law, Culture and Cultural Appropriation*, 10 *Yale J.L. & Human.* 575, 579-85 (discussing changing meanings of "culture"). Debates about the meaning of "culture" can present significant practical questions. See, e.g., Benedict Kingsbury, "Indigenous Peoples" in *International Law: A Constructivist Approach to the Asian Controversy*, 92 *Am. J. Int'l L.* 414, 414-16 (1998) (discussing the contested definition of cultural identity in international law and politics, and its implications for the concept of "indigenous peoples").

²¹ [21] John Hart Ely, *Democracy and Distrust* 112 (1980).

²² [22] Florence Rush, *The Best Kept Secret: Sexual Abuse of Children* (1980).

²³ [23] See, e.g., Diane Holloway, *Young and Sexy Got Old Fast*, *Austin Am.-Statesman*, Dec. 27, 1992, at 5 (describing popularity of child abuse dramas); Lee Margulies, *Focus on Fantasy and Nightmares*, *L.A. Times*, Feb. 8, 1986, at 13 (describing CBS "movie of the week" about child abuse).

political debate, [24]²⁴ television talk shows, [25]²⁵ and celebrity confessions.[26]²⁶ At the center of this discovery lies child pornography, which the Supreme Court considers a gruesomely potent subset of child sexual abuse.[27]²⁷

The Court's child pornography jurisprudence depends on this idea: Child pornography is child sexual abuse.[28]²⁸ Thus, at the very start of its inquiry into child pornography, the Court approvingly quoted one scholar who categorized child pornography as "an even

²⁴ [24] David Lauter & James Gerstenzang, *Accuracy of Bush, Clinton Accusations Varies*, L.A. Times, Oct. 11, 1992, at A36 (describing Bush/Clinton feud over child abuse statistics in Arkansas during Clinton's tenure as governor).

²⁵ [25] For one of the many books documenting media obsession with child sexual abuse, see Louise Armstrong, *Rocking the Cradle of Sexual Politics* 206 (1994) ("It was now [by 1993] a rare day when incest was not on the menu [of television shows].").

²⁶ [26] For example, Oprah Winfrey, Roseanne Barr, and Suzanne Somers have all publicly revealed that they were sexually molested as children. See Leslie Miller, *Sexual Abuse Survivors Find Strength to Speak in Numbers*, USA Today, Aug. 27, 1992, at 6D. One former Miss America who revealed her childhood victimization has now become a spokeswoman for incest victims. See Marilyn Van Debur Adler, *Speaking the Unspeakable*, Chi. Trib., May 26, 1991, at 3 (describing her abuse by her father from the age of five to eighteen).

²⁷ [27] *New York v. Ferber*, 458 U.S. 747, 758 (1982) (stating that "the distribution of [child pornography] is intrinsically related to the sexual abuse of children").

²⁸ [28] Attorney General's Commission on Pornography, *Final Report* 406 (1986) [hereinafter *Attorney General's Report*] ("Child pornography is child abuse."); 142 Cong. Rec. S-11900 (daily ed. Sept. 30, 1996) (statement of Sen. Biden) ("At the heart of the analysis ... is a very straightforward idea: Children who are used in the production of child pornography are victims of abuse, plain and simple. And the pornographers, also plainly and simply, are child abusers."); see also 132 Cong. Rec. S-14225-01 (daily ed. Sept. 29, 1986) (statement of Sen. Roth) ("Those who advertise in order to receive or deal in child pornography and child prostitution are as guilty of child abuse as the actual child molester"); Tina M. Beranbaum et. al., *Child Pornography in the Late 1970s in Child Pornography and Sex Rings* 9 (Ann W. Burgess, ed. 1984). See generally Jenkins, *supra* note 10, at 148 ("The belief that child pornography represented both the direct product and immediate cause of criminality made it easy to enlist support for [its] suppression"); *The Child Pornography Prevention Act of 1995 Before the Comm. on the Judiciary of the United States Senate, 103rd Cong. (1996)* (statement of Bruce A. Taylor, President and Chief Counsel, National Law Center for Children and Families) ("Pornography is at the center of the sexual exploitation of children. It is used for enticement, seduction, instruction, blackmail, trade, and sale.").

greater threat to [*216] the child victim than ... [routine] sexual abuse." [29] ²⁹ According to the Court, child pornography not only documents an underlying act of abuse - the sexual use of a child - but the recording of the act also becomes a collateral violation against the child's dignity. The circulation of the pictures comes to "haunt" the child, so that the initial act of abuse takes on a life of its own, exposing the child to perpetual reinjury. [30] ³⁰

There are further connections between child pornography and child sexual abuse. Some view child pornography as not merely the product, but also the cause of abuse. First, child pornography may be a tool of seduction. The Supreme Court has noted that "pedophiles use child pornography to seduce other children into sexual activity." [31] ³¹ Second, child pornography may incite its viewers to molest children. As Congress warned, it "whets [the]

²⁹ [29] Ferber, 458 U.S. at 759 n.10 (quoting David P. Shouvlín, Preventing the Sexual Exploitation of Children: A Model Act, 17 Wake Forest L. Rev. 535, 545 (1981)); see also William A. Stanmeyer, The Seduction of Society 88 (1984) ("Child pornography is the worst form of child abuse.").

³⁰ [30] Ferber, 458 U.S. at 759 n.10 ("Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place.") (quoting Shouvlín, *supra* note 29, at 545). The Court wrote that "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation." *Id.* at 759. The Court went on to explain that the production of child pornography is a "low-profile, clandestine industry" and that the "most expeditious if not the only practical method of law enforcement may be to dry up the market for this material" by punishing its production and distribution. *Id.* at 760.

³¹ [31] *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (citing Attorney General's Report, *supra* note 28, at 649).

sexual appetites” of pedophiles, creating their fantasies and stimulating them to victimize real children. [32]³²

[*217] This conception of child pornography - that it is sexual abuse, that it is in fact the core of sexual abuse - persists as the foundation of the approach taken by courts, legislators, politicians, and the media. [33]³³ For example, the Attorney General’s Commission on Pornography stated in its widely cited Report: “There can be no understanding of the special problem of child pornography until there is understanding of the special way in which child pornography is child abuse.” [34]³⁴ Therefore, in this Article, I will consider child pornography as a subset of the larger phenomenon of child sexual abuse and I will examine them in tandem.

³² [32] Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-26. This view of child pornography is similar to a familiar feminist argument against pornography: that pornography is the theory and rape is the practice. See Juliann Whetsell-Mitchell, *Rape of the Innocent: Understanding and Preventing Child Sexual Abuse* 209-10 (1995). For discussion of the constitutionality of the 1996 Act, see *infra* notes 196-305; see also Adler, *Inverting the First Amendment*, *supra* note 6 (criticizing the Act). There are at least two other familiar arguments about the relationship between child pornography and child abuse: First, that victims of either form of abuse will grow up to become victimizers who perpetuate the "cycle of abuse", Hearing Before the Comm. on the Judiciary, Subcomm. on Crime 4 (1997) (statement of D. Douglas Rehman); second, as the Ferber Court stated, sexually exploited children may be predisposed to self-destructive behavior such as drug and alcohol abuse or prostitution. Ferber, 458 U.S. at 758 (citing Densen-Gerner, *Child Prostitution and Child Pornography: Medical, Legal, and Societal Aspects of the Commercial Exploitation of Children* (1980)).

Although public discussion often presumes that there is a strong relationship between use of child pornography and molestation of children, the statistics on this connection are uncertain, not only in terms of causation, but even in terms of correlation. For example, in the Congressional testimony that prompted Congress to revise the law, an expert testified that most child molesters possess pornography. But not all possess child pornography; some possess only adult pornography. And there are, for obvious reasons, no studies of which I am aware that document how many people possess child pornography but do not molest actual children. The Child Pornography Prevention Act of 1995: Hearing Before the Comm. on the Judiciary of the U.S. Senate (statement of Bruce Taylor, Nat'l Law Center for Center for Children and Families), *supra* note 28, at 21.

³³ [33] For decisions repeating this assumption, which persists in all the case law on child pornography, see, e.g., *United States v. Arvin*, 900 F.2d 1385, 1389 (9th Cir. 1990); *United States v. Andersson*, 803 F.2d 903, 907 n.3 (7th Cir. 1986).

³⁴ [34] Attorney General's Report, *supra* note 28, at 406 (emphasis in original).

The statistics vary wildly on the incidence of both child sexual abuse and child pornography. [35]³⁵ What is clear is that social concern, indeed social panic, [36]³⁶ about the problem of child sexual abuse and the closely [*218] related problem of child pornography is a modern phenomenon that has grown significantly just over the last two decades. Scholars now routinely talk of the "recent discovery" [37]³⁷ of child sexual abuse, and of a vast, previously unknown underground network of child pornography at its center.

³⁵ [35] See *infra* notes 44-49 and accompanying text. Although I raise questions about the panic surrounding child sexual abuse and the way in which such panic has obscured accurate figures, I feel obliged to say that I do not doubt that child abuse happens. That said, my interest in this Article is not to uncover the "true" statistics on child sexual abuse, but rather to look at the way in which the statistics and everything else about the subject have come to be such a charged cultural preoccupation. Therefore, I do not purport to claim that some of the statistics others have offered are "true" and that other statistics are "false." My decision not to "take sides" does not stem from a doubt that there is a truth about child sexual abuse. Rather, it stems from two other factors: (1) my doubts about the ability of statistics to accurately reflect the truth in such an ideologically embattled and difficult to document crisis; and more importantly, (2) the focus of this Article, which is not to uncover the truth or falsity of the statistics, but rather to show that the statistics are contested, and to understand the implications of that contest.

This focus is in keeping with my approach in this Article. My method in this Part as well as in Part II emulates Foucault's practice of "genealogy." Foucault described genealogy, his empirical, documentary approach to history, as a "history of the present." Michel Foucault, *Discipline and Punish* 31 (Alan Sheridan trans., Pantheon Books 1977). Foucault's method "avoids the search for what 'really happened'" and asks instead how our particular way of thinking about and speaking about things arose. Bell, *supra* note 8, at 46. The goal is not to get at the origins, but to "identify the accidents, the minute deviations - or conversely, the complete reversals - ... that gave birth to those things that continue to exist and have value for us." Michel Foucault, *The Foucault Reader* 81 (Paul Rabinow ed., 1984). At another point, Foucault described his method as an effort "to question over and over again what is postulated as self-evident, to disturb people's mental habits." Michel Foucault, *Politics, Philosophy, Culture: Interviews and Other Writings 1977-1984*, at 265 (Alan Sheridan trans., Lawrence D. Kritzman ed., 1988).

³⁶ [36] The word "panic" appears constantly in literature about the sexual abuse movement. See, e.g., Jenkins, *supra* note 10, at 219-20 (noting that isolated events of sexual abuse often give rise to a sense of urgency within communities and among policymakers). The use of the term "panic" in this context tends to refer to the "moral panic" theory developed in the 1970s by British sociologists, most prominently Stuart Hall. See Stuart Hall, *Policing the Crisis* (1978); see also Stanley Cohen, *Folk Devils and Moral Panics* 9-26 (1972) (illustrating the emergence of collective episodes of juvenile deviance and the moral panics they both generate and rely upon for their growth); Erich Goode & Nachman Ben-Yehuda, *Moral Panics* 23-24 (1994) (attributing the term "moral panic" to Stanley Cohen).

³⁷ [37] Bell, *supra* note 8, at 2.

This assertion that we only “recently discovered” these intertwined problems may seem odd, given the public prominence that they have now attained. Declared a “national emergency” in 1990, [38]³⁸ the crisis over child sex abuse has taken center stage in our culture and politics, as the worst of all possible evils. [39]³⁹ Yet, in spite of our vigilance, the emergency shows no signs of abating: In 1993, the Secretary of Health and Human Services termed child abuse a “rising epidemic.” [40]⁴⁰

Indeed, in our present culture, concern over the crisis is so widespread that discussion of child sexual abuse may seem “inescapable.” [41]⁴¹ Yet, this was not always so. In fact, the awareness of child sexual abuse as a significant social problem began only in the late 1970s, [42]⁴² a few years before the Supreme Court heard *New York v. Ferber*, the case in which it created child pornography law as a distinct constitutional category. The same is true for child pornography itself. A decade prior to *Ferber*, child pornography was an unknown genre: Writing of *Ferber* in the 1982 Supreme Court Review, Professor Fred Schauer remarked that “the phenomenon of child pornography is so new that it would have been impossible to predict even ten years ago.” [43]⁴³

Did child sexual abuse and child pornography spring out of nowhere in the 1970s? First, I will consider what we know of sexual abuse more generally and then I will turn to child

³⁸ [38] Hacking, *Making and Molding*, supra note 8, at 257.

³⁹ [39] *Id.* at 253; see also Laura Kipnis, *Bound and Gagged: Pornography and the Politics of Fantasy in America* 5 (1996) (“Pedophilia is the new evil empire of the domestic imagination: now that communism has been defanged, it seems to occupy a similar metaphysical status as the evil of all evils . . .”).

⁴⁰ [40] James R. Kincaid, *Erotic Innocence: The Culture of Child Molesting* 79 (1998) [hereinafter Kincaid, *Erotic Innocence*]. The notion that child sexual abuse is on the rise is consistent with what some scholars describe as an “escalation theory” of sexual crime. One scholar asserts that this theory has been “the prevailing orthodoxy for most of the twentieth century.” Jenkins, supra note 10, at 9.

⁴¹ [41] Hacking, *Making and Molding*, supra note 8, at 257. In spite of the constant onslaught of discussion about child sexual abuse, there remains a surprising tendency to refer to it as a still undiscovered secret. See, e.g., Cynthia Grant Bowman & Elizabeth Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy*, 109 *Harv. L. Rev.* 549, 551 (1996) (arguing that our “culture has been slow to accept the continuing reality of child sexual abuse”).

⁴² [42] David Finkelhor, *A Sourcebook on Child Sexual Abuse* 10 (1986).

⁴³ [43] Frederick Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 *Sup. Ct. Rev.* 285, 311.

pornography itself. I present these sections in significant detail; my argument in Parts III and IV depends on [*219] an in-depth account of the cultural context in which child pornography law operates.

A. THE DISCOVERY AND RISE OF CHILD SEXUAL ABUSE

It is hard to state with confidence the actual statistics on the incidence of child sexual abuse. The field of calculating its existence is rife with discord and accusations. Of course, child sexual abuse exists. Yet, strangely, "experts" in the field have divided into camps, with little that they agree on. Battles rage over which statistics are correct; then battles rage over the interpretation of the statistics. The figures are so uncertain that a recent U.S. Department of Health and Human Services survey of studies on child sexual abuse stunningly reported that "rates for victimization for girls range from 6 to 62 percent" of the population, for boys "from 3 to 24 percent." [44] ⁴⁴

In spite of this uncertainty, the same survey nonetheless concluded that the number of reported cases of child sex abuse has risen dramatically in recent years.[45] ⁴⁵ Yet, in the thicket of conflicting statistics, it is unclear whether this rise represents an actual increase in incidents of abuse, or is attributable to other factors, such as an increase in awareness, better

⁴⁴ [44] Kathleen Coulborn Faller, Department of Health and Human Services, Administration for Children and Families, *Child Sexual Abuse: Intervention and Treatment Issues* 16 (1993) (emphasis added); see also Louise Armstrong, *Rocking the Cradle of Sexual Politics* 52 (1994) (noting that "statistics shot wildly all over the place" in the 1980s). A commonly cited figure is that one out of three girls in the United States is sexually abused before the age of eighteen. See Ellen Bass & Laura Davis, *The Courage to Heal* 24 (3d ed. 1994). The New York Times recently reported that experts estimated that about twenty to twenty-five percent of female adults have been sexually abused as children, up from an estimate of eighteen percent in 1994. See Jason DeParle, *Early Sex Abuse Hinders Many Women on Welfare*, N.Y. Times, Nov. 28, 1999, at 1.

⁴⁵ [45] Faller, *supra* note 44, at 17.

reporting,⁴⁶ [46] expanding definitions of what constitutes child sexual abuse,⁴⁷ [47] or as some skeptics contend, a rise in cultural [*220] hysteria.⁴⁸ [48] Many have argued that the growing attention paid to the problem of child sexual abuse stems from its power as a social metaphor, not from a significant rise in incidence. For example, two child advocates write:

The choice of child abuse as an official social problem and the timing of its occurrence cannot be explained solely in terms of the phenomenon of child maltreatment itself. Rather, the emergence of child abuse as a key social problem concerns, in part, its functions as a generative metaphor serving to displace other collective unconscious anxieties and contradictions in American society.⁴⁹ [49]

⁴⁶ [46] Although most would agree that reporting has improved, some experts still fear that child sexual abuse is vastly under-reported. See, e.g., Carey Goldberg, *Getting To the Truth in Child Abuse Cases: New Methods*, N.Y. Times, Sept. 8, 1998, at F1 (quoting Dr. Carolyn Newberger, an expert on sexual abuse at the Harvard Medical School, on studies suggesting that child abuse is still under-reported).

⁴⁷ [47] A consistent definition of sexual abuse has yet to arise. For a discussion of the expanding definition of child sexual abuse, see Kincaid, *Erotic Innocence*, supra note 40, at 79-80. One problem in defining sexual abuse is the complexity of the abusive process by which children are often emotionally lured into sexual relations with adults. For example, psychotherapist Dr. Mic Hunter, an expert on sexually abused boys, reports that "People like to talk about the sexual assault of children ... but that rarely happens, because it does not need to." Frank Bruni, *In an Age of Consent, Defining Abuse by Adults*, N.Y. Times, Nov. 9, 1997, at 3 (quoting Dr. Mic Hunter). Another expert explains that although it has been "demonized" and "branded heresy" to admit, children "sometimes participate without protest - and with apparent enthusiasm - in their victimization." Id.

For documentation of the shift in legal perceptions of child sexual abuse, see William E. Nelson, *Criminality and Sexual Morality in New York, 1920-1980*, 5 *Yale J.L. & Human.* 265, 266-67 (1993). Nelson describes the shift over the course of the twentieth century in courts' approaches to child sodomy cases; whereas once the young boy accusers had been dismissed as "half-witted youths," they are now portrayed as "child victims." Id. at 336 (comparing *People v. Deschessere*, 74 N.Y.S. 761, 764 (N.Y. App. Div. 1902) with *People v. Fielding* 385 N.Y.S.2d 17, 18-19 (N.Y. App. Div. 1976)).

⁴⁸ [48] In fact, a group of scholars have formed calling themselves the "new hysterians" (playing on the humanities movement called "new historians"). These scholars share an interest in modern outbreaks of mass hysteria, in which they include child sexual abuse as a prominent example. Elaine Showalter, *Hystories: Hysterical Epidemics and Modern Culture* 7-8, 144-46 (1997).

⁴⁹ [49] Nancy Scheper-Hughes & Howard F. Stein, *Child Abuse and the Unconscious in American Popular Culture*, in *The Children's Culture Reader* 178 (Henry Jenkins ed., 1998).

In the midst of the bitter debates about the incidence of child sexual abuse, one thing is clear: There has been a dramatic explosion of discussion about child sexual abuse in the last two decades.⁵⁰ [50] Prior to that time, it was barely recognized as a problem.⁵¹ [51] In fact, the term “child abuse” itself is of relatively recent vintage. According to philosopher Ian Hacking, the term only appeared in mainstream usage in 1962, in response to the alarming medical discovery of “battered-child syndrome.”⁵² [52] An instant [*221] media sensation, the discovery of this new syndrome led to an “explosion in child abuse literature” in the next decade.⁵³ [53] These early accounts of child abuse focused exclusively on physical violence against children. The sexual abuse of children was viewed as a separate and far less pressing issue than child battering. Yet, the two problems merged in public consciousness,⁵⁴ [54] until

⁵⁰ [50] See, e.g., Joel Best, *Threatened Children: Rhetoric and Concern About Child-Victims* 171 (1990) (“Why did concern about threats to children become widespread in the late 1970s and early 1980s [when] there was nothing new about physical or sexual abuse?”).

⁵¹ [51] Of course, there were earlier attempts to protect children, but as the text in this section should show, the new movement has a distinctive character. The most prominent child abuse movement prior to the seventies dates to the turn of the last century, and the foundation of the society for prevention of cruelty to children, an outgrowth of The American Society for the Prevention of Cruelty to Animals (ASPCA). Traditional obscenity law was premised on concern for the effect of obscenity on a vulnerable child audience. See *The Queen v. Hicklin*, 3 Q.B. 360, 369-73 (1868) (basing obscenity definition on the effects of isolated passages on the weakest members of society); see generally Walter Kendrick, *The Secret Museum* (1987) (recounting history of obscenity regulation, including Anthony Comstock's claim that vice threatened to corrupt the morals of children). Modern obscenity law also evidences special concern for the child audience. See *Ginsberg v. New York*, 390 U.S. 629, 634-37 (1968) (establishing “variable obscenity” standard; upholding statute prohibiting the sale of material to children when purchase of the same material by adults is protected).

⁵² [52] Hacking, *Making and Molding*, *supra* note 8, at 266 (citing Henry Kempe et al., *The Battered-Child Syndrome*, 181 JAMA 17 (1962) and *The Battered Child Syndrome*, 181 JAMA 42 (1962) (offering the dubious statistic that more children died from child abuse than from leukemia, cystic fibrosis, or muscular dystrophy)); see also Lela B. Costin et al., *The Politics of Child Abuse in America* 115-17 (1996) (examining the effects of Kempe's article on the attitudes of lawmakers toward child abuse); Scheper-Hughes & Stein, *supra* note 49, at 178 (“When C. Henry Kempe and his associates (1962) at Colorado General Hospital created a new diagnostic entity - the ‘Battered Child Syndrome’ - the American public finally sat up and took notice.”).

⁵³ [53] Hacking, *Making and Molding*, *supra* note 8, at 269.

⁵⁴ [54] According to Hacking, a 1975 article was the first to make the connection. *Id.* at 275 (citing Suzanne M. Sgroi, *Sexual Molestation of Children: The Last Frontier in Child Abuse*, *Children Today*, May-June 1975, at 18). An article in *Ms.* magazine popularized the issue in 1977. Ellen Weber, *Incest: Sexual Abuse Begins at Home*, *Ms.*, Apr. 1977, at 64.

gradually the sex eclipsed the violence.⁵⁵ [55] Hacking argues that by the mid-1970s, the problem of child sexual abuse gained such prominence in our cultural landscape that it changed the meaning we attach to the phrase “child abuse.” Whereas the term previously referred to violence, “child abuse” now primarily conjures up sexual abuse or sexual violence.⁵⁶ [56] In public discourse, regardless of actual practice, sexual abuse of children is now the problem in child abuse.

A major force behind this shift in meaning was the feminist movement and its vigorous campaign against incest.⁵⁷ [57] In the mid-1970s, early “speakouts” by women incest survivors propelled the movement,⁵⁸ [58] unmasking the crime of incest as a vast, hidden social crisis.⁵⁹ [59] As the formerly “unspeakable” crime of incest was taken up by feminists and thrust into the public sphere, soon it merged into a larger issue: the sexual abuse of children more generally, whether inside or outside the family.

Also fueling the discovery of child sexual abuse was a theoretical revolution in psychiatry. In 1984 two prominent books by psychoanalysts [*222] appeared that attacked the foundation of Freudian theory: the Oedipus complex.⁶⁰ [60] Early in his career, Freud had advanced a

⁵⁵ [55] See Hacking, *Making and Molding*, supra note 8, at 278.

⁵⁶ [56] *Id.* This is striking in contrast to those studies that suggest that child sexual abuse accounts for only a fraction of all child abuse. See Margaret Talbot, *Against Innocence*, *New Republic*, Mar. 15, 1999, at 27, 31 (citing a 1997 study finding that violence and neglect constitute seventy-six percent of child abuse cases, while only 8 percent of cases involve sexual abuse). But see supra notes 42-47 and accompanying text on the inconclusiveness of studies about child abuse.

⁵⁷ [57] See Ian Hacking, *Rewriting the Soul: Multiple Personality and the Sciences of Memory* 56-58 (1995) [hereinafter Hacking, *Rewriting the Soul*].

⁵⁸ [58] See, e.g., Louise Armstrong, *Kiss Daddy Goodnight: A Speak Out On Incest* 231-42 (1978) (telling her own and other's stories of sexual abuse by male caretakers in an "attempt to rescue the subject from both hysteria and denial.").

⁵⁹ [59] *Id.* at 3-6. Other significant books in the feminist movement to expose incest include Sandra Butler, *Conspiracy of Silence: The Trauma of Incest* 188-200 (1978); Susan Forward & Craig Buck, *Betrayal of Innocence: Incest and Its Devastation* 163-78, 181-86 (1978); Karin C. Meiselman, *Incest: A Psychological Study of Causes and Effects with Treatment Recommendations* 331-49 (1978).

⁶⁰ [60] Jeffrey Moussaieff Masson, *The Assault on Truth: Freud's Suppression of the Seduction Theory* 189-93 (1984); Alice Miller, *Thou Shalt Not Be Aware: Society's Betrayal of the Child* 145-59 (1984). It is fair to say that Freud's understanding of childhood sexuality informs most of his work. His most extended treatment of the subject may be found in Sigmund Freud, *Three Essays on the Theory of Sexuality* (James Strachey trans., Basic Books 1975) (1905).

“seduction theory” that he later rejected. In the rejected theory, Freud had supposed that many of his women patients were ill because they had been molested as children, usually by their fathers. But in 1897, Freud changed his mind, and so changed the course of psychoanalysis: His patients’ abuse was not necessarily real; it usually existed only in fantasy.⁶¹ [61] The consistent reports by his patients of childhood “seductions” were manifestations of their unconscious oedipal sexual wishes. Freud’s abandonment of the seduction theory therefore allowed him to uncover the centerpiece of his theory of childhood sexual development.

The 1984 books flatly argued that Freud was wrong, or rather, that he had been right the first time. The books began a crisis in psychoanalysis that reverberates to this day.⁶² [62] The authors argued that Freud’s abandonment of the seduction theory in favor of the Oedipus complex had been a betrayal. His patients had not fantasized their molestation; they were victims of actual sexual abuse that Freud ignored in order to build his theory. The new Freud critics contended that psychoanalysis - and our modern understanding of the human personality - are founded on a lie and a cover-up of child molestation. Therapists, influenced by the attacks, began to search for hidden signs of child sexual abuse in their patients. Many found what they were looking for.⁶³ [63]

⁶¹ [61] Freud still believed that child sexual abuse occurred. The change was that he came to see it as a far less prevalent cause of psychopathology than he had previously supposed. See, e.g., Lawrence Wright, *Remembering Satan* 160 (1994) (discussing Freud's contention that molestation still retained a role, albeit "a humbler one" in the etiology of neuroses).

⁶² [62] The attacks on Freud were part of a larger movement of Freud revisionism. So bitter are the disputes that the Library of Congress, under pressure from Freud's critics, chose to postpone an exhibition. See, e.g., Margaret Talbot, *The Museum Show Has an Ego Disorder*, *N.Y. Times Mag.*, Oct. 11, 1998, at 56 (discussing controversy among Freud scholars and critics). The attacks have also been central in the recovered memory debates and the debates over multiple personality disorder. See *infra* notes 76–82 and accompanying text.

⁶³ [63] As detailed below, see *infra* note 76 and accompanying text, critics charge that many of the crises over sexual abuse were implanted by (usually well-meaning but misguided) therapists.

Child sex abuse began to reveal itself not only in the home, but also in institutions - schools and churches - and on the streets, where pedophiles awaited unsuspecting children.⁶⁴ [64] Anxiety over child sexual [*223] abuse has continued to mount, to the point where cultural critics contend that we live in a "culture of child abuse,"⁶⁵ [65] that nothing short of a "child abuse movement" is afoot.⁶⁶ [66]

⁶⁴ [64] See Hacking, *Making and Molding*, supra note 8, at 255-56. Typical reporting emphasizes the diffuse, ambiguous nature of the threat. For example, a postal investigator who testified before the Senate Judiciary Committee as it considered legislation in 1996 stated that pedophiles include "doctors, teachers, lawyers, law enforcement officers, clergymen, and businessmen... . Many hold respected positions in their community and have concealed their interest in child pornography for years. The hobbies of offenders include coaching youth sports, dance instruction, leading youth groups, baby-sitting, and amateur photography." *Child Pornography Prevention Act of 1995: Hearings on S. 1237 Before the Senate Judiciary Comm., 104th Cong. 23* (1996) (testimony of Postal Chief Jeffrey J. Dupilka); see also Johnette Howard & Lester Munson, *Betrayal of Trust: The Case Against a Top Volleyball Coach Focuses Attention on the Sexual Abuse of Young Athletes*, *Sports Illustrated*, Apr. 21, 1997, at 66 (describing pattern of sexual abuse by prominent volleyball coach in Chicago); William Nack & Don Yaeger, *Every Parent's Nightmare*, *Sports Illustrated*, Sept. 13, 1999, at 40 (describing problem of sexual abuse in youth sports); *Trust and Betrayal*, Primetime Live (ABC television broadcast, March 12, 1997) (transcript available at 1997 WL 15362233) (reporting that professional hockey player Sheldon Kennedy was once sexually abused by his coach).

⁶⁵ [65] Richard Goldstein, *The Girl in the Fun Bubble*, supra note 11, at 38. Goldstein writes that "no other crime so preoccupies the press." *Id.*

⁶⁶ [66] Hacking, *Rewriting the Soul*, supra note 57, at 66 ("The child abuse movement is the most important piece of consciousness-raising of the past three decades or so.").

Our cultural preoccupation has taken root and blossomed in several different fields of concern.⁶⁷ [67] In the 1980s, the focus moved to day care centers.⁶⁸ [68] Numerous prosecutions arose against day care center workers, based on children's seemingly fantastical accounts of sexual and often satanic ritual abuse.⁶⁹ [69] The defendants were accused of molesting the children in weird and violent rites. Prosecutors claimed that a major aim of these rituals (other than to worship Satan), was to produce child pornography. [*224] None was ever found.⁷⁰ [70] The cases were the subject of intense media and judicial scrutiny. One

⁶⁷ [67] An exploration of the social factors that explain why child sexual abuse has emerged so forcefully in public consciousness is a subject for another article. I suspect that the following factors, among others, are significant: changing sexual mores, the rise of consumer culture, the saturation of the culture with photographic images in advertising and mass and electronic media, changes in family structure, and reactions to the rise of feminism and the changing role of women.

⁶⁸ [68] *Maryland v. Craig*, 497 U.S. 836, 840 (1990) (analyzing Sixth Amendment Confrontation Clause in the context of a child abuse prosecution involving a day care center); David Finkelhor et al., *Nursery Crimes* 13 (1988) (reporting study conducted by Family Research Laboratory on sexual abuse in day care).

It is interesting that day care proved to be one of the early sites for panic over child sexual abuse. Day care is a highly symbolic marker of the changing roles of women. It is where women, spurred by the budding feminist movement to enter the workforce, left their children. This suggests that it might be fruitful to probe the connection between rising anxiety over child sexual abuse in the late 1970s and hostility toward the rising feminist movement.

⁶⁹ [69] For some of the prominent books describing the movement, as well as some of those driving and attacking it, see Debbie Nathan & Michael Snedeker, *Satan's Silence: Ritual Abuse and the Making of a Modern American Witch Hunt* (1995); Richard Ofshe & Ethan Watters, *Making Monsters: False Memories, Psychotherapy, and Sexual Hysteria* (1994); David Sakheim & Susan E. Devine, *Out of Darkness: Exploring Satanism and Ritual Abuse* (1992); Wright, *supra* note 61, at 193-200 (recounting the story of one family in which the daughters' recovered memories of satanic ritual sexual abuse led to the conviction of their father and others).

⁷⁰ [70] David Shaw, *Reporter's Early Exclusives Triggered a Media Frenzy*, L.A. Times, Jan. 20, 1990, at A1:

The prosecution charged in March, 1984, that the McMartin Pre-School was, in effect, a front for a massive child pornography ring The district attorney, the FBI, the U.S. Customs Service and various local law enforcement agencies and task forces . . . did not find a single one of the "millions" of photographs and films that [the deputy district attorney] had said were taken.

Philip Jenkins argued that the media-generated panic over child pornography "augmented the sensational appeal" of the day care cases by adding a plausible motive for the abuse: the production of child pornography. Jenkins, *supra* note 10, at 146.

of these cases, the McMartin Preschool Trial in Los Angeles, ran for two years beginning in 1984, making it the longest criminal trial in U.S. history.⁷¹ [71]

Coinciding in the 1980s with the newfound panic over day care centers was another legal and cultural trend: Suddenly adults were experiencing “recovered memories” of childhood sexual abuse, often with satanic overtones.⁷² [72] In a relatively short time, recovered memories of repressed sexual abuse in childhood grew from “virtual nonexistence to epidemic frequency.”⁷³ [73] Scholars report an “explosion of research and publishing” on the subject by activists between 1978 and 1981.⁷⁴ [74] In 1980, the publication of *Michelle Remembers*,⁷⁵ [75] a guide for adults who suspected they had repressed memories of their own sexual abuse as children, marked a major turning point in the “recovered-memory phenomenon.”⁷⁶ [76] A rash of lawsuits arose as those who had recovered memories sued their alleged abusers - usually their parents. [*225] And so began the “the memory wars,” which pitted activists

⁷¹ [71] Seth Mydans, *7 Years Later, McMartin Case Ends in a Mistrial*, N.Y. Times, July 28, 1990, at 1 (describing trial of Raymond Buckey as “longest and costliest” in U.S. history). Four members of the McMartin family and three teachers were accused of molesting the children and using them in satanic rituals. Peggy McMartin Buckey was acquitted after a two-year trial (and two years in jail). Her son, Raymond Buckey, underwent two trials and five years in jail before charges against him were dismissed in 1990. Id.

Other prominent day care cases involving multiple victims and defendants included the Fells Acres Day School case in Malden, Massachusetts (1985), see Goldberg, *supra* note 46, at F1; the “Wee Care Day Nursery” case in Maplewood, NJ (1985), see *State v. Michaels*, 642 A.2d 1372, 1384-85 (N.J. 1994) (reversing conviction of day care worker at “Wee Care”); the “Little Rascals Day Care” case in Edenton, North Carolina (1989), see *Sex Abuser Gets 12 Life Terms in Day-Care Case*, N.Y. Times, April 24, 1992, at A14. The Little Rascals case was the subject of a Frontline documentary. *Frontline: The Search for Satan* (PBS television broadcast, Oct. 24, 1995).

⁷² [72] For some of the many significant works investigating - and attacking - the recovered memory movement, see Ofshe & Watters, *supra* note 69, at 1-13, 289-304 (arguing that recovered memory therapy is often carried out by “poorly trained, overzealous, or ideologically driven” psychotherapists); Wright, *supra* note 61, at 160.

⁷³ [73] Frederick Crews, *The Memory Wars: Freud's Legacy in Disrepute* 159 (1995).

⁷⁴ [74] Jenkins, *supra* note 10, at 128.

⁷⁵ [75] Michelle Smith & Lawrence Pazder, *Michelle Remembers* (1980).

⁷⁶ [76] Wright, *supra* note 61, at 161. For other books, in addition to *Michelle Remembers*, that were central to the movement, see Judith Lewis Herman, *Trauma and Recovery* (1992); Bass & Davis, *supra* note 44.

against mainstream psychiatric professionals, many of whom insist that recovered memories are in fact implanted in patients by their therapists.⁷⁷ [77]

Entering the fray was a new syndrome, "multiple personality disorder," said to be caused by childhood sexual abuse.⁷⁸ [78] Ian Hacking compares the multiple personality "movement," which has "thrived in a milieu of heightened consciousness about child abuse," to a "parasite living upon a host."⁷⁹ [79] Like everything surrounding child sexual abuse, the diagnosis of multiple personality disorder has engendered bitter disagreement among professionals, some of whom contend that the disease is iatrogenic, created by a small band of therapists, aided by TV talk shows and tabloid dramas.⁸⁰ [80] It is the single most contested diagnosis in psychiatry.⁸¹ [81] Although a majority of psychiatrists still believe there is simply no such thing as multiple personality disorder, the rate of diagnosis of the disease has increased exponentially since 1980.⁸² [82]

The day care cases reached a groundswell in the mid-1980s, the recovered memory lawsuits in the early 1990s.⁸³ [83] Since that time, a backlash has struck; critics have begun to claim that the theories and methods underlying these cases were spurious.⁸⁴ [84] Many experts reviewing the day care cases contend that police investigators and prosecutors questioned the children in a manner that implanted or suggested their

⁷⁷ [77] See Hacking, *Rewriting the Soul*, supra note 57, at 115 (noting brutality of rhetoric in these wars; describing one allegation that debunkers of recovered memory are like "good Germans" who facilitated the "Nazis.").

⁷⁸ [78] See generally Frank W. Putnam, *Diagnosis and Treatment of Multiple Personality Disorder* 47-50 (1989) (reporting the relationship between childhood sexual abuse and the incidence of multiple personality disorder).

⁷⁹ [79] Hacking, *Rewriting the Soul*, supra note 57, at 256.

⁸⁰ [80] *Id.* at 8-9.

⁸¹ [81] *Id.*

⁸² [82] *Id.* It was first created as a diagnostic criteria in 1982. Hacking traces the contemporary movement to 1973 and the book (and later movie) *Sybil*, published in 1973. *Id.* at 41-43 (citing Flora Rheta Schreiber, *Sybil* (1973)).

⁸³ [83] "By 1994 over three hundred cases involving repressed memory had been filed in American courts." Showalter, supra note 48, at 146.

⁸⁴ [84] Hacking, *Rewriting the Soul*, supra note 57, at 14.

accounts of abuse.⁸⁵ [85] By 1992, in response to the rise of charges and lawsuits based on recovered memories, some accused parents formed the False Memory Syndrome Foundation, which attracted more than 6,000 families in its first two years.⁸⁶ [86] Yet, strangely, the backlash seems to continue the discussion [*226] of child sexual abuse.⁸⁷ [87] Now instead of movies of the week about child abuse, we have movies of the week about people who were falsely accused of committing child abuse.⁸⁸ [88] The cultural obsession persists.

In the mid-1990s, a new menace riveted public attention: sexual predators.⁸⁹ [89] States enacted so-called Megan's Laws, which require convicted sexual offenders to register their

⁸⁵ [[85] In response to the explosion of cases in the last decade, there have been approximately 500 studies conducted on the subject of the "suggestibility" of children's memories when questioned by adults. See Goldberg, *supra* note 46. As with studies of child abuse in general, the research in this area is marked by discord. The New York Times article, for example, describes two different "camps" of researchers on child suggestibility. *Id.*

⁸⁶ [86] Hacking, *Rewriting the Soul*, *supra* note 57, at 121.

⁸⁷ [87] Indeed, many have noted the extraordinary similarities between those leading the "backlash" and those leading the war on child sexual abuse. For an elaborate discussion of the similarities by an FBI investigator who specializes in child abuse cases, see Kenneth V. Lanning, *The "Witch Hunt," The "Backlash" and Professionalism*, 9 APSAC Advisor 4 (Winter 1996); see also James R. Kincaid, *Producing Erotic Children*, in *The Children's Culture Reader*, *supra* note 49, at 241, 246 [hereinafter Kincaid, *Producing Erotic Children*]. Kincaid argues that "both the standard and the backlash stories are so popular [because] they have about them an urgency and a self-flattering righteous oomph;" both maintain "the particular erotic vision of children." *Id.*

⁸⁸ [88] See, e.g., Robynn Tysver, *Falsely Accused Parents to Get \$ 45,000*, *Omaha World-Herald*, July 16, 1998, at 19 (describing made-for-TV movie about woman who was falsely accused of child abuse).

⁸⁹ [89] See National Ass'n of State Mental Health Program Dirs., *Summary of Responses from Survey on Sexually Violent Predator Commitment Statutes/Legislation*, in "Sexual Predator" Legislation Tool Kit (1997) (describing various state laws regulating sexual predators). A proliferating number of Internet sites allow one to track pedophiles. For example, <http://www.sexoffender.com> lets one find listings of offenders by state and county in states that list sex offenders.

presence with local authorities.⁹⁰ [90] There was also an increased public interest in retribution against child molesters, evidenced for example, by rising calls to castrate pedophiles.⁹¹ [91] States have called for longer confinements. Kansas's "Sexually Violent Predator Act," upheld by the Supreme Court two years ago, provides for the indefinite civil commitment of certain sex offenders.⁹² [92] The defendant in the Kansas case was convicted of repeated child molestation.

[*227] The Internet has proved to be a particularly rich site for fear of sexual predators (and of child pornographers, as I will describe below). Anxiety over children's exposure to pedophiles was a major justification in Congress' rush to pass the 1996 Communications Decency Act (CDA),⁹³ [93] a measure that quickly succumbed to a First Amendment challenge.⁹⁴ [94] New anti-stalking measures have arisen, targeting pedophiles who prey on

⁹⁰ [90] The laws are named for Megan Kanka, a seven-year-old who was raped and murdered in 1994 by a neighbor who had twice been convicted of sexual assault. See Robert Hanley, *Federal Appeals Court Rejects a Challenge to 'Megan's Law,'* N.Y. Times, Apr. 13, 1996, at 23.

Congress encouraged the enactment of registration laws by providing financial incentives for states to create sex offender registration programs. See 42 U.S.C. 14071 (g) (2), (i) (Supp IV 1998). All fifty states have enacted registration provisions. See Jane A. Small, Note, *Who Are the People in Your Neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws*, 74 N.Y.U. L. Rev. 1451, 1459 & n.41 (1999). The federal law was amended in 1996, with a provision requiring states to release "relevant information that is necessary to protect the public." 42 U.S.C. 14071(e). As of late 1997, forty-one states had a community notification requirement as well. See Alan R. Kabat, Note, *Scarlet Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy for a Symbol's Sake*, 35 Am. Crim. L. Rev. 333, 335 (1998) (including a comprehensive survey of the laws of the fifty states and the District of Columbia).

⁹¹ [91] See Kincaid, *Erotic Innocence*, supra note 40, at 90-94; Kris W. Druhm, Comment, *A Welcome Return to Draconia: California Penal Law 645, The Castration of Sex Offenders and the Constitution*, 61 Alb. L. Rev. 285 (1997).

⁹² [92] *Kansas v. Hendricks*, 521 U.S. 346, 352-53 (1997). See also Adam J. Falk, *Sex Offenders, Mental Illness and Criminal Responsibility: The Constitutional Boundaries of Civil Commitment after Kansas v. Hendricks*, 25 Am. J.L. & Med. 117, 118 (1999) (noting that civil commitment of sex offenders "occurs for an indefinite time period").

⁹³ [93] Communications Decency Act of 1996, Pub. L. No. 104-104, tit. V, 110 Stat. 56, 133-43 (1996).

⁹⁴ [94] See *Reno v. ACLU*, 521 U.S. 844, 881 (1997) (striking down the CDA).

children on the Internet.⁹⁵ [95] The Protection of Children From Sexual Predators Act of 1998 criminalizes the use of interstate facilities to transmit information about a minor for criminal sexual purposes.⁹⁶ [96] The Child Online Protection Act (COPA) prohibits knowingly distributing to minors “material that is harmful to minors.”⁹⁷ [97]

Meanwhile lurid, anguished media reports about the peril to our children fuel the crisis. As a media critic reported in 1997: “No other crime so preoccupies the press.”⁹⁸ [98] Child sexual abuse has become the master narrative of our culture.⁹⁹ [99] It eclipses all other crimes; it is,

⁹⁵ [95] See, e.g., The Children's Online Privacy Protection Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-728 (codified at 15 U.S.C. 6501-6506) (regulating the collection and use of personal information gathered from children on the Internet).

⁹⁶ [96] See Pub. L. 105-314, tit. I, 101(a), 112 Stat. 2974, 2975 (codified at 18 U.S.C. 2425).

⁹⁷ [97] 47 U.S.C. 231(a)(1) (2000). The Eastern District of Pennsylvania enjoined enforcement of the statute. See *ACLU v. Reno*, 31 F. Supp. 2d 473, 477 (E.D. Pa. 1999). See also Jill Jacobson, Comment, *The Child Online Protection Act: Congress's Latest Attempt to Regulate Speech on the Internet*, 40 Santa Clara L. Rev. 221, 243-50 (1999) (arguing that COPA is unconstitutional despite its narrower scope than the CDA); Heather L. Miller, Note, *Strike Two: An Analysis of the Child Online Protection Act's Constitutional Failures*, 52 Fed. Comm. L.J. 155, 168-87 (1999) (same).

⁹⁸ [98] Goldstein, *The Girl in the Fun Bubble*, supra note 11, at 38.

⁹⁹ [99] See, e.g., Scheper-Hughes & Stein, supra note 49, at 179 (describing “child abuse as a key (or master) social problem of our times”).

we repeatedly hear, "worse than murder."¹⁰⁰ [100] We view it as a root cause.¹⁰¹ [101] It [*228] excuses its victims of anything else; it "exculpates."¹⁰² [102] When someone is accused of a heinous crime, he breaks down and confesses his sordid history of childhood sexual victimization. And we respond, "Well, of course that explains it."¹⁰³ [103]

Child sexual victimization is the finale of countless movies, the climactic revelation that explains everything.¹⁰⁴ [104] A critic writes of popular women's fiction: "The deep, dark secret

¹⁰⁰ [100] Kincaid, *Erotic Innocence*, supra note 40, at 16. Victims of child pornography in particular are said to have been "emotionally and spiritually murdered." Judianne Densen-Gerber, *What Pornographers are Doing to Children*, Redbook, Aug. 1977, at 86. Some legislative schemes reflect the view that child pornography is worse than murder. Compare, e.g., Ariz. Rev. Stat. 13-604.01(B), (D) (Supp. 1993) with id. 13-701(A) (Supp. 1993) (imposing mandatory minimum penalty of seventeen years in prison for violation of child pornography law but only mandatory minimum of ten years for second-degree murder), cited in *Arizona v. Gates*, 897 P.2d 1345, 1349 (1994).

¹⁰¹ [101] For example, a recent article in the *New York Times* asserted that childhood sex abuse is an ignored explanation for why so many women fail to make a successful transition from welfare. DeParle, supra note 44, at 1. The article noted a correlation between being a victim of childhood sexual abuse and problems in later life, such as drug and alcohol addiction, receipt of welfare, mental illness, and victimization through domestic violence. But the article went on to assert that this correlation amounted to causation, that the early sexual trauma "explained the roots" of the problems in later life. Indeed, the article attributed such explanatory force to child sexual abuse that the author wrote: "Without a recognition of the sexual abuse in their early lives, it is difficult to understand" how some women arrived on welfare. *Id.*

¹⁰² [102] Hacking, *Rewriting the Soul*, supra note 57, at 15. For popular books critical of this trend, see Alan M. Dershowitz, *The Abuse Excuse: And Other Cop-outs, Sob Stories, and Evasions of Responsibility* 3-47 (1994); Wendy Kaminer, *I'm Dysfunctional, You're Dysfunctional* 26-27, 152 (1993); Robert Hughes, *Culture of Complaint* 7-10 (1993).

¹⁰³ [103] Examples of accused murderers who defended themselves, whether at trial or in the media, by claiming that they were sexually victimized as children include the notorious Menendez brothers, see Lawrence W. Crispo at al., *Jury Nullification: Law Versus Anarchy*, 31 *Loy. L.A. L. Rev.* 1, 35-36 (1997), and more recently, the grifter Sante Kimes, who along with her son was convicted of kidnapping and killing a rich New York woman. Kimes claims that she was sexually molested as a child. See Mary Voboril, *No Credibility: Kidnap Suspect Makes Dizzying Array of Bogus Claims*, *Newsday*, Oct. 25, 1998, at A06.

¹⁰⁴ [104] The issue has permeated not only the news media, but also contemporary literature, theater, and art. Examples are so abundant that it would be impossible to offer a complete list. Here are just a few popular novels that mine this theme: Dorothy Allison, *Bastard out of Carolina* 278-91 (1993); Maya Angelou, *I Know Why the Caged Bird Sings* 64-69 (1993); Kathryn Harrison, *Exposure* 158-65 (1993); Jane Smiley, *A Thousand Acres* 185-92 (1991).

that you have to plow through hundreds of pages to discover is always - but always - what the blurb writers like to call 'society's last taboo'. So it's not much of a surprise anymore."¹⁰⁵ [105] Question: Why in *The Prince of Tides* are the brother and sister, so, well, crazy? (The sister half-dead from a suicide attempt, the brother underachieving and ruined.) Answer: They were molested as children.¹⁰⁶ [106] The secret revealed, it dispels mystery. We accept this notion even as some members of the psychiatric establishment have come to doubt it - to suggest that the long-term effects of childhood sexual abuse may have been exaggerated.¹⁰⁷ [107]

[*229] All of these incidents indicate a changed view of children: Children's sexual vulnerability has become one of their most prominent characteristics. Regardless of which "side" one takes as to the truth of statistics on child sexual abuse, regardless of whether it is really a spreading plague or only an outbreak of mass hysteria, it is certain that child sexual abuse is now a subject of widespread controversy and social concern, a "cultural addiction."¹⁰⁸ [108] We have come to scrutinize child sexuality with an intense fervor: In 1996,

¹⁰⁵ [105] Maureen Freely, *Blowing Hot and Hotter*, *Observer Review*, July 16, 1995, at 12.

¹⁰⁶ [106] See Pat Conroy, *The Prince of Tides* (1986).

¹⁰⁷ [107] A major 1998 study in the highly respected *Psychological Bulletin* of the American Psychological Association found that adults who had been molested as children did not display significant emotional differences when compared to other adults who had not been abused. Bruce Rind et al., *A Meta-Analytic Examination of Assumed Properties of Child Sexual Abuse Using College Samples*, 124 *Psychol. Bull.* 22, 46 (1998). The study reviewed and analyzed the data from fifty-nine previous studies of college students who had reported experiencing childhood sexual abuse. The study found that students who were sexually abused were on average only slightly less well-adjusted than other comparable students and that those differences could be explained by other environmental factors. The study also argued that the pejorative word "abuse" was inaccurate to describe many instances of adult-child sex. Congress denounced the study and the Association, which criticized the study in response. See G.E. Zuriff, *Pedophilia and the Culture Wars*, *Public Interest*, Winter 2000, at 29; see also Richard Green, *Sexual Science and the Law* 173-75 (1992) (discussing the methodology of "sexual science research"). Green questions the methodology of many studies of child sexual abuse. He argues that legal and social responses to a child's revelation that he was abused may contribute significantly to the long-term harm the child suffers. *Id.* at 173.

¹⁰⁸ [108] James R. Kincaid, *Child Loving: The Erotic Child and Victorian Culture* 381 (1992) [hereinafter Kincaid, *Child Loving*].

a kindergarten student who kissed a girl in his class was suspended for sexual harassment.¹⁰⁹ [109]

Cultural rhetoric insists, more than ever, on the innocence of children. We are a far cry from the days in which Freud proclaimed that “cruelty” was a “component of the sexual instinct” of children,¹¹⁰ [110] or when he portrayed infant and childhood sexuality as manipulative, conniving and filled with murderous rage toward the same-sex parent, or when psychoanalyst Melanie Klein revealed her view of the child as a rageful sexually aggressive actor.¹¹¹ [111] Psychoanalysis replaced childhood innocence with a vision of childhood as a hotbed of forbidden incestuous sexual strivings. Instead of accepting Freud’s portrait of childhood as a realm rampant with hostile sexual desire, we now strive to recover our “pure” inner child. Freud’s theory of childhood sexuality has been widely accepted,¹¹² [112] but it has always been hard to swallow. At first glance, it may appear that the discovery of child sexual abuse as a social problem has returned us to a pre-Freudian state where children are once again sexually pure and blank. As I will describe below, this new vision of children may seem more palatable, but it has come at a cost.¹¹³ [113]

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B. THE DISCOVERY AND RISE OF CHILD PORNOGRAPHY

¹⁰⁹ [109] Cynthia Gorney, *Teaching Johnny the Appropriate Way to Flirt*, N.Y. Times Mag., June 13, 1999 at 43; see also *Davis v. Monroe County Board of Ed.*, 526 U.S. 629 (1999) (holding school district accountable for the sexual harassment of a fifth grade girl by one of her classmates); Judith Levine, *A Question of Abuse*, *Mother Jones*, July-Aug. 1996, at 32 (describing the case of a 9-year-old boy removed from his family for sexual abuse of his sister); *Donahue Show: Six-Year-Olds Sexually Harassing* (CBS television broadcast, Jan. 5, 1994).

¹¹⁰ [110] Sigmund Freud, *Three Contributions to the Theory of Sex* in *The Basic Writings Sigmund Freud* 561 (A. A. Brill ed. & trans., 1995).

¹¹¹ [111] For some of Klein's work on child sexuality, see Melanie Klein, *The Psycho-Analysis of Children* (The Writings of Melanie Klein, vol. 2), (Alex Strachey trans., 1984); *The Selected Melanie Klein* (Juliet Mitchell ed., 1986).

¹¹² [112] This is in spite of the attacks described supra notes 60-63, and accompanying text.

¹¹³ [113] See *infra* Parts III and IV.

The distress surrounding child sexual abuse fostered the growth of new subspecialties of concern and intervention: Sexual predators; day care abuses; recovered memory; satanic ritual abuse; and multiple personality disorder all arose, each with its own set of warring experts, advocates, and victims.¹¹⁴ [114] Yet, of the many fields in which the problem of child sexual abuse took root, child pornography proved the most fertile.

In the first part of this section, I discuss awareness of child pornography as a societal problem. Part two discusses the rise in prosecutions. Part three reports statistics on the amount of child pornography and its waxing and waning presence.

1. Public Awareness. - As with child sexual abuse more generally, initial recognition of child pornography as a societal problem dates to the late 1970s. Regardless of whether child pornography actually increased at this time, it is clear, as the Attorney General's Commission reported, that it was in the "late 1970s, when awareness and concern about child pornography escalated dramatically."¹¹⁵ [115] The year 1977 marked a turning point. In 1977, extensive press coverage¹¹⁶ [116] claimed there had been an "emergence of a nationwide, multimillion dollar child pornography market."¹¹⁷ [117] The media convergence catalyzed

¹¹⁴ [114] On the proliferation of child abuse "experts - researchers, educators, clinicians, therapists, and social workers," see Scheper-Hughes & Stein, *supra* note 49, at 179.

¹¹⁵ [115] Attorney General's Report, *supra* note 28, at 408.

¹¹⁶ [116] See, e.g., Child's Garden of Perversity, *Time*, Apr. 4, 1977, at 55 (describing horrific scenes such as a movie of a "ten-year-old girl and her eight-year-old brother in fellatio and intercourse"); see also Ray Moseley, Child Pornography: Sickness for Sale, *Chi. Trib.*, May 15, 1977, at 1 (first of four-part series on child pornography). For a particularly detailed account of the significance of the year 1977 as a turning point in public concern over child sexual abuse and child pornography, see Gayle S. Rubin, Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality, in *The Lesbian and Gay Studies Reader* 3, 6-8 (Henry Abelove et al. eds., 1993); see also Pat Califia, The Age of Consent: The Great Kiddy-Porn Panic of '77, in *Public Sex* 47-51 (1994) (describing effect of the Kildee-Murphy hearings to formulate legislation on sexual abuse against children); Jenkins, *supra* note 10, at 122. Anti-homosexual fervor also fueled the movement. For example, an expert testified before the House in 1977 that "most agree that child sex and pornography is basically a boy-man phenomenon." *Sexual Exploitation of Children: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 95th Cong.* 205 (1977) (testimony of Kenneth Wooden, Director, Nat'l Coalition of Children's Justice).

¹¹⁷ [117] *The Supreme Court, 1981 Term*, 96 *Harv. L. Rev.* 62, 141 n.2 (1982).

state and federal legislative action.¹¹⁸ [118] That year thus marked the initiation of federal and state laws against child pornography, including the New York law that came before the Supreme Court five years later in *Ferber*. When the Supreme Court transformed "child pornography" into a constitutional category in 1982, concern for child sexual abuse had entered the First Amendment, just as it had entered so many other realms of our society.

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2. Law Enforcement. - A rapidly growing complex of federal and state law enforcement programs works to combat the crisis.¹¹⁹ [119] Perhaps the most prominent of these is the FBI's undercover operation, code-named *Innocent Images*.¹²⁰ [120] Other important agencies include the U.S. Customs Cybersmuggling Center, and the International Child Pornography Investigation and Coordination Center, founded in 1996.¹²¹ [121] In 1999, the FBI increased its number of online child pornography task forces from one to ten.¹²² [122]

¹¹⁸ [118] *Id.*

¹¹⁹ [119] See Ron Scherer, *New Vice Squads Troll the Web for Child Porn*, *Christian Science Monitor*, Dec. 17, 1998, at 1. These join the numerous centers for the prevention of child abuse, such as the National Center for Missing and Exploited Children, which was founded in 1984. See Jenkins, *supra* note 10, at 128-29.

¹²⁰ [120] See George F. Will, *Nasty Work*, *Wash. Post*, Jan. 23, 2000, at B7. Since 1995, *Innocent Images* has made 487 arrests and achieved 409 convictions. Most of the 78 non-convictions are in cases still pending. *Id.*; see also *Internet Security: Hearing Before the Sen. Comm. on Appropriations Subcomm. for the Dept. of Commerce, Justice, State, the Judiciary, and Related Agencies (2000)* (statement of Louis J. Freeh, Dir. FBI), available at 2000 WL 11068231.

¹²¹ [121] See Robert MacMillan, *Cash Sought for Net Child Porn Crackdown*, *Newsbytes News Network*, Apr. 15, 1999, available at 1999 WL 5121333. The New York State's Attorney General's Office runs "Operation Ripcord." *Id.*

¹²² [122] See Scott Tillet, *FBI Turning Internet Against Child Pornographers*, *Network World*, Feb. 3, 2000. In 1998, the National Center for Missing and Exploited children reported that monthly calls to its child pornography "tipline" increased by more than twenty-five fold in one year. *Id.* Citizen groups have joined the battle. For example, SOC-UM, (Saving Our Children - United Mothers) has identified the web addresses of about 14,000 child pornography/pedophilia sites; see SOC-UM Organization, <http://www.soc-um.org>. An FBI agent says he "wouldn't be nearly as effective without the help of Internet surfers ... There's just people all over the Internet monitoring... ." C.G. Wallace, *Computer Sleuth Waging War on Child Porn*, *Salt Lake Trib.*, Mar. 8, 1999, at B2.

Child pornography prosecutions have increased over the last decade. Since the early 1990s, the Department of Justice has tripled the number of annual cases it brings.¹²³ [123] From 1998 to 1999 alone, the FBI's Innocent Images project doubled its prosecutions.¹²⁴ [124] The significance of this increase in prosecutions is unclear: It may be that child pornography itself is on the rise. It is possible, however, that the increased prosecutions indicate other factors, such as increased enforcement, better detection, or expanding legal definitions of what constitutes a crime.¹²⁵ [125]

3. Statistics. - Echoing the trend with child sexual abuse in general, statistics on the prevalence of child pornography vary dramatically. At one extreme, an author claimed that there was a vast, worldwide, commercial [*232] five billion dollar child pornography industry¹²⁶ [126](a figure derided by the FBI).¹²⁷ [127] Others have estimated a more moderate yet still shocking figure: A one billion dollar industry exists, exploiting about 1.5 million children.¹²⁸ [128] At the other extreme are those who insist that "commercial child pornography does not exist in this country."¹²⁹ [129] In their view, child pornography is a

¹²³ [123] Scherer, *supra* note 119, at 1.

¹²⁴ [124] Tillet, *supra* note 122.

¹²⁵ [125] An FBI agent who works on child pornography stings said "You've got more lines in the water. And the more lines in the water, the more fish you're going to catch." *Id.* But the same agent also told another source that pursuing child pornographers on line is like "fishing in a pond of hungry fish where you don't have enough bait." Wallace, *supra* note 122, at B2. For an analysis of the expanding legal definitions of child pornography, see *infra* Part II.B.

¹²⁶ [126] Laura J. Lederer, *Poor Children Targets of Sex Exploitation*, *Nat'l Catholic Rep.*, Nov. 22, 1996, at 11.

¹²⁷ [127] Kenneth V. Lanning, *NCAVC, FBI Academy, Investigator's Guide to Allegations of 'Ritual Child Abuse'* 3 (1992).

¹²⁸ [128] Florence Rush, *Child Pornography*, in *Take Back the Night: Women on Pornography* 71, 77-78 (Laura Lederer ed., 1980); Carol McGraw, *Child Smut Business Going Underground: Grows Uglier as Customers Trade Children, Not Just Pictures*, *Police Say*, *L.A. Times*, Sept. 16, 1985, at 3. Yet another source suggests that 300,000 to 600,000 minors are involved in a combination of prostitution and pornography. See Robert Lee Pierce, *Child Pornography: A Hidden Dimension of Child Abuse*, in *8 Child Abuse and Neglect* 483, 486 (1984).

¹²⁹ [129] Free Speech Coalition, <http://www.freespeechcoalition.com/industry/truth/childporn.html> (last visited Mar. 20, 2000).

small amateur practice; a “moral panic” has caused people to create statistics far out of line with the scale of the problem.¹³⁰ [130]

Many reports suggest that there have been fluctuations in the existence of child pornography since it was first “discovered” as a national problem in the late 1970s. Initial media reports on child pornography in 1977 were dire. A May, 1977 NBC broadcast estimated that “as many as 2 million American youngsters are involved in the fast-growing, multimillion-dollar child pornography business.”¹³¹ [131] The Chicago Tribune reported, also in May, 1977, that “child pornography has become a nation-wide multi-million dollar racket that is luring thousands of juveniles into lives of prostitution” and exploiting up to 100,000 children at any time.¹³² [132]

Although many sources suggest that child pornography was widely available in the 1970s,¹³³ [133] by the 1980s, a number of accounts indicated that the commercial child pornography industry had been all but eliminated [*233] in this country.¹³⁴ [134] Even the Attorney General’s Commission reported in 1986 that “there now appears to be comparatively little domestic commercial production of child pornography.”¹³⁵ [135] The lack of a domestic

¹³⁰ [130] I.C. Jarvie, *Child Pornography and Prostitution*, in 1 *The Sexual Abuse of Children: Theory and Research* 308, 322-26 (1992); see also Lawrence A. Stanley, *The Child Porn Myth*, 7 *Cardozo Arts & Ent. L.J.* 295, 320-21 (1989) (asserting that the child pornography industry does not exist and was largely destroyed by the conviction of one woman who was supposedly responsible for eighty percent of the industry in the United States); *Prosecutors Voice Confidence on 2nd Kid Sex Films Trial*, *S.D. Union Trib.*, Feb. 12, 1984, at A3 (detailing the eighty percent estimate made by prosecutors).

¹³¹ [130] Jenkins, *supra* note 10, at 122.

¹³² [132] *Child Pornography: Sickness for Sale*, *Chi. Trib.*, May 15, 1977, reprinted in *Sexual Exploitation of Children: Hearings Before the Subcomm. on Crime of the Comm. on the Judiciary*, 95th Cong. 428 (1977).

¹³³ [133] Jenkins, *supra* note 10, at 146. Reports stated that most of it was imported from Europe, especially the Netherlands and Scandinavia, but some was manufactured domestically. *Id.*

¹³⁴ [134] James S. Granelli, *Officials Search for Violations of New Child Porn Laws*, *L.A. Times*, Sept. 16, 1985, at 3 (quoting postal inspector as saying that large-scale commercial child pornography industry was no longer in existence).

¹³⁵ [135] *Attorney General's Report*, *supra* note 28, at 409.

commercial industry was no cause for complacency, however. On the contrary, a dangerous cottage industry was forming.¹³⁶ [136]

Furthermore, “there remained a significant foreign commercial industry” to combat.¹³⁷ [137] In any event, the public seemed to perceive that child pornography was on the rise.¹³⁸ [138] Activists warned that “child pornography distribution rings” were “ever-widening.”¹³⁹ [139] Yet, some critics maintain that the vigilance persisted without cause. One historian argues, for example, that “in reality, child porn was never manufactured domestically on any large scale after the 1970s, and continuing arrests and seizures could be sustained only by steadily expanding the definitions of what was illegal and by emphasizing the role of pornography consumers rather than only the makers or distributors.”¹⁴⁰ [140]

Although some claimed it was a waning problem, Congress found otherwise. In 1986 Congress found that “child exploitation has become a multi-million dollar industry, infiltrated and operated by elements of organized crime, and by a nationwide network of individuals openly advertising their desire to exploit children.”¹⁴¹ [141] A House Report from 1984 had estimated that “tens of thousands of children under the age of 18 are believed to be filmed or photographed while engaging in sexually explicit acts.”¹⁴² [142]

¹³⁶ [136] *Id.* at 410; McGraw, *supra* note 128, at 3.

¹³⁷ [137] Attorney General's Report, *supra* note 28, at 409.

¹³⁸ [138] Best reprints a 1986 California poll that measured public perception of increased danger to children. Fifty-two percent of those polled said that the danger of child pornography was “much greater” than it had been ten years earlier. Best, *supra* note 50, at 153.

¹³⁹ [139] Jenkins, *supra* note 10, at 147.

¹⁴⁰ [140] Jenkins, *supra* note 10, at 146. Certainly law enforcement has been vigilant; see, e.g., *Jacobson v. United States*, 503 U.S. 540, 541 (1992) (overturning child pornography conviction because of police harassment and entrapment of defendant); Stanley, *supra* note 130, at 298 - 99.

¹⁴¹ [141] Child Abuse Victims' Rights Act, Pub. L. No. 99-591, 702, 100 Stat. 3341-74 (1986).

¹⁴² [142] H.R. Rep. No. 98-536, at 2 (1983).

Even if child pornography was driven underground in the 1980s, many would insist that the 1990s saw a "return of the repressed."¹⁴³ [143] In [*234] 1995, Senator Hatch warned that child pornography was a "plague upon our people."¹⁴⁴ The media tell us that child pornography is now "soaring again" - primarily on the Internet.¹⁴⁵ New technologies have changed the methods of distribution and production.¹⁴⁶ Though new laws proliferate to combat the new technology (as documented below), law enforcement officials still expect that child pornography is "going to rapidly explode as a cottage industry."¹⁴⁷ [147] Despite all our efforts, we are now in the "golden age of child pornography."¹⁴⁸ [148]

¹⁴³ [143] I am, of course, borrowing the phrase from Freud's description of the process by which emotions that have been repressed return in a distorted fashion. See Sigmund Freud, *The Interpretation of Dreams* 577 - 78 (James Strachey trans., 1959) (1900). Because the contents of the unconscious are indestructible, they always reemerge by "devious routes" into consciousness. J. Laplanche & J.-B. Pontalis, *The Language of Psycho-analysis* 398 (Donald Nicholson-Smith trans., 1973) (1967).

¹⁴⁴ [144] 141 Cong. Rec. S13,542 (1995) (statement of Sen. Hatch regarding Child Pornography Prevention Act of 1995).

¹⁴⁵ [145] Scherer, *supra* note 119, at 4.

¹⁴⁶ [146] "The Internet is the ultimate distribution system" for child pornography. David E. Kaplan, *New Cybercop Tricks To Fight Child Porn*, U.S. News & World Rep., May 26, 1997, at 29 (quoting Robert Flores, former head of the Justice Department's anti-child pornography section). The Internet is "an anonymous superstore for pedophiles ... They were not only increasing the demand for child pornography, thereby ensuring that more children would be raped and abused, but they were creating a community where they could all get together and make themselves feel better about what they were doing." Michael Heaton, *Man Fights Against Child Porn On Internet: FBI Uses His Data In Arrests*, Times-Picayune (New Orleans), June 2, 1996, at A16 (quoting anti-child porn activist, Barry Crimmins).

Technological advances have also changed the methods of production. Videotape and digital cameras have eliminated the dangerous step of film development in the production process. Nevertheless, child pornographers still get caught while attempting to get film developed. See, e.g., *United States v. Dawn*, 129 F.3d 878, 880 (7th Cir. 1997) (describing how film processor notified police after seeing children performing sexual acts on eight mm movie film brought in by defendant); *Garay v. State*, 954 S.W.2d 59, 62 (Tex. App. 1997) (stating that developer of still photographs notified police).

¹⁴⁷ [147] Scherer, *supra* note 119 (quoting Gene Weinschenk, director of the U.S. Customs Service Cybersmuggling Center); see also Cara Tanamachi, *Federal Prosecutors Target Internet Child Pornography*, Austin-Am. Statesman, Aug. 24, 1998, at A1 (quoting a U.S. Customs Service Agent who noted sharp rise in arrests and described child pornography as a "growing problem" that is likely to keep growing).

¹⁴⁸ [148] Will, *supra* note 120, at B7.

II. THE LAW OF CHILD PORNOGRAPHY

In this Part, I will describe the birth and growth of child pornography law. As will be evident, the course of the law's evolution closely tracks the cultural crisis charted in Part I. I do not present here an analysis of the legal implications of these doctrinal developments, nor do I discuss their legitimacy or wisdom. (I consider these questions in a separate article.)¹⁴⁹ [149] Rather, I tell the story of the historical development of the law in order to illustrate its chronological correlation with the cultural story recounted above. I trace two different themes in this history: the expansion of the rationale for banning child pornography, and the widening definition of the term.

One peculiar aspect of child pornography law is that the doctrinal category has evolved with the Supreme Court in a strangely passive pose: [*235] Rather than attempting to define child pornography itself, the Court's cases have simply upheld statutory definitions. This is in stark contrast to the law of obscenity, for example, where the Court struggled to create the precise constitutional definition of the category and thereby to set a clear boundary beyond which states could not go.¹⁵⁰ [150]

¹⁴⁹ [149] Adler, *Inverting the First Amendment*, *supra* note 6.

¹⁵⁰ [150] See generally *Miller v. California*, 413 U.S. 15, 24 (1973) (delineating the current three-pronged obscenity standard); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) (stressing that under the Roth obscenity test, a work must be utterly without social value before it can be considered obscene); *Roth v. United States*, 354 U.S. 476 (1957) (holding that "obscenity" is not protected speech). Under this approach, the Court develops a definition of speech that can be banned, which then serves as a limit on legislative enactments. It recurs throughout First Amendment law. For example, it is the approach taken by the Court in the subversive advocacy cases, which developed over the years into the current *Brandenburg* "incitement to imminent lawless action" standard. *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969). Of course, one explanation for the Court's passive pose in *Ferber* is that the Court there was upholding a statute, whereas in *Brandenburg*, it was invalidating a statute. Arguably, striking down a statute requires explanation of constitutional limits in a way that upholding a statute might not. But this was not the case with *Roth*, the Court's first obscenity case. Even though the Court was upholding a statute and *Roth*'s conviction under it, Justice Brennan's opinion nonetheless announced a standard constitutional definition of obscenity, one that the Court struggled to revise in *Memoirs* and finally in *Miller*.

Aside from declaring the requirement of a few standard protective features (such as the requisite scienter,¹⁵¹ [151] or the need for a statute to specifically define the prohibited material),¹⁵² [152] the Court's task in child pornography law has been primarily to accept legislative enactments and prosecutorial ambitions, and then to justify them within the First Amendment. With Congress and states pushing further and further for limits on child pornography, this lack of a clear boundary - indeed the suggestion of some Justices that they would entertain even broader definitions of child pornography than current ones¹⁵³ [153] - has made the Court's work seem like an invitation to statutory expansion. As legislatures expand the scope of child pornography law, as prosecutors rush to vigorously enforce these laws to their limits, the response of the courts, to much of this, has been acceptance. There is a sense of boundlessness in child pornography law.

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A. Creation Of Child Pornography Law

Congress passed its first child pornography legislation, the Protection of Children Against Sexual Exploitation Act, in 1978, just a year after the news media discovered the crisis of child

¹⁵¹ [151] *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (holding that it was necessary to prove that the defendant knew that the children in the materials were minors); *New York v. Ferber*, 458 U.S. 747, 765 (1982) (holding that in the context of child pornography "criminal responsibility may not be imposed without some element of scienter"). This requirement is borrowed directly from obscenity law. See *Smith v. California*, 361 U.S. 147, 154-55 (1959) (establishing obscenity law scienter requirements).

¹⁵² [152] Again, this was not an innovation unique to child pornography law, but rather a standard borrowed from obscenity law. See *Miller*, 413 U.S. at 23-24.

¹⁵³ [153] In *Massachusetts v. Oakes*, 491 U.S. 576 (1989), a case which turned on mootness, two Justices voted for the plurality's result - to remand the case - but did not join the plurality's reasoning. Instead, Justice Scalia, joined by Justice Blackmun, argued that the Court should have reached the merits of the case. *Id.* at 588 (Scalia and Blackmun, J.J., concurring). They then opined that the Massachusetts statute at issue, which criminalized a vast amount of child nudity and which reached further than any child pornography statute upheld by the Court, was not overbroad. *Id.*

pornography.¹⁵⁴ [154] The drafters of that Act assumed that they were constrained by obscenity law standards in their approach to the problem of child pornography. The Act, therefore, did not exceed the bounds of existing obscenity standards as articulated by the Supreme Court in *Miller v. California*.¹⁵⁵ [155] It outlawed the use of children in the production of obscene materials. It also enhanced the penalties for transmission or receipt of obscene materials that contained depictions of children.¹⁵⁶ [156] Congress, however, rejected any measures that would have exceeded the scope of existing obscenity laws.¹⁵⁷ [157] The 1982 *Ferber* case removed that barrier.

In *New York v. Ferber*,¹⁵⁸ [158] a unanimous Supreme Court (extremely rare in First Amendment cases) created a previously unknown exception to the First Amendment, proclaiming that “child pornography” was a new category of speech without constitutional protection.¹⁵⁹ [159] The *Ferber* Court encountered a novel First Amendment problem:

¹⁵⁴ [154] Pub. L. No. 95-225, 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. 2251-2253). Prior to 1977, only six states had provisions specifically prohibiting the use of minors in obscene materials or performances. See *Child Pornography and Sex Rings*, supra note 28, at 8. Now, all fifty states have child pornography laws. See 720 Ill. Comp. Stat. Ann. 5/11-20.1 (West 1994 & Supp. 1998) (listing statutes of forty-seven states); see also Juliann Whetsell-Mitchell, *Rape of the Innocent* 208 (1995) (noting that prior to 1977, most states did not have laws regulating the production and distribution of child pornography). For the three states not listed in the Illinois statute, see N.Y. Penal Law 263.00-.25 (McKinney 2000); S.C. Code Ann. 16-15-405 (2000); Vt. Stat. Ann. tit. 18, 2827 (2000).

¹⁵⁵ [155] 413 U.S. at 15.

¹⁵⁶ [156] Pub. L. No. 95-225, 18 U.S.C. 2252(b).

¹⁵⁷ [157] See Annemarie J. Mazzone, Comment, *United States v. Knox: Protecting Children from Sexual Exploitation Through the Federal Child Pornography Laws*, 5 *Fordham Intell. Prop. Media & Ent. L.J.* 167, 174-79 (1994) (discussing congressional debates on whether it could ban non-obscene child pornography).

¹⁵⁸ [158] 458 U.S. 747 (1982).

¹⁵⁹ [159] The Court's exclusion of certain categories of expression from constitutional expression was most famously articulated in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (explaining limitations on free speech which are constitutional). Justice Scalia's opinion in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) suggested a somewhat surprising twist on how to think about categories excluded from the First Amendment. He called it a fiction to think that certain categories are completely banished from constitutional protection. His opinion established limits on "underinclusive" viewpoint-based regulations of expression even when that expression existed wholly within an unprotected category - in the case of *R.A.V.*, the category of fighting words. *Id.* at 387.

Whether non-obscene¹⁶⁰ [160] sexual depictions of children - speech not falling into any previously defined First Amendment exception - could be constitutionally restricted. The Court's answer was yes.

[*237] In response to Ferber, Congress quickly passed legislation modeled on the New York statute upheld in that case. The result was the Child Protection Act of 1984.¹⁶¹ [161] The Act changed the meaning of "sexual conduct" to include certain non-obscene pictures of children. The Act also raised the age of "children" for purposes of the law from sixteen to eighteen, thereby vastly extending the universe of "child pornography."¹⁶² [162] Convictions rose dramatically under the revised law. Under the 1977 law only twenty-three defendants were convicted during the seven years it was in effect (all of those violations were for the distribution rather than the production of child pornography).¹⁶³ [163] In contrast, at least 214

¹⁶⁰ [160] The materials at issue in Ferber had been found not obscene by the jury, which was instructed to consider obscenity as well as child pornography charges against the defendant. 458 U.S. at 752. Thus the issue for the Court was sharply defined.

¹⁶¹ [161] Pub. L. No. 98-292, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. 2251-2254, 2256, 2516).

¹⁶² [162] Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204. The 1984 Act made other significant changes, such as increasing the maximum fines tenfold, and removing the requirement that the transmission or receipt of child pornography be done for profit, thereby targeting the growing non-commercial cottage industry. Fines increased from \$ 10,000 to \$ 100,000 for a first offense. 18 U.S.C. 2251. In addition, the law clarified that purely textual pornography did not fall within the scope of the statute; the language substituted "visual depiction" for "visual or print medium," which could be interpreted to include text:

No reason for coverage of non-visual depictions was found in the legislative history of the Act, and no need for such coverage has been identified in the 6 years of implementation of the Act. Rather than write in an obscenity requirement for print material, it seems more appropriate [sic] to simply limit coverage to visual material.

H.R. Rep. No. 98-536, at 3 (1983). The law also added sections dealing with civil and criminal forfeiture. 18 U.S.C. 2253-2254.

¹⁶³ [163] H.R. Rep. No. 98-536, at 2 (1983).

defendants were convicted in the twenty-eight months following the enactment of the 1984 law.¹⁶⁴ [164]

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B. Definition of "Child Pornography"

¹⁶⁴ [164] H.R. Rep. No. 99-910, at 5 (1986). In 1986, Congress again amended the law to create two new offenses involving advertising. Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, 100 Stat. 3510 (codified as amended at 18 U.S.C. 2251, 2255-2256, 2421-2423 (1986)). The bill banned (1) advertising child pornography for any type of exchange and (2) advertising seeking participation in any sexually explicit conduct for the purpose of creating child pornography. It also clarified that "visual depiction" included undeveloped film and videotape, thereby codifying a decision in which the Ninth Circuit rejected a defendant's argument that undeveloped film was not a visual depiction. *Id.* at 4, 100 Stat. 3511; *United States v. Smith*, 795 F.2d 841, 846-47 (9th Cir. 1986).

In 1988, Congress specifically outlawed the transmission of child pornography images by computer. Pub. L. No. 100-690, sec. 7511(b), 102 Stat. 4485 (as amended 18 U.S.C. 2252 (1988)). The 1988 Act also imposes extensive record-keeping requirements for producers of any visual depiction of sexually explicit conduct that was produced by materials mailed or shipped in interstate commerce. *Id.* 7513 (a), 102 Stat. at 4487. Producers of such material were required to keep elaborate records about names and ages of performers and to provide such information to authorities upon request. 18 U.S.C. 2257(a)-(c).

The Act was found unconstitutional because the requirements were not narrowly tailored and "put as much, if not more, of a burden on reputable producers of adult images than on the child pornography industry." *Am. Library Ass'n v. Thornburgh*, 713 F. Supp. 469, 479 (D.D.C. 1989). The court also found that the law's presumption that the performers were underage if the records were unavailable or incomplete violated due process. *Id.* at 480-81. Congress amended the Act to address concerns raised by the court. Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, 311, 104 Stat. 4789, 4816 (codified at 18 U.S.C. 2257(d)-(e)). The government's appeal from the District Court's decision was dismissed in part as moot because of the changes. See *Am. Library Ass'n v. Barr*, 956 F.2d 1178, 1186-87 (D.C. Cir. 1992). On remand, the changes were again challenged and found to be unconstitutional, *Am. Library Ass'n v. Barr*, 794 F. Supp. 412, 417-20 (D.D.C. 1992), but the Court of Appeals reversed and determined that most of the provisions were constitutional. *Am. Library Ass'n v. Reno*, 33 F.3d 78, 88-94 (D.C. Cir. 1994). The Court of Appeals did find that the requirement that records be kept indefinitely was unconstitutional and suggested a five-year limit. *Id.* at 91. The court also found that photo developers are not "producers" of sexually explicit material and therefore not subject to the record-keeping requirements. *Id.* at 93.

Congress amended the statute again in 1996 to change the definition. See *infra* notes 196-200 and accompanying text. Congress also dispensed with its requirement that prosecutions be for possession of "three or more items" containing child pornography. Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, 203(b)(1), 112 Stat. 2978 (codified as amended at 18 U.S.C. 2252A (1994 & Supp. IV 1998)). The new law permits prosecution for possession of a single image. *Id.*

Since *Ferber*, federal courts, so disquieted¹⁶⁵ [165] by the dangers of child sexual abuse, have tolerated statutes that define child pornography in increasingly broad and subjective terms. The law upheld in *Ferber* prohibited using a child in a "sexual performance," meaning "any play, motion picture, photograph, or dance" which included "sexual conduct." Sexual conduct was in turn defined to mean "intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals."¹⁶⁶ [166] The federal 1984 Child Protection Act adopted most of this definition from *Ferber* but changed the word "lewd" to "lascivious."¹⁶⁷ [167]

It is this latter term, "lewd" or "lascivious exhibition of the genitals," that launched the most problematic aspect of defining child pornography. Determining whether a photo depicts a child engaged in intercourse or masturbation, for example, would appear to be a relatively straightforward task. But what exactly is "lascivious exhibition of the genitals"? [*239] How

¹⁶⁵ [165] Justice Brennan chose this term to describe the majority's motivations in *Osborne v. Ohio*, 495 U.S. 103, 143 (1990) (Brennan, J., dissenting).

¹⁶⁶ [166] *New York v. Ferber*, 458 U.S. 747, 751 (1982) (quoting N.Y. Penal Law 263.00(1), 263.00(3), 263.00(4) (McKinney 1980)). Current federal law has codified the definition as follows:

(2) "sexually explicit conduct" means actual or simulated - (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (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) (A)-(E) (1994).

¹⁶⁷ [167] Child Protection Act of 1984, Pub. L. No. 98-292, 5, 98 Stat. 204, 205 (codified as amended at 18 U.S.C. 2253 (1994)) (redesignated 2255 and subsequently renamed 2256). This was supposedly in order to emphasize the distinction between child pornography law and obscenity law, with which the term "lewd" is often associated. See *United States v. Dost*, 636 F. Supp. 828, 830-32 (S.D. Cal. 1986) (discussing the Act).

does it differ from an “innocuous”¹⁶⁸ [168] photograph of a naked child - a family photograph of a child

taking a bath, or an artistic masterpiece portraying a naked child model? It is at this margin of child pornography law, where its prohibitions bump up against “innocent” speech, that, ironically, the definition of child pornography has grown.

Each subtle reiteration of the definition of “lascivious exhibition of the genitals” since Ferber has expanded it. In the 1989 case of *Massachusetts v. Oakes*, two members of the Court expressed approval of a law that would have prohibited any depiction of child nudity, so long as the law drew certain exemptions for a narrow range of proper “purposes.”¹⁶⁹ [169] In 1990 in *Osborne v. Ohio*, the Court held constitutional a statute prohibiting child nudity if there

was a “graphic focus on the genitals,” a term that had been previously unknown in the Court’s child pornography or obscenity cases.¹⁷⁰ [170] The test seems to invite prosecutions of pictures in which a child’s genitals appear at the

¹⁶⁸ [168] Throughout, I use terms like “innocuous” or “innocent” to refer to pictures that are not child pornography. But one point of this Article is to expose and then analyze the very difficulty of distinguishing the innocent and innocuous photograph from “real” child pornography. These terms should therefore be read as placeholders for contested meaning. See Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 Cal. L. Rev. 1499, 1506–08 (1996) [hereinafter Adler, *What's Left*]. The Supreme Court has used these terms to distinguish protected depictions of children from child pornography. See, e.g., *Osborne v. Ohio*, 495 U.S. 103, 113–14 (1990) (discussing the distinction between child pornography and “innocuous” photographs).

¹⁶⁹ [169] See 491 U.S. 576, 588–90 (1989) (Scalia and Blackmun, J.J., concurring). This move, like the move to criminalize a range of depictions of nudity in the *Osborne* case, described *infra* notes 191–195 and accompanying text, is particularly striking, given that the Court has repeatedly noted in its speech cases that depictions of nudity are protected under the First Amendment: “‘Nudity alone’ does not place otherwise protected material outside the mantle of the First Amendment.” *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981) (quoting *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974)). This is supposedly so even in child pornography law. Indeed, the Ferber opinion repeated the Court’s mantra that “nudity[] without more is protected expression.” *Ferber*, 458 U.S. at 765 n.18 (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975)); see also *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 84 (1994) (Scalia, J., dissenting) (distinguishing nudity from “sexually explicit conduct”); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932–33 (1975) (invalidating ordinance that would prohibit any female from appearing in any public place with uncovered breasts); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212–14 (1975) (striking down ban on nudity in drive-in movies even when nudity was visible to passers-by).

¹⁷⁰ [170] 495 U.S. at 113 (quoting *State v. Young*, 525 N.E.2d 1363, 1368 (Ohio 1988)).

center. Thus, a finding of graphic focus may depend on where a photographer aims his camera, making a determination of constitutional protection depend on what could be an accident of pictorial composition.¹⁷¹ [171]

Lower courts have contributed to the expansion of the definition. In the 1994 case of *United States v. Knox*, the Third Circuit held that a depiction could constitute a "lascivious exhibition of the genitals" even if a [*240] child is wearing clothes.¹⁷² [172] The defendant, Knox, possessed videotapes that zoomed in on the genital areas of clothed girls. The Third Circuit approved Knox's conviction under federal law, deciding that the definition of "child pornography" did not require child nudity.¹⁷³ [173] The Circuit held its ground, even after the Supreme Court remanded the case to the Circuit for reconsideration in light of a brief by the Solicitor General of the United States in which he argued that the Circuit had gone too far, and that the statute required at least "discernibility" of the genitals if not outright nudity.¹⁷⁴ [174] The Knox case caused a "political firestorm"; it prompted front-page headlines,¹⁷⁵ [175] a resolution passed by Members of Congress condemning the Solicitor General's interpretation, and the unusual step of the members of Congress filing a brief in the case.

Meanwhile, other district and circuit courts have been busily amplifying the meaning of "lascivious exhibition." Virtually all lower courts that have addressed the issue have embraced the widely followed so-called "Dost" test, originally developed by a California

¹⁷¹ [171] *Id.* at 138 (Brennan, J., dissenting).

¹⁷² [172] 32 F.3d 733, 747 (3d Cir. 1994); accord *United States v. Horn*, 187 F.3d 781, 790 (8th Cir. 1999) (finding that "a reasonable jury could conclude that the exhibition of pubic area was lascivious" in "beach scenes [of] girls wearing swimsuit bottoms").

¹⁷³ [173] *Knox*, 32 F.3d at 737.

¹⁷⁴ [174] *Id.* at 737. The case provoked significant political controversy. For a discussion of the "torrent of political outrage," see Eric M. Freedman, *A Lot More Comes into Focus When You Remove the Lens Cap*, 81 *Iowa L. Rev.* 884, 929-30 (1996); see also Lawrence A. Stanley, *The Child Porn Storm*, *Wash. Post*, Jan. 30, 1994, at C3 (op-ed piece by Knox's attorney decrying the case as "a clear injustice, driven by political imperatives"); Pierre Thomas, *Reno Takes Tougher Stance on Child Pornography*, *Wash. Post*, Nov. 11, 1994, at A3 (describing Reno's submission of brief at the urging of President Clinton to take a tougher stance in response to a unanimous Senate resolution).

¹⁷⁵ [175] E.g., Frank J. Murray, *Appeal Rejected in Child Porn Case: Sentence Upheld for Clothed Poses*, *Wash. Times*, Jan. 18, 1995, at A1 (reporting on the Supreme Court's denial of certiorari in *Knox*).

district court and affirmed in an opinion by the Ninth Circuit.¹⁷⁶ [176] The test identifies six factors that are relevant to the determination of whether a picture constitutes a “lascivious exhibition”; it includes such questions as “whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity” and “whether the visual depiction is intended or designed to elicit a sexual response in the viewer.”¹⁷⁷ [177]

If we pushed the definition in the evolving case law to the extreme, it seems to threaten all pictures of unclothed children, whether lewd or not, and even pictures of clothed children, if they meet the hazy definition of “lascivious” or “lewd.” Thus, the capacious law has proved an excellent vehicle for prosecutorial vigilance. Some of the recent cases suggest [*241] just how far child pornography law has drifted.

Most prominent have been prosecutions against “mainstream” targets: In both Alabama and Tennessee, prosecutors, egged on by anti-abortion activist and Operation Rescue leader Randall Terry, brought obscenity and child pornography charges against Barnes & Noble for selling photography books by artists Jock Sturges and David Hamilton.¹⁷⁸ [178] (Sturges’s studio had been ransacked by an FBI raid in 1993, but a grand jury had refused to indict him for child pornography violations.)¹⁷⁹ [179] Oklahoma brought a child pornography prosecution against a video store for renting the 1979 Academy award-winning film *The Tin Drum* based on a novel by Gunter Grass.¹⁸⁰ [180] Hollywood studios reportedly shunned the

¹⁷⁶ [176] *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987).

¹⁷⁷ [177] *Dost*, 636 F. Supp. at 832. The test does not require that all factors be met to find that a depiction is a lascivious exhibition; nor are the factors meant to be exhaustive. *Id.* In spite of the universal adherence to the *Dost* test, a closer examination of the cases reveals troubling uncertainty about the proper meaning of “lascivious.” Part IV, *infra*, will discuss some of the problems with the test.

¹⁷⁸ [178] Keith Russell, *Anti-Porn Group Wages Moral Battle*, *Nashville Banner*, Dec. 29, 1997, at A1.

¹⁷⁹ [179] Philip Hager, *U.S. Grand Jury Refuses to Indict Photographer*, *L.A. Times*, Sept. 17, 1991, at A3.

¹⁸⁰[180] Lois Romano, *Seizure of 1979 Art Film Draws Fire*, *Wash. Post*, June 30, 1997, at A1. A federal judge ruled that the film did not violate Oklahoma's statute. See *Oklahoma ex rel. Macy v. Blockbuster Videos Inc.*, 27 Media L. Rep. 1248 (W.D. Okla. 1998); see also *Video Software Dealers Ass'n v. City of Oklahoma City*, 6 F. Supp. 2d 1292 (W.D. Okla. 1997) (ordering that confiscated videotapes be returned).

remake of the film *Lolita* based on fears of criminal prosecution; despite the filmmakers' careful use of body doubles for all controversial scenes, it took a year, as well as significant cutting, to find a studio willing to release the film.¹⁸¹ [181] A sixty-five-year-old New Jersey grandmother and respected photographer was arrested for taking nude photographs of her two four to six-year-old granddaughters.¹⁸² [182] The incident is the latest in a number of arrests where parents or family members face charges for pictures that they claim were innocent family snapshots or artistic endeavors.¹⁸³ [183] Recently, an NPR reporter who says he was researching a free-lance article on police tactics in pursuing child pornographers was himself arrested for receiving child pornography. The defendant moved to dismiss, raising a free speech claim, but the court rejected the motion. It held that even "well-intended uses of" images of child pornography are unprotected.¹⁸⁴ [184]

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C. Rationale for Prohibiting Child Pornography

¹⁸¹ [181] Celestine Bohlen, *A New 'Lolita' Stalls in Europe*, N.Y. Times, Sept. 23, 1997, at E1.

¹⁸² [182] Kate Coscarelli & Jeffery C. Mays, *Photos of Undressed Kids Get Grandmother Arrested*, Newark Star-Ledger, Feb. 5, 2000, at 1.

¹⁸³ [183] See, e.g., Editorial, *Suitable for Framing? Lorain Mom's Nude Pictures of Her 8-Year-Old Daughter Raise Questions About Parenting and Prosecution*, The Plain Dealer, Oct. 16, 1999, at 8B (mother arrested for nude picture of daughter in bathtub).

¹⁸⁴ [184] *U.S. v. Matthews*, 11 F. Supp. 2d. 656 (D. Md. 1998), *aff'd* 209 F. 3d 338 (4th Cir. 2000). Given this climate, in researching this Article, I have done the only sensible thing: I have not deliberately sought out any "real" child pornography. Of course, given the looseness of the definition we may all have seen "child pornography," just by watching movies, music videos, or TV. This question is taken up in Part III.C, which addresses the mainstream availability of "soft core" child porn. There I also discuss works of art depicting child nudity that may lack protection under current law.

Although Ferber announced five reasons that supported the exclusion of child pornography from constitutional protection,¹⁸⁵ [185] the primary thrust of these rationales was this: Child pornography must be prohibited because of the harm done to children in its production.¹⁸⁶ [186] The speech lacks First Amendment protection because its creation requires a crime, the abuse of an actual child.¹⁸⁷ [187]

This notion that the production of child pornography requires an act of child abuse is the key to the Court's jurisprudence. The rationale explains, for example, the Court's dramatic departure from the strictures of obscenity law in the child pornography cases: its refusal to

¹⁸⁵ [185] *New York v. Ferber*, 458 U.S. 747, 756-64 (1982). The five rationales set out in *Ferber* were as follows:

1. The state has a "'compelling'" interest in "'safeguarding the physical and psychological well-being of a minor.'" *Id.* at 756-57 (quoting *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 607 (1982)).

2. Child pornography is "intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed" in order to control the production of child pornography. *Id.* at 759. The Court went on to explain that the production of child pornography is a "low-profile, clandestine industry" and that the "most expeditious if not the only practical method of law enforcement may be to dry up the market for this material" by punishing its use. *Id.* at 760.

3. "The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production" of child pornography. *Id.* at 761.

4. The possibility that there would be any material of value that would be prohibited under the category of child pornography is "exceedingly modest, if not de minimis." *Id.* at 762.

5. Banning full categories of speech is an accepted approach in First Amendment law and is therefore appropriate in this instance. *Id.* at 763-64.

¹⁸⁶ [186] The first three rationales address this central harm. The fourth rationale goes to the assumption that the category of speech in question is "low value"; banning it therefore presents little First Amendment concern. See *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66-73 (1976) (outlining hierarchy of valued speech). The fifth rationale recognizes the Court's precedent of having banned whole categories of speech before.

¹⁸⁷ [187] The abuse of an actual child is "the distinguishing characteristic of child pornography." Attorney General's Report, *supra* note 28, at 405.

make an exception for works of "serious literary, artistic, political, or scientific value,"¹⁸⁸ [188] which is a central concern in obscenity cases, or to consider [*243] works as a whole rather than isolated passages.¹⁸⁹ [189] If the point of the law is to protect children from abuse in the production of pornography, the Court reasoned, it seems irrelevant whether the resulting work has artistic value.¹⁹⁰ [190]

In *Osborne v. Ohio*, the Court extended the reach of child pornography law in its decision to uphold the criminalization of mere possession as opposed to distribution or production of child pornography.¹⁹¹ [191] Once again, the Court relied on the unique rationale underlying

¹⁸⁸ [188] *Miller v. California*, 413 U.S. 15, 24 (1973) (establishing exception in obscenity law for works that possess such value). Although the Court has never entertained a child pornography case in which serious value was raised as a defense, the Court's dicta in *Ferber* rejected the idea of an exception for value. *Ferber* held that the lack of an exception for serious value did not render the law so overbroad that it failed under the doctrine of "substantial overbreadth." *Ferber*, 458 U.S. at 766-74. The concurring opinions in *Ferber* suggest some discord on the question of serious value among the members of the Court at the time of the 9-0 decision. For example, Justice O'Connor wrote to emphasize that artistic value was irrelevant to the harm of child abuse that child pornography law sought to eradicate. "For example, a 12-year-old child photographed while masturbating surely suffers the same psychological harm whether the community labels the photograph 'edifying' or 'tasteless.' The audience's appreciation of the depiction is simply irrelevant to New York's asserted interest in protecting children from psychological, emotional, and mental harm." *Id.* at 774-75 (O'Connor, J., concurring). In contrast, Justice Brennan assumed that serious artistic value would be a valid defense in a case if it were raised. He wrote that harm to a child and value of a depiction bear an inverse relationship to one another: "The Court's assumption of harm to the child resulting from the 'permanent record' and 'circulation' of the child's 'participation' ... lacks much of its force where the depiction is a serious contribution to art or science." *Id.* at 776 (Brennan, J., concurring in the judgment) (citations omitted). In *Hilton*, the First Circuit indicated that serious value would be a defense under the Child Pornography Prevention Act of 1996 when the prosecution was based on virtual child pornography that did not involve a real or recognizable child. *United States v. Hilton*, 167 F.3d 61, 71 (1st Cir. 1999).

In any event, the Court's unwillingness to except works of serious artistic value from the definition of child pornography, and the assumption that it is unlikely that any works that might be child pornography might also possess even de minimus social value, are simply contrary to contemporary artistic practice. For a discussion of the importance of child nudity in art, see *infra* notes 248-251.

¹⁸⁹ [189] This rationale of child abuse is also key to the Court's and Congress's assumption that child pornography can be only images rather than text. The supposition is that text does not record actual abuse, but rather can spring from the imagination.

¹⁹⁰ [190] See *supra* note 188 (discussing Justice O'Connor's adherence to the idea that value is irrelevant to harm).

¹⁹¹ [191] 495 U.S. 103, 111 (1990).

child pornography law in justifying both the decision and the rejection of a basic tenet of obscenity law: Privacy rights protect the individual possessor of obscenity in his own home, even though the material he possesses would be illegal to make or sell.¹⁹² [192] All of these doctrinal turns in child pornography law were necessary according to the Court because child pornography, unlike adult obscenity, springs from a grievous harm.¹⁹³ [193]

Yet, two developments in child pornography law have departed from this essential basis and have significantly extended the foundation upon which the law is built. The first departure was made by the Court itself, the second by Congress. In *Osborne*, the Court introduced an entirely new rationale for banning child pornography: Pedophiles may use it to seduce new victims or to convince children to submit to sexual violation.¹⁹⁴ [194] [*244] Until *Osborne*, it was unheard of in modern First Amendment law that speech could be banned because of the possibility that someone might use it for nefarious purposes.¹⁹⁵ [195]

Congress also departed from the rationale of child pornography law when it passed the Child Pornography Prevention Act of 1996.¹⁹⁶ [196] The law responded to a technological innovation, the development of virtual child pornography – wholly computer-generated images. Although it is possible to view this innovation as a means of circumventing the problem of child abuse that was previously required for the production of child pornography, Congress chose another position. It outlawed under the rubric of child pornography law

¹⁹² [192] *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (holding that the government cannot prohibit mere possession of obscene material).

¹⁹³ [193] *Osborne*, 495 U.S. at 109 ("The State does not rely on a paternalistic interest in regulating *Osborne's* mind. Rather, Ohio has enacted [its law prohibiting possession of child pornography] in order to protect the victims of child pornography").

¹⁹⁴ [194] *Id.* at 111 ("Evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.") (citing Attorney General's Report, *supra* note 28, at 649).

¹⁹⁵ [195] The Court did not state that this rationale could stand alone in justifying the prohibition of child pornography. Rather, the Court added this rationale to a list of others. See *id.* ("Other interests also support the Ohio law."). For a discussion of the constitutional problems raised by this rationale, see Adler, *Inverting the First Amendment*, *supra* note 6.

¹⁹⁶ [196] Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 121 (codified in scattered sections of 18 U.S.C.).

materials that appear to be (but are not) depictions of children engaged in sexual conduct.¹⁹⁷ [197] According to Congress, such child pornography, even though it is made without the use of real children, must be prevented because it “inflames the desires of child molesters, pedophiles, and child pornographers”¹⁹⁸ [198] and “encourages a societal perception of children as sexual objects.”¹⁹⁹ [199] We can debate whether that law is good policy. What is certain, however, is that it is a total departure from the basis of child pornography law - the abuse of children in the production of the material - as the Supreme Court devised it. The law has so far withstood constitutional challenge in the First Circuit and the Eleventh Circuit; in December of 1999, the Ninth Circuit struck it down.²⁰⁰ [200]

[*245]

III. TABOO, TRANSGRESSION, AND THE INCREASED SEXUAL ALLURE OF CHILDREN

The arc of child pornography law closely tracks the cultural crisis mapped out above: Since their “discovery” in the late 1970s, the problems of child sexual abuse and child pornography have reached epidemic proportions.²⁰¹ [201] Child pornography law arose in the same time frame and grew apace. Its lifespan and development correspond to the rise in awareness of child sexual abuse more generally.

¹⁹⁷ [197] "'Child pornography' means any visual depiction ... of sexually explicit conduct, where ... (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct; [or] (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct" 18 U.S.C. 2256(8) (B)-(C) (Supp. IV 1998).

¹⁹⁸ [198] Child Pornography Prevention Act of 1996 121(10) (B) .

¹⁹⁹ [199] 121(11) (A) .

²⁰⁰ [200] *United States v. Hilton*, 167 F.3d 61, 65 (1st Cir. 1999); *United States v. Acheson*, 195 F.3d 645, 648 (11th Cir. 1999). But see *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1086 (9th Cir. 1999), cert. granted, *Ashcroft v. Free Speech Coalition*, 121 S.Ct 876 (2001). The Ninth Circuit found that the law "criminalizes disavowed impulses of the mind" and "evil ideas," and therefore violated the First Amendment. *Id.* at 1094.

²⁰¹ [201] *Jenkins*, supra note 10, at 146-46 (questioning the statistics used in the media to support the claim that child pornography was a growing crisis).

What are we to make of the correspondence between a spreading cultural crisis and a growing legal structure? The conventional interpretation is obvious: Law exists in a reactive mode; child pornography law has expanded because it has responded to an expanding crisis.

In this Part, I cast aside this interpretation, not because it is wrong, but because I think it is incomplete. Instead, I offer the first of two readings that supplement the conventional account. Although I believe the first reading offered here is legitimate, in the end, I find it only partially satisfactory. I will explain why when I turn to my second reading in Part IV, which I believe is a deeper, albeit more troubling, interpretation of the problem.

Inherent in all regulation, but particularly in regulation of sexual desire, there is the possibility that legal taboos will invite their own violation. The desire to transgress a prohibition, indeed the thrill of transgression for its own sake,²⁰² [202] is a familiar story. In fact, it is a foundational one. The most basic myths of western culture tell of contravening prohibitions: Think of Adam and Eve, or Prometheus, or Psyche.

Does this way in which interdiction can conjure desire play a role in the puzzling relationship between an expanding law of child pornography on the one hand and an escalating crisis of child sexual victimization on the other? Has legal regulation of child pornography invited its own contravention, a rise in sexualized depictions of children?

I do not argue that the desire to transgress is a ubiquitous problem conjured up by all legal regulation. The dialectic between prohibition and transgression is not universal. This is so in two important ways: First, even assuming that there is a sector of people who desire to violate a prohibition simply because activities are forbidden, we need not suppose that this sector represents more than a minority of the general population. We can further assume that not all of those who feel desire to transgress will in fact do so. Based on these assumptions, therefore, it is possible to suppose that more people will be driven to obey a prohibition than [*246] defy it. On this analysis, prohibition would do more good than harm (in terms of achieving its stated ends).

Second, this dynamic is not present in all realms. Rather, the sometimes dialectical relationship between prohibition and desire plays itself out in different ways in different domains. Its relative power varies according to the situation. As I will explain below, it is especially relevant in sexuality. Its significance is even more urgent in the context of our current crisis over child sexual abuse.

²⁰² [202] See, e.g., Deborah Cameron & Elizabeth Frazer, *The Lust to Kill* 57-58 (1987) (quoting Simone de Beauvoir, *Force of Circumstance* 255 (R. Howard trans. 1968)) (describing "transcendent" feeling of deviant for living above the rules of society)).

I analyze these questions in three sections. First, I explore the contours of the relationship between prohibition and violation. Second, I argue that the nature of sexuality²⁰³ [203] renders this dialectic particularly forceful in the context of sexual regulation, as opposed to regulation in general. Third, I propose that the current climate surrounding child pornography law, described above, has made it especially likely to encourage this perverse effect. In short, there is something special about child pornography law.

A. The Dialectic Between Prohibition And Transgression

How can we best explain this paradox, which one critic called the “perverse human tendency to transform prohibition into temptation?”²⁰⁴ [204] Some scholars have argued that this dynamic arises from the nature of prohibition itself, its peculiar dependence on its own

²⁰³ [203] I should qualify any reference to the "nature of sexuality" by cautioning that I mean only the nature of sexuality as we understand it. As will be evident in Part IV, it is essential to my argument that sexuality is socially constructed.

²⁰⁴ [204] Roger Shattuck, *Forbidden Knowledge: From Prometheus to Pornography* 329 (1996). I have previously argued that the category "art" is defined by its transgressive quality. See Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 *Yale L.J.* 1359, 1362-65, 1378 (1990).

violation.²⁰⁵ [205] As Foucault writes, "limit and transgression depend on each other ... [A] limit could not exist if it were absolutely uncrossable... ." ²⁰⁶ [206]

[*247] In fact, the existence of the legal limit seems to make its transgression more alluring, implicating our "lust for the forbidden."²⁰⁷ [207] Foucault explains: "In ... our gestures and speech, transgression prescribes not only the sole manner of discovering the sacred ... but also a way of recomposing its empty form, its absence, through which it becomes all the more scintillating."²⁰⁸ [208] Chaucer's Wife of Bath is more to the point. She said, "Forbede us thing, and that desiren we."²⁰⁹ [209]

But which comes first: desire or prohibition? To answer with certainty is impossible, but Freud suggests the answer may be desire. Describing his inquiry into tribal taboos, Freud writes: "Taboo is a very primitive prohibition imposed from without (by an authority) and

²⁰⁵ [205] To Bataille, a transgression "suspends a taboo without suppressing it." Georges Bataille, *Erotism: Death & Sensuality* 36 (Mary Dalwood trans., 1986) (1957). Rather, "transgression does not deny the taboo but transcends it and completes it." *Id.* at 63. See also Mark C. Taylor, *Desire of Law, Law of Desire*, 11 *Cardozo L. Rev.* 1269, 1269 (1990) (noting that law and desire exist in dialectical relationship to each other).

²⁰⁶ [206] Michel Foucault, *A Preface to Transgression* in Michel Foucault, *Language, Counter-Memory, Practice: Selected Essays and Interviews* 29, 34 (Donald Bouchard, ed. 1977) (explaining Bataille) [hereinafter Foucault, *Preface to Transgression*]. Foucault continues:

Perhaps [transgression] is like a flash of lightning in the night which, from the beginning of time, gives a dense and black intensity to the night it denies, which lights up the night from the inside, from top to bottom, and yet owes to the dark the stark clarity of its manifestation, its harrowing and poised singularity; the flash loses itself in this space it marks with its sovereignty and becomes silent now that it has given a name to obscurity.

Id. at 35.

²⁰⁷ [207] Shattuck writes that "lust for forbidden knowledge" is at the root of human curiosity: "Ancient and modern prohibitions on particular areas of knowledge sometimes stimulate human curiosity more than they dampen it." Shattuck, *supra* note 204, at 330.

²⁰⁸ [208] Foucault, *Preface to Transgression*, *supra* note 206, at 35.

²⁰⁹ [209] Geoffrey Chaucer, *The Canterbury Tales*, in *Chaucer's Poetry: An Anthology for the Modern Reader* 207 (E.T. Donaldson ed., 1975) (*The Wife of Bath's Prologue*, line 525).

directed against the strongest desires of man."²¹⁰ [210] Of course, this makes sense: "Whatever is expressly forbidden must be an object of desire."²¹¹ [211]

Yet, some theorists have posited that prohibition produces desire.²¹² [212] At the very least, Freud observes that prohibition could heighten a pre-existing longing.²¹³ [213] In fact, Freud is at times susceptible to an interpretation that the order may be entirely reversed, that prohibition precedes desire and not vice versa: Again, in *Totem and Taboo*, Freud remarked on the inherent capacity of a taboo to arouse temptation. Freud's general approach to the personality also suggests this structure; as one contemporary critic explains: In Freud, "the super-ego is ... wrought from the sexualization of a prohibition and only secondarily becomes the prohibition of sexuality."²¹⁴ [214]

[*248] Even though the question of which came first seems unanswerable, the answer may be unimportant. Once in place, the two are locked in a dialectical dance: Prohibitions escalate

²¹⁰ [210] Sigmund Freud, *Taboo and the Ambivalence of Emotions*, in *Totem and Taboo* 802 (A.A. Brill trans., Modern Library 1938) (1912). The desire to transgress a taboo resides in the unconscious; in most cases, the conscious fear of violation outweighs the unconscious desire. *Id.* at 799. Yet, the desire to transgress remains embedded in the taboo. *Id.*

I use Freud's work here in spite of the criticism leveled against him in the context of child sexual abuse as described in Part I. I should also note that my use of Foucault later in this Article further complicates the question of Freud's validity here, since, as I explain in Part IV, Foucault raised troubling questions about Freud's work on sexuality. I grapple with these contradictions later in the Article when I consider the relationship and ultimate harmony between the two readings offered in Parts III and IV.

²¹¹ [211] *Id.* at 828.

²¹² [212] Part IV will address this question from another perspective.

²¹³ [213] Sigmund Freud, *The Most Prevalent Form of Degradation in Everyday Life* 212 (1912) in *4 Collected Papers* 203 (Joan Riviere trans., Basic Books 1959) [hereinafter *Freud, Degradation*].

²¹⁴ [214] Judith Butler, *Excitable Speech: A Politics of the Performative* 175 n.19 (1997).

desire, desire calls for greater prohibitions, and so on.²¹⁵ [215] As Freud observed, “desire is mentally increased by frustration of it.”²¹⁶ [216]

In psychoanalytic theory, prohibition curiously preserves rather than obliterates the desire it suppresses.²¹⁷ [217] In fact, the pleasure of repeating and observing a prohibition may come to replace the satisfaction of violating it: The enforcement of the prohibition is an occasion for the reliving of the prohibited desire, made all the more pleasurable because it is relived under the veil of condemnation.²¹⁸ [218] (Many have observed the salaciousness of the censor; the leering, suggestive ebullience that can accompany a vigorous censorship campaign.) In this way, prohibition and desire depend on one another. As Judith Butler writes, “The prohibition does not seek the obliteration of prohibited desire; on the contrary, prohibition pursues the reproduction of prohibited desire and becomes itself intensified through the renunciations it effects... . The prohibition not only sustains, but is sustained by, the desire that it forces into renunciation.”²¹⁹ [219]

This theory has unpleasant implications when considered in the context of our cultural preoccupation with child molestation. It would suggest that the heightened anxiety about child sexual abuse is closely related to repressed pedophilic desire. Nancy Scheper-Hughes, a child welfare advocate and the chair of the Department of Anthropology at Berkeley, has argued that “the national bsession with child abuse and rescue” masks “the national

²¹⁵ See Freud's discussion of the dynamic relationship between conscience and renunciation in Sigmund Freud, *Civilization and its Discontents* 84 (1961).

²¹⁶ [216] Freud, *Degradation*, *supra* note 213, at 213-14.

²¹⁷ [217] This view is consistent with Freud's general theory of repression, by which desires are driven into the unconscious but never eliminated. Sigmund Freud, *The Interpretation of Dreams* 577 (James Strachey trans., 1913) (1900). Because the contents of the unconscious are indestructible, they always reemerge by “devious routes” into consciousness. J. Laplanche & J.-B. Pontalis, *The Language of Psychoanalysis* 398 (Donald Nicholson Smith, trans., 1973) (1967).

²¹⁸[218] See Butler, *supra* note 214, at 117.

²¹⁹ [219] *Id.*

collective unconscious fear/wish that a 'child is being beaten' 'a girl is being molested.'"²²⁰
[220]

[*249]

B. Sex and Transgression

Sex thrives on transgression. Bataille writes that "the profound complicity of law and the violation of law" defines eroticism.²²¹ [221] The psychoanalysts Laplanche and Pontalis insist that the "language of desire [is] necessarily marked by prohibition."²²² [222] Indeed, in sexuality, Freud observed that "some obstacle is necessary to swell the tide of the libido to its height."²²³ [223] Freud questioned why prohibition increases desire in the realm of the erotic, but not in all other realms. For example, he compares desire for wine to desire for sex:

One thinks, for instance, of the relation of the wine-drinker to wine. Is it not a fact that wine always affords the drinker the same toxic satisfaction - one that in poetry has so often been likened to the erotic and that science as well may regard as comparable?... Do we ever find a drinker impelled to go to another country where ... alcohol is prohibited, in order to stimulate his dwindling pleasure in it by these

²²⁰ [220] Scheper-Hughes & Stein, *supra* note 49, at 186. She also writes: "The 'child saver' investigators are themselves suspect of playing out a child molestation fantasy." *Id.* at 189. The "child is being beaten" reference in the first quotation is to Freud, who remarked, in a somewhat similar vein: "It is surprising how often people who seek analytic treatment for hysteria or an obsessional neurosis confess to having indulged in the phantasy: 'A child is being beaten.'" Sigmund Freud, *A Child is Being Beaten: A Contribution to the Study of the Origin of Sexual Perversions* 179 (James Strachey, trans. 1995) (1917).

²²¹ [221] Bataille, *supra* note 205, at 36. Drawing on Hegel, Bataille examines the dialectic of transgression and taboo. To Bataille, a transgression "suspends a taboo without suppressing it." *Id.* Rather, "transgression does not deny the taboo but transcends it and completes it." *Id.* at 63; see also Jessica Benjamin, *The Bonds of Love: Psychoanalysis, Feminism, and the Problem of Domination* 62-68 (1988) (discussing Bataille and Hegel); David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. Pa. L. Rev. 111, 116 (1994) ("Sexual expression ... subverts every taboo by making it a fetish. The forbidden is simultaneously eroticized.").

²²² [222] Jean Laplanche & Jean Bertrand Pontalis, *Fantasy and the Origins of Sexuality*, in *Formations of Fantasy* 11 (Victor Burgin et al. eds., 1986).

²²³ [223] Freud, *Degradation*, *supra* note 213, at 213.

obstacles? Nothing of the sort... . Why is the relation of the lover to his sexual object so very different?²²⁴ [224]

How does Freud answer this question? The appeal of the taboo holds special force in sex according to Freud because our sexuality is founded in taboo – the frustrated incestuous desire that children feel for their parents.²²⁵ [225] Sexual prohibitions exert a special hold on us because they allow us unconsciously to revisit our forbidden oedipal longings. To exploit its pleasures to the fullest, we need to experience sexuality as forbidden.

It may be that prohibition is so stimulating and so suggestive of eroticism that its very presence can alchemically transform the mundane into the sexy. For example, the Wall Street Journal reports that in the last few [*250] years, as “cigarette smoking was pushed to the extremes of acceptable behavior” a new fetish sprang to life for so-called “smoxploitation” films,²²⁶ [226] movies marketed for their erotic appeal, yet featuring “fully clothed, attractive women who do nothing but smoke.”²²⁷ [227] This story suggests that prohibition not only intensifies the allure of certain sexual scenarios, but can conjure up sex out of whole cloth.

According to psychoanalytic theory, the structure of sexuality makes it inevitable that regulations of sex will be inherently (albeit only partially) counterproductive. The Freudian insight gives force to an argument made by Catharine MacKinnon against obscenity law. To MacKinnon, the social condemnation surrounding obscenity may be part of its allure:

It seems essential to the kick of pornography that it be to some degree against the rules Thus obscenity law, like the law of rape, preserves the value of, without

²²⁴ [224] *Id.* at 214. For an interesting critique of this passage, see William Ian Miller, *The Anatomy of Disgust* 124-27 (1997).

²²⁵ [225] Freud theorized that men and women reacted differently in this respect. Men often chose to grapple with the obstacle by splitting their desire between an "appropriate" wife, who recalled the man's mother or sisters, and a mistress whom the man could view as degraded and therefore outside the incest taboo. (Freud's analysis dwells on class distinctions here.) Freud reasoned that it was often "not possible for [women] ... to undo the connection thus formed in their minds between sensual activities and something forbidden" Freud, *Degradation*, *supra* note 213, at 211-212.

²²⁶ [226] Suein L. Hwang, *Drag Queens: Paula Puffs and Her Fans Watch Enraptured 'Smoxploitation' Films Signal That Smoking is Becoming a Fetish Among Many*, *Wall St. J.*, Jan. 31, 1996, at A1.

²²⁷ [227] *Id.* As the editor of a pornographic magazine that has turned to smoking pictures argued, "anytime something becomes ... taboo, it will be eroticized." *Id.* (quoting Dian Hanson, editor of *Leg Show*, a "popular fetish magazine").

restricting the ability to get, that which it purports to both devalue and to prohibit. Obscenity law helps keep pornography sexy by putting state power - force, hierarchy - behind its purported prohibition on what men can have sexual access to.²²⁸ [228]

Furthermore, for MacKinnon, the cyclical relationship of obscenity and sexual desire means that pornography will keep pushing back the boundary of what is acceptable. She writes, "the frontier of the taboo keeps vanishing as one crosses it... . More and more violence has become necessary to keep the progressively desensitized consumer aroused to the illusion that sex is (and he is) daring and dangerous."²²⁹ [229] (Of course, MacKinnon does not explain adequately how her own regulation of pornography will escape this trap.)

C. Child Pornography Law and Mainstream Pedophilia

If prohibition produces or escalates desire in the realm of sexuality generally, is there anything about child pornography law that would make it particularly vulnerable to this perverse dynamic? Sociological literature suggests the answer is yes: The social climate of anguish over child sexual abuse, and the expanding laws of child pornography that [*251] express and reflect this anguish, have made children all the more sexually alluring.

The classic sociological work on the nature of taboo and transgression is Kai T. Erikson's *Wayward Puritans: A Study in the Sociology of Deviance*.²³⁰ [230] Erikson writes that "deviant behavior [seems] to appear in a community at exactly those points where it is most

²²⁸ [228] Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 162 (1987).

²²⁹ [229] *Id.* at 151. MacKinnon assumes that her ordinance eschews one of the pitfalls of obscenity law - state power enforcement - by making pornography a tort, subject to individual women's civil lawsuits, rather than a crime. *Id.* at 198-205. Obviously, the state is still involved in the tort system, a problem that MacKinnon avoids completely.

²³⁰ [230] Kai T. Erikson, *Wayward Puritans: A Study in the Sociology of Deviance* (1966). Erikson's work points to the social shaping of deviant categories and of identities.

feared.”²³¹ [231] Explaining the paradox by which “many of the institutions designed to discourage deviant behavior operate in such a way as to perpetuate it,”²³² [232] he writes:

Any community which feels jeopardized by a particular form of behavior will impose more severe sanctions against it and devote more time and energy to the task of rooting it out. At the same time, however, the very fact that a group expresses its concern about a given set of values often seems to draw a deviant response from certain of its members. There are people in any society who appear to “choose” a deviant style exactly because it offends an important value of the group...²³³ [233]

Erikson’s theory indicates that the heated anxiety we have exhibited about child pornography makes it more inviting to criminal violation. As he explains, deviant behavior manifests itself in perfect symmetry to social fears, lending a “self-fulfilling prophetic” quality to the community’s apprehensions.²³⁴ [234] An early history of Puritan culture explained the self-generative quality of fear: “Their troublers came precisely in the form and shape in which they apprehended them.”²³⁵ [235]

Reconsider in this context the scandal over the Calvin Klein “kiddie porn” advertising campaign of August 1995. Prior to the release of the campaign, public concern over children’s

²³¹ [231] *Id.* at 22 (emphasis added). Another work that emphasizes the necessity of transgression to the social order is Rene Girard, *Violence and the Sacred* 106 (Patrick Gregory trans., 1972) (discussing royal incest rituals). Girard contends that transgression serves a ritualistic, normative function which reaffirms cultural stability. See *id.* at 257. See also Stephen Greenblatt, *Renaissance Self-Fashioning: From More to Shakespeare* (1984). Greenblatt contends that the formation of individual identity requires the existence of an “alien” to attack. He writes: “Self-fashioning is achieved in relation to something perceived as alien, strange, or hostile. This threatening Other – heretic, savage, witch, adulteress, traitor, Antichrist – must be discovered or invented in order to be attacked and destroyed.” *Id.* at 9. For a classic exploration of related themes, see Herbert Marcuse, *Eros and Civilization* 49–51 (1966).

²³² [232] Erikson, *supra* note 230, at 14.

²³³ [233] Erikson, *supra* note 230, at 20. Erikson’s work focuses on the necessity of deviance in the formation of group identity; he views deviance as part of community’s “overall division of labor.” *Id.* at 19.

²³⁴ [234] *Id.* at 17, 22.

²³⁵ [235] *Id.* at 23 (quoting George Edward Ellis, *The Puritan Commonwealth*, in *The Memorial History of Boston 166* (Justin Winsor ed., 1880)) (describing early Puritan crime). Erikson elaborates the point, noting that the deviance came in the exact reflected image “of those values which stood at the core of the Puritan consciousness.” Erikson, *supra* note 230, at 23.

sexual vulnerability had [*252] reached a frenetic pitch: *Knox v. United States* had been decided the previous year. Senator Orrin Hatch had just introduced the legislation that was to become the Child Pornography Prevention Act of 1996.²³⁶ [236] Congress had just passed the Communications Decency Act - since declared unconstitutional - aimed to protect children from the dangerous sex available on the Internet.

In July 1995, *Time* magazine featured a frightening and much criticized cover story detailing the sexual threat to America's children posed by new technology.²³⁷ [237] (Commentators assailed the magazine for giving in to cultural hysteria; *Time* printed a retraction the following week.) Also in July 1995, the FBI made news when it began investigating a ring of child pornographers on America Online.²³⁸ [238] At the very height of this panic, in August 1995, Calvin's Klein's new multimillion dollar "kiddie porn" jeans campaign emerged on buses and TV ads.

The campaign looked like fetish photographs of a pedophile. In one image, a pubescent girl spreads her legs to reveal white cotton panties under her short skirt. In the TV ads, the

²³⁶ [236] See 141 Cong. Rec. S13, 540, S13, 542 (1995) (statement of Sen. Hatch). See *supra* notes 196-200 and accompanying text for a discussion of the provisions of the Act.

²³⁷ [237] See Philip Elmer-DeWitt, *On a Screen Near You: Cyberporn*, *Time*, July 3, 1995, at 38.

²³⁸ [238] See Associated Press, *FBI Ready For Raid On Computer Child Porn*, *Plain Dealer* (Clev.), July 6, 1995, at 5B, available at 1995 WL 7118712.

teenagers seem to be tricked into auditioning for a part in a pornographic movie.²³⁹ [239] A critic called it "the most profoundly disturbing campaign in TV history."²⁴⁰ [240]

Klein withdrew the ad campaign amid public outcry, an unfulfilled threat of prosecution for child pornography,²⁴¹ [241] and general media [*253] frenzy. It was a staggering success. The campaign dramatically increased sales of Calvin Klein jeans.²⁴² [242] The cancelled ads became hip collectors' items. Amidst all the government and media focus on child pornography, it seems as if such an ad campaign were predestined; it searched out and violated the hottest taboo. After all, jeans sell the image of the sexual outlaw. Like a cool teenager, Calvin Klein sold the swagger of saying nothing scared him, certainly not the sexual threat that preoccupied policymakers. He defied authority and gained instant credibility with rebellious kids.²⁴³ [243]

²³⁹ [239] Here is the text of one of the commercials as quoted in Calvin's Provocative Portfolio, Advertising Age, Sept. 4, 1995, at 34. The scene depicts an awkward good looking pubescent boy in a T-shirt and jeans. He stands in a cheaply wood paneled basement and addresses an off-camera male voice.

Off-camera voice [OCV]: You got a real nice look, how old are you?

Model: Twenty-one [clearly lying].

OCV: What's your name?

Model: August.

OCV: Why don't you stand up ... are you strong?

Model: I'd like to think so.

OCV: You think you could rip that shirt off of ya?

Model rips off T-shirt

OCV: That's a nice body ... do you work out?

Model: Uh huh.

OCV: Yeah, I can tell.

²⁴⁰ [240] Deborah Voorhees, Ad Watchdog Has an Eye for Howlers, Dallas Morning News, Feb. 18, 2000, at 53, available at 2000 WL 14655897 (quoting Bob Garfield, advertising critic for Advertising Age).

²⁴¹ [241] The FBI reportedly investigated the possibility of issuing criminal child pornography charges against Klein, but never went forward. See Paula Span, Sexy Calvin Klein Ads Spark FBI Inquiry, Wash. Post, Sept. 9, 1995, at A1. The fact that the models were clothed in the ads presumably would be no bar to prosecution under the Knox court's interpretation of the federal anti-child pornography statute. It was unclear from press reports whether any of the very young looking models were actually minors.

²⁴² [242] Heavy Hitters Pull No Punches, Advertising Age, Dec. 18, 1995, at 16 (stating that the "hype" over controversial ads convinced teens that the jeans must be cool, and product flew off the racks. "Mr. Klein expects jean sales will nearly double this year").

²⁴³ [243] For work establishing that transgression is the basis of youth culture, see Dick Hebdige, Subculture: The Meaning of Style 17-19 (1991).

How did this come to be? How did a “kiddie porn” advertising campaign - so extreme that it sparked an FBI investigation, and so mass-market that it appeared on the sides of buses - arise in an era of increased regulation of child pornography? Strange as it may seem, the Calvin kiddie pornography campaign exemplifies a recent pattern. A cultural critic writes of the “ubiquitous eroticization of little girls in the popular media and the just as ubiquitous ignorance and denial of this phenomenon.”²⁴⁴ [244] For example, fashion celebrates the “waif look” to the point where even a mainstream magazine like *Vogue* was accused in the popular press of peddling kiddie porn. Pop star sensation Britney Spears rose to fame by dressing up as a naughty schoolgirl and dancing provocatively in her uniform.²⁴⁵ [245] The *Village Voice* describes the increasing demand for models who look like little girls: The modern ideal has “the face of a child, while her engorged red lips suggest readiness for penetration. Her boyish body heightens the illusion of the fuckable child.”²⁴⁶ [246] Not only fashion, but even network news uses sexy children. Three years after the death of six-year-old JonBenet Ramsey, her preternaturally sexual figure still minces eternally on prime time television in full makeup and a revealing outfit. Decrying the seemingly endless - not to mention needless footage that aired “every, every night” for months after the murder, CBS news anchor [*254] Dan Rather condemned the TV industry for repeatedly airing pictures that “border on kiddie porn.”²⁴⁷ [247]

²⁴⁴ [244] Valerie Walkerdine, *Popular Culture and the Eroticization of Little Girls*, in *A Children's Culture Reader*, supra note 49, at 254; see also Sarah Boxer, 'Lolita' Turns 40, Still Arguing for a Right to Exist, *N.Y. Times*, Aug. 1, 1998, at B9 (“every man, woman, and child among us has become a vile, pustulating pedophile,” quoting writer Damon Treat, who wrote about “the new Lolitocracy”).

²⁴⁵ [245] See, e.g., Britney's Wild Ride, *People*, Feb. 14, 2000, at 98 (“Your 12-year-old daughter's favorite popster is a pouty teen temptress who sings 'Hit Me Baby One More Time.'”); Nicholas Barber, Hit On Me Baby One More Time (But Sex Is Out Of The Question), *The Guardian*, Aug. 13, 2000, at 8 (describing the “soft porn fantasy” Rolling Stone photo shoot that “pictured Spears in her underwear, toy teletubby under one arm in a pink bedroom” being sold as a “jailbait man-pleaser”).

²⁴⁶ [246] Richard Goldstein, *Nymph Mania*, *Village Voice*, June 17, 1997, at 48.

²⁴⁷ [247] Andrew Wallenstein, *Pretty Girl, Ugly Media: Pageant 'Issue' a Flimsy Excuse for Exploiting Model's Slaying*, *Ariz. Republic*, Feb. 5, 1997, at B5 (quoting Dan Rather).

The child as sexual subject has emerged as a major force in artistic culture.²⁴⁸ [248] Best-selling, high-art photographer Sally Mann takes erotic nudes of her prepubescent children. A recent photograph of Mann's daughter entitled "Venus After School" pictured the naked child languorously spread on a divan in the precise position of Manet's famous portrait of a prostitute.²⁴⁹ [249] One of the most disturbing and well-known art photographers, Larry Clark, who documents the lives of drug addicted and violent teenagers, takes photographs which, one could argue, easily meet the definition of child pornography.²⁵⁰ [250] For example, the title of the close-up photograph "Prostitute Gives Teenager His First Blow Job" speaks for itself. Ironically, at the same time Sally Mann and Larry Clark are so vulnerable to censorship,²⁵¹ [251] it is essential to note their commercial and critical success. Mann's shows sell out. Larry Clark has been embraced by the film industry.²⁵² [252] Mann's and Clark's renown, coupled with their legal vulnerability, suggests the complex relationship between legal prohibition and artistic popularity.

The highly eroticized use of children in fashion, television, and advertising is now the "soft porn" of child pornography.²⁵³ [253] As the crisis over child pornography mounts and the legal proscriptions multiply, the sexual allure of children does too. A cultural scholar reports that "there [now] circulates more disguised kiddie porn than at any other period in history The late twentieth century has seen children emerge as the principal incitements to desire" ²⁵⁴ [254] As rhetoric rises about the threat of sexual abuse, as we insist more than

²⁴⁸ [248] Some of the prominent contemporary artists whose work depicts child nudity include Jock Sturges, Larry Clark, Wendy Ewald, Henry Darger, and Jake and Dinos Chapman (who were among the notorious "Sensation" artists).

²⁴⁹ [249] Manet's *Olympia* is in turn based on Titian's *Venus of Urbino*, from which the Mann photograph takes its title.

²⁵⁰ [250] See Jim Lewis, *Larry Clark: What Is This?*, *Parkett* No. 32, June, 1992, at 21.

²⁵¹ [251] See *supra* notes 188-190 and accompanying text, explaining lack of protection for works that may contain artistic value.

²⁵² [252] See *Kids* (Miramax 1995) (chronicling sexual activities of young teenagers in New York City).

²⁵³ [253] Walkerdine, *supra* note 244, at 257.

²⁵⁴ [254] Marina Warner, *Six Myths of Our Time* 59 (1994) (also noting that in current pornography, "children have in many ways replaced women"); see also Higonnet, *supra* note 5, at 10-11 (asserting that "more and more sexual meanings are now being ascribed to photographs of children both past and present").

ever on the natural innocence of children, as we expand the definition of what constitutes child sexual conduct, the seductive child beckons to us in advertising, fashion, pop culture, and art. In fact, some scholars argue that modern society is perverse and pedophilic, that pedophilia has become “such an everyday [*255] part of our lives that we hardly notice it.”²⁵⁵ [255] Some feminists have gone so far as to argue that given our culture, we should no longer label the person who sexually abuses children as a pervert; rather such a person is behaving according to “normal” masculine sexual culture.²⁵⁶ [256]

In this sense, child pornography law seems like a partial failure. Perhaps the law has been successful in reducing the circulation of hard core child pornography, although given the difficulty of measuring the existence of child pornography and the claims that it is a rising tide, the law may have failed even at that.²⁵⁷ [257] Yet, even if we assumed that child pornography law has succeeded at this task, it seems that its target has mutated and gone mainstream. Whatever the law’s success in stamping out the “low-profile, clandestine industry” of kiddie porn, child pornography law has presided over a period in which the sexualized marketing of children has stepped into the light of day.²⁵⁸ [258] Given what we know of desire, sexuality, and deviance, the law may have unintentionally fueled this trend.

IV. CHILD PORNOGRAPHY LAW AND THE PROLIFERATION OF THE SEXUAL CHILD

All seems infected that th’ infected spy,
As all looks yellow to the jaundiced eye.

²⁵⁵ [255] Emily Driver, Introduction, in *Child Sexual Abuse* 23 (Emily Driver & Audrey Droisen eds., 1989); see also Bell, *supra* note 8, at 78 (documenting and evaluating feminist arguments on this point). Feminists argue that it is not just the sexualizing of children that is at work; the valorization of women's youth and of female childlike behavior also reflects this perversity. *Id.*

²⁵⁶ [256] Bell, *supra* note 8, at 82.

²⁵⁷ [257] As I discuss in Part I.B.3, *supra*, the statistics are hard to interpret on this point.

²⁵⁸ [258] *New York v. Ferber*, 458 U.S. 747, 760 (1982).

- Alexander Pope, *An Essay on Criticism* (1709)²⁵⁹ [259]

In this Part, I show that the story I told above of taboo and transgression is incomplete, and, in a sense, naive. That is so because the story still depends on a conception of law as a pure realm, separate from culture but caught in a dialectic with it. Here I deconstruct²⁶⁰ [260] that false binary. Although I think there is a dialectical relationship, it is only one aspect of a more complex alliance.

Call the theory I present here the disease model of child pornography law. Like everything else, law has been infected by the sexualization of children; it is symptomatic of the illness it fights. And once infected, the doctor spreads the disease to his other patients. In this view, law does not merely invite its own transgression; it reenacts and disseminates the very cultural problem it attacks. The drama described above of taboo and transgression is still a means of cross-contamination between doctor and [*256] patient. The argument is still valid. But it is just one type of case, off to the side, in an enormous sick ward.

The two different theories work in synergy. For the sake of clarity, however, I want to stress their differences. Whereas previously I focused on the way in which child pornography law might increase sexual desire for children, in this Part I do not focus on desire. Rather, I argue that child pornography law socially constructs the child as sexual. One result of this construction may be that more people feel sexual desire for children. But that is not the only possible result. Others may feel increased horror or repulsion. Others may be driven to activism. In any event, child pornography law has deepened the link between children and sex. The reaction to their union will vary with each observer.

The argument in this Part has two sections. In the first section, I argue that child pornography law requires us to scrutinize pictures of children – and ultimately children themselves – as pedophiles do. In the second section, I begin by arguing that the law presents a problem of “resignification”: It strips the sexualized child out of child pornography, inserts him into a new context, and inadvertently reifies what it attacks. I then turn to a Foucauldian structure in which to rethink child pornography law.

A. Surveillance and the Pedophilic Gaze

²⁵⁹ [259] Alexander Pope, *An Essay on Criticism*, in Alexander Pope 17, 34 (Pat Rogers ed. 1993).

²⁶⁰ I mean to use the word not in the loose slang meaning it has acquired (i.e., to “take apart”), but in a Derridean sense.

Child pornography law has changed the way we look at children. I mean this literally. The law requires us to study pictures of children to uncover their potential sexual meanings, and in doing so, it explicitly exhorts us to take on the perspective of the pedophile.²⁶¹ [261] As Congress stated, one danger of child pornography is that it “encourages a societal perception of children as sexual objects.”²⁶² [262] But child pornography law unwittingly encourages the same perception. It, too, sexualizes children, and thereby promotes one of the very dangers it purports to solve.²⁶³ [263] I begin with a cultural example that illustrates the changed way we look at children and then turn to case law to explain it.

In February of 1999, Calvin Klein launched an advertising campaign introducing his first line of children’s underwear. Unlike the controversial campaign of 1995 discussed above, this advertised underwear for toddlers, not for teens. The centerpiece of the campaign was a black-and-white photograph of two boys – about age 4 or 5 - jumping on a sofa in their underwear. The company said the ad showed “children, smiling, laughing and just being themselves.”²⁶⁴ [264] Klein unveiled the new ad in a [*257] huge billboard in Times Square. He also ran full-page ads in the New York Times Magazine and other newspapers.

The reaction was swift and furious: Critics saw the ads as “child pornography.” The accusations were the front-page story the next day in newspapers and tabloids. The New York Post’s story called the pictures “provocative ads, featuring semi-nude kids.”²⁶⁵ [265] Boycotts were threatened. Talk show host Rosie O’Donnell vowed on national TV never again

²⁶¹ [261] *United States v. Villard*, 700 F. Supp. 803, 812 (D.N.J. 1988).

²⁶² [262] Child Pornography Prevention Act of 1996, 18 U.S.C. 2251 (Congressional Findings, at (11)(A)) (Supp. IV 1998).

²⁶³ [263] I do not mean to suggest that children are not sexual prior to our gaze. Rather, I mean that our gaze has now shaped and changed their sexuality.

²⁶⁴ [264] Lenore Skenazy, *Calvin's Not-So-Model Behavior*, N.Y. Daily News, Mar. 1, 1999, at 29 (quoting Calvin Klein).

²⁶⁵ [265] Kirsten Davis & Ed Robinson, *Brief Stay for Calvin Kiddie Ads*, N.Y. Post, Feb. 18, 1999, at 5. Mayor Rudolph Giuliani said that the ads “did not look like the kind of thing you'd want to do with young children.” Matt Reed, *Designer Briefs on Kids?*, Cincinnati Enquirer, Feb. 23, 1999, at C1 (quoting Mayor Giuliani).

to buy underwear by Calvin Klein.²⁶⁶ [266] Klein had the billboard removed a day after it was unveiled and never ran the ads again.²⁶⁷ [267] (It was too late to remove them from some newspapers, where they appeared once.)²⁶⁸ [268]

How did this happen? Why did so many people come to see child pornography in this picture of children “smiling, laughing and just being themselves”? Even Klein’s critics acknowledged: “You can envision this photograph taken by accident - an innocent photo taken by a mom.” A curator at the International Center for Photography described the picture as a “very ordinary image.”²⁶⁹ [269] It was similar to a family snapshot but with “a sense of nostalgia and classicism.”²⁷⁰ [270] What made this “ordinary image” become “provocative”²⁷¹ [271] and “pornographic”? The same critic who recognized that a “mom” could have taken the photo by accident pointed to the following evidence to show that this picture was not an accident at all, that it was child pornography: “If the outline of the little boys’ genitals can be seen in a photograph taken by a professional photographer, that’s not an accident,” he said.²⁷² [272]

After I read this criticism, I went back and looked at the picture in the New York Times Magazine. One of the little boy’s underpants seem baggy as he jumps in midair. Is that an outline of his genitals I wondered? It was then, as I scrutinized the picture of the five-year-old’s underwear, that I realized I was participating in a new order, a world created and compelled by child pornography.

²⁶⁶ [266] Reed, *supra* note 265, at C1.

²⁶⁷ [267] *Id.*

²⁶⁸ [268] Calvin Klein Axes Ads for New Kids Underwear, *Advertising Age*, Feb. 22, 1999, at 64.

²⁶⁹ [269] Associated Press, *Criticized Klein Ad is Pulled*, Feb. 18, 1999, available at 1999 WL 12931035 (quoting Bernard Yenelouis of the International Center for Photography in New York).

²⁷⁰ [270] *Id.*

²⁷¹ [271] Davis & Robinson, *supra* note 265.

²⁷² [272] *After Outcry, Calvin Klein Ends Children's Underwear Ads*, *Chi. Trib.*, Feb. 18, 1999, at 9.

I do not believe that thirty years ago people would have seen the photograph the way we do now. Our vision has changed.²⁷³ [273] I think that [*258] child pornography law is part of the reason we have come to think about the picture this way, searching for signs of sex in a “very ordinary image” of children.

It is essential to the definition of child pornography for us to understand that pedophiles see differently. Once we understand this, however, we have to take another step: We must look at pictures as a pedophile would. Consider the argument made to the Supreme Court in *Knox* by amici:

Because lasciviousness should be examined in the context of pedophilic voyeurs, this Court should view visual images of young girls in playgrounds, schools, and swimming pools as would a pedophile. Pedophiles associate these settings with children, whom to pedophiles, are highly eroticized sexual objects. It therefore follows as a matter of course that viewing videocassettes of the genitalia of young girls in these settings permits the pedophile to fantasize about sexual encounters with them.²⁷⁴ [274]

This argument exhorts the Court to see children as “highly sexualized objects.” The Third Circuit seems to have accepted this argument when the case was remanded to it from the Supreme Court. In examining the videotapes of clothed girls, the court found significant that “nearly all of these scenes were shot in an outdoor playground or park setting where children are normally found.”²⁷⁵ –[275] This aspect of the videotapes - that they were filmed in a setting where “children are normally found” - became one of the details that the court specifically, though not exclusively, relied on in concluding that the material in question was child pornography that “would appeal to the lascivious interest of an audience of

²⁷³ [273] See generally John Berger, *Ways of Seeing* 1-33 (1972). Berger presents the changing conventions of perception and representation. He writes: “Today we see the art of the past as nobody saw it before. We actually perceive it in a different way.” *Id.* at 16. For an international perspective, see Richard Marusa, *American Prudery, and Its Opposite*, *N.Y. Times*, Feb. 19, 2000, at A15 (arguing that an advertising image which in Europe is seen as “innocent and natural” would likely “be denounced by some in America as child pornography”).

²⁷⁴ [274] Brief of National Law Center for Children and Families et al. as Amici Curiae in Support of the Respondent at 1183, *Knox v. United States*, vacated as moot, 510 U.S. 939 (1993) (No. 92-1183) (citations omitted). Amici argue at another point that “it is crucial for the Court to understand that the production, distribution, and receipt of child pornography are accomplished by pedophiles. Because each of the persons involved view children as sexual objects, they react much differently to videotapes such as [those in question] than would a non-pedophile.” *Id.*

²⁷⁵ [275] *Knox v. United States*, 32 F.3d 733, 747 (3d Cir. 1994).

pedophiles."²⁷⁶ [276] According to this logic, a place "where children are normally found" is now suspiciously erotic. If the picture "permits the pedophile to fantasize,"²⁷⁷ [277] then it requires us to do so too.

[*259] Why did the law develop like this? The problem for legal regulation is that pedophiles²⁷⁸ [278] often find stimulation from the very same pictures that non pedophiles consider innocuous, that we²⁷⁹ [279] extol and value: consider the pedophilic magazine *Paidika*, a self-described online "Journal of Paedophilia."²⁸⁰ [280] Its website depicts not grotesque sex acts with children, but pictures of kids that I could only call "cute." *Paidika* also provides links for the interested pedophile to *Vogue Bambini*, an Italian fashion magazine for children's clothes. *Paidika* features on its website a recent *Vogue* cover,

²⁷⁶ [276] *Id.* In a recent case, the First Circuit rejected the government's rather startling assertions that the setting of photographs of children on a beach was sexually suggestive because "'many honeymoons are planned around beach locations.'" *United States v. Amirault*, 173 F.3d 28, 33 (1st Cir. 1999).

²⁷⁷ [277] Brief of National Law Center for Children and Families et al., *supra* note 274, at 10.

²⁷⁸ [278] Cf. *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997) (upholding civil confinement of pedophiles as sexually violent predators and discussing lack of "harmony" among psychiatrists about classification of pedophilia as a mental illness).

Foucault's work calls into question the categorization of people according to their sexual practices, and thus destabilizes the category of "pedophile." See, e.g., Michel Foucault, *The History of Sexuality: An Introduction*, Vol. 1 42-43 (Robert Hurley trans., 1990) (1978) [hereinafter *Foucault, History of Sexuality*] (discussing creation of "homosexuality" as a category).

²⁷⁹ [279] Of course, my discussion of "mainstream pedophilia" in Part III, *supra*, questions the binary division, assumed in public discourse, between "pedophiles" and "us." For a discussion of the ways in which "pedophilic" desire reflects "mainstream" masculine desire, see Bell, *supra* note 8, at 158-59.

To desire someone younger than oneself, with less access to power than oneself, is certainly not an abnormal desire. It is the predominant construction of masculine desire in the contemporary form of heterosexuality. If therefore, one wishes to question the division between adult and child sexuality, one must also stress both the 'normality' of paedophilia and its gendered aspect.

Id.

²⁸⁰ [280] *Paidika, Journal of Paedophilia* (June 9, 1998), at <http://konpeito5.bekkoame.or.jp/ro/fresh/paidikaa.html> (last visited June 9, 1998). *Paidika* describes itself as a "scholarly journal" that explores what it terms "consensual adult-child sexual relations." *Id.*

depicting the child star Macauley Culkin and a blonde girl. The children, wearing heavy winter coats and hats, smile angelically at the camera.

In fact, certain pedophiles may prefer “innocent” pictures.²⁸¹ [281] According to some theorists, the stimulation of a picture may be inversely proportional [*260] to its overtly sexualized nature: It may be the very innocence - the sexual naivete - of the child subject that is sexually stimulating.²⁸² [82] Thus, the peculiar nature of pedophilic desire itself may make the governance of child pornography an impossible task. One writer reports that members of the North American Man Boy Love Association (NAMBLA - an organization for pedophiles, many of whom are in prison) find erotic stimulation by watching children on network television, the Disney channel, and mainstream films. As the writer puts it: “I had found NAMBLA’s ‘porn’ and it was Hollywood.”²⁸³ [283]

With this in mind, it becomes easier to understand why the territory of “lewd exhibition of the genitals” has proved fertile ground for legislative action and judicial approval. Take the facts of *United States v. Knox*,²⁸⁴ [284] the controversial Third Circuit decision discussed above. According to the facts, here was a pedophile whose apparently preferred form of child pornography existed on this very margin: Although the court found that the material was

²⁸¹ [281] For example, the catalogue from which Knox ordered his videotapes described one videotape, featuring girls in panties, as “so revealing it's almost like seeing them naked (some say even better).” *Knox*, 32 F.3d at 138 (emphasis added). See also Hearings on S. 1237 Child Pornography Prevention Act of 1995, *supra* note 64, at 21 (“Often, when we conduct searches in our investigations, we find photographs of children who are not involved in sexual activity, photographs taken by pedophiles for their own gratification.”) (testimony of Chief Postal Inspector Jeffrey Dupika); John Crewdson, *By Silence Betrayed: Sexual Abuse of Children in America* 247 (1988) (a pedophile could “look at the children's underwear section of a Sears catalogue and become aroused”) (quoting Rob Freeman-Longo, a researcher at Oregon State Hospital); Warner, *supra* note 254, at 59 (“Lewis Carroll's friends were undisturbed by his photographs of their children, while some pederasts today, it seems, are kept very happy by [children's clothing] catalogues.”). For other cases in which defendants were arrested for material that seems to fall into this category, see, e.g., *Arizona v. Gates*, 897 P.2d 1345, 1347 (1994) (material depicted children in “normal situations and poses,” in a “ballet costume, and in a dance class” and in “department store underwear advertisements, National Geographic-type articles, and medical textbooks”).

²⁸² [282] See Kincaid, *Erotic Innocence*, *supra* note 40, at 54-55. This suggests the presence of the dialectic between taboo and transgression described in Part III, *supra*. It also calls into question the role played by the rising insistence on childhood innocence as described in Part IV.A, *supra*.

²⁸³ [283] Matthew Stadler, *Stranger*, March 20, 1997, at 15 (cited in Kincaid, *Erotic Innocence*, *supra* note 40, at 115).

²⁸⁴ [284] 32 F.3d 733 (3d Cir. 1994).

bought by Knox for sexual stimulation, the videotapes seized from the defendant did not portray explicit sexual acts such as intercourse. Indeed, they did not even depict nudity; rather, they contained “vignettes of teenage and preteen females” engaging in baton twirling and gymnastics routines and sometimes “striking provocative poses for the camera.”²⁸⁵ [285] The girls, aged eleven to seventeen were all wearing “bikini bathing suits, leotards, underwear, or other abbreviated attire.”²⁸⁶ [286]

By criminalizing this type of material, it becomes harder and harder to draft a definition of prohibited speech that evades overbreadth.²⁸⁷ [287] How do we at once prohibit the material at issue in Knox and yet avoid sending a parent to jail for taking a picture of her eleven-year-old daughter wearing a bikini on the beach? Or, for that matter, how do we distinguish between the material Knox possessed and protect mainstream fashion magazines and advertisements, often featuring fifteen or sixteen-year-old-models “striking provocative poses” and wearing “abbreviated attire” - sometimes even nude?

In 1986 the Attorney General’s Commission noted these problems in a footnote to its report:

There is also evidence that commercially produced pictures of children in erotic settings, or in non-erotic settings that are perceived [*261] by some adults as erotic, are collected and used by pedophiles... . For example, advertisements for underwear might be used for vastly different purposes than those intended by the photographer or publisher.²⁸⁸ [288]

Yet, the Attorney General’s Report also indicated that although it was “important to identify” this kind of material, “there is little that can be done about” it.²⁸⁹ [289] Legislatures and prosecutors did not agree. The push to criminalize this sector of “child pornography” was already underway. Thus, the law presses inexorably in the direction of prohibiting more and more speech that is susceptible of at least two different interpretations.

²⁸⁵ [285] n285. Id. at 737.

²⁸⁶ [286] Id.

²⁸⁷ [287] For a discussion of the overbreadth doctrine in the context of child pornography law, see Adler, *Inverting the First Amendment*, supra note 6.

²⁸⁸ [288] Attorney General's Report, supra note 28, at 407 n.71.

²⁸⁹ [289] Id.

As a result of this pressure, the pedophilic gaze has become central, not peripheral, to child pornography law. It is relevant in the law's premise as well as in its application. First, the obligation to see the world from the eyes of a pedophile arises from the basic assumption in the definition of child pornography described above. Once we accept that prohibited depictions of "sexual conduct" by children can include not only explicit sex acts, but also the more subjective notion of "lascivious exhibitions," this process begins. The law presumes that pictures harbor secrets, that judicial tests must guide us in our seeing, and that we need factors and guidelines to see the "truth" of a picture. As a court explained, child pornography law rests on the notion that a photograph contains "subtleties which the jury must study."²⁹⁰ [290] That even a clothed child can be engaging in lascivious exhibition of his genitals only makes the process more urgent and more difficult. Once the law acknowledges that pedophiles like many pictures of children, and that clothed children can be sexy children, then we have to redouble our efforts and to doubt our standard ways of seeing.

Second, the mechanisms of applying the law usher us step by step into a pedophilic world. As discussed in Part II, the leading case on the meaning of "lascivious exhibition" is *United States v. Dost*, a California district court case that announced a six-part test for analyzing pictures.²⁹¹ [291] [*262] The test was affirmed in a Ninth Circuit decision. The so-called "Dost test" identifies six factors relevant to the determination of whether a picture constitutes a "lascivious exhibition":

- 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;

²⁹⁰ [290] *United States v. Villard*, 700 F. Supp. 803, 811 (D.N.J. 1988).

²⁹¹ [291] 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff'd sub nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987). *Dost* has been adopted by the Third Circuit in *Knox*, 32 F.3d at 747; the First Circuit in *United States v. Amirault*, 173 F.3d 28, 32 (1st Cir. 1999) (emphasizing that the *Dost* factors are "neither comprehensive nor necessarily applicable in every situation"); the Fifth Circuit in *United States v. Rubio*, 834 F.2d 442, 448 (5th Cir. 1987) (affirming use of factors without specifically citing *Dost*); the Eighth Circuit in *United States v. Horn*, 187 F.3d 781, 789 (8th Cir. 1999) ("we find helpful the six criteria suggested" in *Dost*), and the Tenth Circuit in *United States v. Wolf*, 890 F.2d 241, 244-46 (10th Cir. 1989) ("We agree with the Ninth Circuit's interpretation of the statutory language [in *Dost*]"). Numerous district courts have followed *Dost* as have many state courts. See, e.g., *Nebraska v. Saulsbury*, 498 N.W.2d 338, 344 (Neb. 1993) (holding that factors set out in *Dost* are relevant under Nebraska law). I have not found a single case in any jurisdiction in which a court mentions the *Dost* factors and declines to follow them. In spite of the universal adherence to the *Dost* test, a closer examination of the cases reveals troubling uncertainty about the proper meaning of "lascivious." Part IV, *infra*, describes some of the problems with the test.

- 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
- 4) whether the child is fully or partially clothed, or nude;
- 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
- 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.²⁹² [292]

The application of the test requires an inquiry into the intended effect of the material on an audience of pedophiles.²⁹³ [293] The sixth and most important Dost factor asks if the picture is "designed to elicit a sexual response in the viewer,"²⁹⁴ [294] which targets not just any

²⁹² [292] Dost, 636 F. Supp. at 832. The test does not require that all factors be met to find that a depiction is a lascivious exhibition; nor are the factors meant to be exhaustive. Id.

²⁹³ [293] Wiegand, 812 F.2d at 1244; Knox, 32 F.3d at 747 (approving the Wiegand court's interpretation of Dost factors); see also United States v. Mr. A., 756 F. Supp. 326, 328-29 (E.D. Mich. 1991) (applying Dost factors and stating that the motive of photographer and intended response of viewer are relevant to determination of lasciviousness).

I leave aside here the daunting interpretive difficulty of ascertaining exactly how a pedophile might see (not to mention the difficulty of ascertaining the viewpoint of a "necrophilic pedophile," as the prosecution urged in one case). Foster v. Virginia, No. 0369-87-2, 1989 WL 641956, at 4 (Va. Ct. App. Nov. 21, 1989).

²⁹⁴ [294] See supra notes 276-283 and accompanying text (discussing interpretation of lascivious).

viewer, but a pedophile viewer.²⁹⁵ [295] As the Ninth Circuit explained, "lasciviousness is [*263] not a characteristic of the child photographed but of the exhibition which the

²⁹⁵ [295] Although it is outside the scope of this Article, this perspective raises a troubling interpretive problem. It has contributed to what is, in my view, a confused body of case law.

How are we to determine the intended effect of a picture? Although courts agree that this is the question to be asked, they have taken two different approaches to the inquiry. On the one hand, most courts that consider the question state that the intended effect of a picture is evident in the picture itself; the reaction of the defendant who possessed the picture is irrelevant. On the other hand, there are courts that rely on evidence of the actual response of the defendant to a picture as evidence of its intended effect. Some courts purport to follow the first standard, but in actual practice follow the second.

The leading case on the idea that child pornography inheres in a photo is *United States v. Villard*, 885 F.2d 117 (3d Cir. 1989). There the court held: "'Child pornography is not created when the pedophile derives sexual enjoyment from an otherwise innocent photo.' ... We must, therefore, look at the photograph, rather than the viewer." *Id.* at 125 (quoting *United States v. Villard*, 700 F. Supp. 803, 812 (D.N.J. 1988)).

The First Circuit recently followed *Villard* in *Amirault*, 173 F.3d at 33 (finding photograph of young naked girl on beach did not contain a "lascivious exhibition of the genitals"); see also *People v. Lamborn*, 708 N.E.2d 350, 355 (Ill. 1999) ("Whether defendant was aroused by the photographs is irrelevant in determining whether the photographs are lewd", and that inquiry must focus "on the photograph itself, not on the effect that the photograph has on an individual viewer"); *Faloon v. Hustler Magazine, Inc.*, 607 F. Supp. 1341, 1344 & n.10 (N.D. Tex. 1985), *aff'd* 799 F.2d 1000 (5th Cir. 1986) (holding that nude pictures of children do not constitute child pornography merely because they were republished in a "raunchy" magazine). This approach presents an appealing fantasy of stable pre-interpretive meaning. It is, unfortunately, interpretively incoherent when applied to photos that do not depict explicit sex acts. Although the comparison is exaggerated, to say that lasciviousness inheres in pictures of children is a bit like saying that the meaning of a Rorschach test inheres in the blots.

The second approach - looking at the actual effect of material on its viewer in order to determine intended effect - is circular. Consider, for example, *State v. Dixon*, No. 01C01-9802-CC-00085, 1998 WL 712344 (Tenn. Crim. App. Oct. 13, 1998), a Tennessee state court decision that follows this approach. The defendant had secretly made a tape using a hidden camera of two little girls taking a bath together. Presumably the content of the tape - though obviously not the circumstances of its making - were innocent and everyday; it depicted nothing more than two girls going through the routine of their bath, not knowing that they had been spied upon or recorded. What the defendant did to take the picture is repulsive. But putting aside his action in making the tape, is it right to call the tape itself child pornography? The court answered yes. It found that the tape depicted sexual conduct by children because it "was intended to elicit a sexual response in the viewer." *Id.* at 2. It based its decision in part on evidence that the "defendant viewed the videotape before engaging in sexual relations with [his adult girlfriend]." *Id.* Under this standard, an everyday image can be child pornography because a pedophile finds it sexually stimulating. This is unfortunately the standard to which many courts covertly revert.

photographer sets up for an audience that consists of himself or like-minded pedophiles."²⁹⁶ [296] The court also suggested that the inquiry should include whether the photographer "arrayed [the image] to suit his peculiar lust."²⁹⁷ [297] To answer this question obligates us to get inside the head of the pedophile and to see the world from his eyes.²⁹⁸ [298]

But it is not only this factor of the Dost test that requires us to take on the perspective of the pedophile. The application of each Dost factor demands a heightened awareness of the erotic appeal of children. We must search out whether the child's genitals are the focal point of the picture, whether the pubic area is prominent, if the child is in a setting normally associated with sex, if the child conveys an erotic acquiescence in his gaze, or if there is some suggestion of his "coyness or willingness to engage [*264] in sexual activity."²⁹⁹ [299] If a videotape depicts a clothed child dancing, we must look closer: Is the child innocently dancing or is she engaging in "gyrations ... indicative of adult sexual relations?"³⁰⁰ [300]

Consider, for example, the scrutiny necessary to determine whether a picture suggests "sexual coyness or a willingness to engage in sexual activity." In the Dost case, the court describes a photograph of a ten-year-old girl sitting naked on the beach:

Her pelvic area appears to be slightly raised or hyperextended, and her legs are spread apart. Her right leg is fully extended at a slight outward angle. Her left leg is

²⁹⁶ [296] Wiegand, 812 F.2d at 1244 (emphasis added).

²⁹⁷ [297] *Id.* (emphasis added). In the Knox case, Solicitor General Drew Days had argued for a different standard, contending that the term "lascivious" must describe the child who is "lasciviously engaging in sexual conduct (as distinguished from lasciviousness on the part of the photographer or consumer)." Brief for the United States, Knox (No. 92-1183), at 9. The Third Circuit disagreed. Instead, the court followed the Ninth Circuit approach, holding that lasciviousness describes material "presented by the photographer [so] as to arouse or satisfy the sexual cravings of a voyeur." Knox, 32 F.3d at 747 (quoting Wiegand, 812 F.2d at 1244).

²⁹⁸ [298] It is perhaps for this reason that the First Circuit recently termed this "the most confusing and contentious of the Dost factors." Amirault, 173 F.3d at 34.

²⁹⁹ [299] *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986).

³⁰⁰ [300] Knox, 32 F.3d at 747.

bent at the knee and extended almost perpendicularly away from the body. Her pubic area is completely exposed, not obscured by any shadow or body part.³⁰¹ [301]

The court then analyzes whether such a photograph is lascivious - in particular whether the girl expresses a sexual "willingness." The court concludes that the girl does seem sexually inviting. Why? Although "nothing else" about the child's attitude conveys this, the court nonetheless concludes that the girl's "open legs do imply such a willingness [to engage in sexual activity]."³⁰² [302]

What does it do to children to protect them by looking at them as a pedophile would, to linger over depictions of their genitals? And what does it do to us as adults to ask these questions when we look at pictures of children? As we expand our gaze and bend it to the will of child pornography law, we transform the world into a pornographic place. Our vision changes the object that we see.³⁰³ [303] Child pornography law constitutes children as a category that is inextricable from sex. The process by which we root out child pornography is part of the reason that we can never fully eliminate it; the circularity of the solution exacerbates the circularity of the problem. Child pornography law has a self-generating quality. As everything becomes child pornography in the eyes of the law - clothed children, coy children, children in settings where children are found - perhaps everything really does become pornographic.

Congress passed the 1996 Child Pornography Prevention Act in part because it feared that child pornography was changing our view of children. Congress found:

The sexualization and eroticization of minors through any form of child pornographic images has a deleterious effect on all children [*265] by encouraging a societal perception of children as sexual objects...³⁰⁴ [304]

³⁰¹ [301] Dost, 636 F. Supp at 833.

³⁰² [302] Id.

³⁰³ [303] As argued above, one result of this sexualization may be that more people feel sexual desire for children. But that is not the only result that I mean to suggest. Rather, I argue that we see children as inextricable from sex. The reaction to this union will vary with each observer.

³⁰⁴ [304] Child Pornography Prevention Act of 1996, Pub. L. 104-208 21(11) (A).

Although I contest the constitutionality of banning speech based on this finding,³⁰⁵ [305] the fundamental insight of Congress was fair: Child pornography changes the way we perceive children. What Congress failed to see is that child pornography law itself has also done that. Even more directly than child pornography, child pornography law explicitly requires us to take on a “perception of children as sexual objects,” to see, for a moment, as a pedophile does. I return to these questions at the end of the next section of this Article.³⁰⁶ [306]

B. Producing the Sexual Child

Now I want to make a more radical argument: The gaze that child pornography law constructs is just part of a larger process by which law spreads the sexualization of children. The expansion of child pornography law has opened up a whole arena for the elaborate discussion of children as sexual creatures.

Quite simply: Even when a child is pictured as a sexual victim rather than a sexual siren, the child is still pictured as sexual. Child pornography law becomes a vast realm of discourse in which the image of the child as sexual is not only preserved but multiplied.

1. Resignification. - This stems, in part, from a basic paradox in censorship: In order to prohibit speech, you must describe it. Child pornography jurisprudence has thus been largely

³⁰⁵ [305] See Adler, *Inverting the First Amendment*, supra note 6. Of course, I also doubt that this is the only effect of child pornography law. Like all speech, child pornography law will have multiple effects. See Adler, *What's Left*, supra note 168, at 1541-47 (describing multiple and conflicting readings that arise from speech).

³⁰⁶ [306] I return to this argument, and the construction of the category "the child" below in Part IV.B.2, where I explore the fit between my analysis and Foucault's theories of sexuality. Cf. Bell, supra note 8, at 86 (noting social construction of children as "simultaneously sexual and not sexual, as innocent and as provocative"); Wendy Brown, *Freedom's Silences*, in *Censorship and Silencing: Practices of Cultural Regulation* 322 (Robert C. Post ed., 1998) ("To speak repeatedly of trauma is a mode of encoding it as identity."); Charles Taylor, *Foucault on Freedom and Truth*, 12 *Pol. Theory* 152, 158 (1984) (stating that discourses "bring[] about a new kind of subject and new kinds of desire and behavior").

Once again, I do not argue that child pornography law makes us all into pedophiles. Rather, I argue that child pornography law makes us share the gaze if not the desire of the pedophile; it thereby shapes the category of "child." For the classic work establishing that the "child" as a category is socially constructed, see generally Phillippe Aries, *Centuries of Childhood: A Social History of Family Life* (Robert Baldick trans., Vintage Books 1962) (1960).

concerned with articulating the limits of the definition of child pornography, beyond which the government may not reach. To do so has required careful analyses of what child pornography is. Cases direct courts and juries to engage in intricate analyses of the “sexual coyness” of children, of their potential to arouse: [*266] Is that girl on the beach giving a come-hither look to the camera?³⁰⁷ [307] We have labored legal opinions pondering the “turgidity” of a boy’s genitals³⁰⁸ [308] and the meaning of “pubic area.”³⁰⁹ [309]

This aspect of child pornography law implicates a larger problem inherent in language. As Judith Butler tells us, “Language that is compelled to repeat what it seeks to constrain invariably reproduces and restages the very speech that it seeks to shut down.”³¹⁰ [310] The extensive efforts to regulate child pornography keep the story of children’s sexuality constantly before us.

Child pornography law has thus become a major venue for the spectacle of child sexuality. I believe its proliferation has transformed the way we think of children. The growth of child pornography law is comparable in effect to Foucault’s view of the power of eighteenth

³⁰⁷ [307] A question posed by the court in *Dost*. See *United States v. Dost*, 636 F. Supp. 828, 833 (S.D. Cal. 1986).

³⁰⁸ [308] Numerous states explicitly prohibit the depiction of boys' "'covered male genitals' in a 'discernibly turgid state.'" See *Osborne v. Ohio*, 495 U.S. 103, 127 (1990) (quoting Ohio Law); see also N.J. Stat. Ann. 2c: 34-3(a)(3)(b) (defining as obscenity "Human male genitals in a discernibly turgid state, even if covered"). The Solicitor General and the Court of Appeals in *Knox* wrestled with the realization that girls' genitals would not be so easily visible. The Solicitor General, arguing for a "visibility" standard, concluded that even though girls could not display "turgidity," "the genitals and pubic areas of girls may also be visible in some circumstances even if the girls are not completely nude." Brief for the United States, *supra* note 297, at n.3.

³⁰⁹ [309] The *Knox* courts struggled to understand what a child's pubic area is. The district court had concluded that since the "pubic area would appear to be the region of the human anatomy in close proximity to the genitals," it included "specifically the uppermost portion of the inner thigh area closest to the ... genitals [that] was clearly exposed." *United States v. Knox*, 776 F. Supp. 174, 180 (N.D. Pa. 1991). The Court of Appeals disagreed and after a scholarly discussion concluded that the "inner thigh is not part of the pubic area." *United States v. Knox*, 32 F.3d 733, 738-39 (3d Cir. 1994).

³¹⁰ [310] Butler, *supra* note 214, at 129. Butler views this position, however, as an incomplete account of the complexity of censorship.

century sex manuals that warned parents of the dangers of childhood masturbation.³¹¹ [311] As Foucault writes,

One might argue that the purpose of these discourses was precisely to prevent children from having a sexuality. But their effect was to din it into parents' heads that their children's sex constituted a fundamental problem ... This had the consequence of sexually exciting the bodies of children while at the same time fixing the parental gaze and vigilance on the peril of infantile sexuality.³¹² [312]

One does not need to be a fancy French theorist to recognize the way in which the repetition of a problem in language may reify the problem [*267] described. A fear of this very danger was a prominent concern in old fashioned, run-of-the-mill obscenity cases. In his cultural history of sexual morality cases in the 1920s and 1930s in New York, Bill Nelson describes several cases in which judges invoked their reticence to describe sexual matters.³¹³ [313] Not only was such description considered indecorous and unseemly,³¹⁴ [314] the fear was that the description would itself spread the vice. The material at issue within a judicial opinion became like an infectious agent that had to be quarantined in the closed chambers of judges; only they had the preternatural strength to withstand it. For example, in a prosecution by the New York Society for the Suppression of Vice to ban a book, a dissenting judge conjured up the notion of contagion when he remarked that it was dangerous to "spread upon our pages

³¹¹ [311] For an interesting account of campaigns against masturbation and their cultural and legal significance, see Geoffrey P. Miller, *Law, Pollution and the Management of Social Anxiety*, Mich. Women's L.J. (forthcoming, 2001) (draft on file with author).

³¹² [312] Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, at 120 (Colin Gordon ed., Colin Gordon et al. trans., Pantheon Books 1980) (1977).

³¹³ [313] Nelson, *supra* note 47, at 270-72.

³¹⁴ [314] See *People v. Hall*, 16 N.Y.S.2d 328, 329 (Jefferson County Ct. 1939) (attempted sodomy case in which court stated the "nature of the case precludes a discussion of the facts"). This case is discussed in Nelson, *supra* note 47, at 270-72.

all the indecent and lascivious parts" of the very book the Society was attempting to suppress.³¹⁵ [315]

Although the concerns may seem quaint, they nonetheless recognize an intrinsic problem in censorship law: Language can perpetuate the thing it seeks to undo. Thus, child pornography law poses another variation on the general problem of "resignification."³¹⁶ [316] Because speech can give rise to multiple and contradictory readings, any kind of speech that describes what it opposes risks participating in the very problem it attacks.

One harm of child pornography is that it pictures children as sexual. But so does child pornography law; it is itself a sphere in which that representation continues and multiplies, albeit in a different fashion and with diametrically opposed purposes. Even well-intentioned speech, in describing what it objects to, may conjure up and reinforce its target.³¹⁷ [317] No matter how well-meaning our goals in fashioning child pornography law, we have still created a space for the perpetual discussion of children [*268] and sex, where children and sex are bound together and where sex extends its grip on children.³¹⁸ [318]

³¹⁵ [315] *Halsey v. New York Soc'y for the Suppression of Vice*, 136 N.E. 219, 223 (N.Y. 1922). Another court refused even to name a book that was the subject of prosecution for fear of "exciting the curiosity of the prurient." *People v. Berg*, 272 N.Y.S. 586, 587 (N.Y. App. Div. 1934), *aff'd* 199 N.E. 513 (N.Y. 1935); see also *Commonwealth v. Holmes*, 17 Mass. 336, 337 (1821) (arguing that any mention of book "would be to require that the public itself should give permanency and notoriety to indecency, in order to punish it").

³¹⁶ [316] See generally, Amy Adler, *What's Left*, *supra* note 168. There I analyzed activist speech that appropriated and subverted the hate speech and pornography it opposed. I showed the ways in which such well intentioned activist speech risked participating in the very problems it attacked (and conversely, that as pornography and hate speech may inadvertently give rise to activism on behalf of women and people of color). Throughout that article, I considered examples where hate speech and its opposite appeared indistinguishable. Here, in child pornography law, the language of law is obviously different from child pornography in one important way: Child pornography by definition uses the language of pictures whereas law uses words to describe these pictures. It translates the initial harmful image into another medium. But like any (good) translation, it retains the flavor and danger of the "original."

³¹⁷ [317] See *id.* at 1560-62.

³¹⁸ [318] Cf. Kincaid, *Child Loving*, *supra* note 108, at 3 (Our talk of pedophilia is "busy rejecting the pedophile that it is at the same time, creating.").

2. Discourse and Foucault. - In the *History of Sexuality*, Vol. 1, Foucault makes an arresting claim: Rather than viewing our present era of sexuality as one in which we have been liberated from a Victorian repression, he argues instead that the tools we think have liberated us - Freudian psychoanalysis, scientific knowledge, a society in which we talk endlessly about sex and probe its depths - have in fact enslaved us further into a deeper and more insidious repression.³¹⁹ [319] Foucault envisions a world that is topsy-turvy. Power, as he views it, resides not in the hands of the police or of a few government institutions; rather it is diffuse and pervasive, an immanent "bio-power" exercised on all by all.³²⁰ [320] Power works only marginally through repression and prohibition; it exerts itself most strongly through

³¹⁹ [319] Cf. Charles Taylor, *Foucault on Freedom and Truth*, in *Foucault: A Critical Reader* 69 (David Couzens Hoy, ed., 1986) (The strength of power lies partly in its disguise as "science, or fulfillment, even 'liberation.'").

³²⁰ [320] For Foucault's own descriptions of power, see, e.g., *History of Sexuality*, supra note 278, at 92 (stating that power is "the multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organization"); id. at 93 ("Power is everywhere; not because it embraces everything, but because it comes from everywhere"). For further discussion of Foucault's notion of power, see Hubert L. Dreyfus & Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (1982); David Garland, *Punishment and Modernity* 131-177 (1990); C.G. Prado, *Starting with Foucault: An Introduction to Genealogy* (1995); Tamsin Spargo, *Foucault and Queer Theory* (1999); *Foucault: A Critical Reader* (David Couzens Hoy ed., 1986); *Feminism & Foucault: Reflections on Resistance* (Irene Diamond & Lee Quinby eds., 1988). I should note Foucault's indication that law operates as a sovereign, or juridico-discursive, mode of power, a mode that has been displaced (albeit not completely) by "productive" power. Foucault, *History of Sexuality*, supra note 278, at 82-91. My argument here highlights the productive aspects of law, the way it functions not only as prohibition but also as discourse. In my view, some of Foucault's references to law in *The History of Sexuality*, Vol. 1, seem to underestimate law's discursive and normalizing qualities.

tools of apparent liberation.³²¹ [321] The analysis that I have just presented would seem to give force to Foucault's theory.³²² [322]

[*269] Foucault argues that one way power spreads its grasp is through an "incitement to discourse."³²³ [323] The history of sexuality for the last three centuries is not a story of Victorian descent into censorship and then twentieth-century liberation from prudery. Instead, Foucault writes, "What we now perceive as the chronicle of a censorship and the difficult struggle to remove it will be seen rather as the centuries-long rise of a complex deployment for compelling sex to speak, for fastening our attention and concern upon sex."³²⁴ [324] There has been a "discursive explosion"³²⁵ [325] around sex, a proliferation of

³²¹ [321] For an interesting analysis of this problem in the context of sexual harassment law, see Janet Halley, *Sexuality Harassment* (forthcoming, draft on file with author).

³²² [322] I should note that when it comes to the precarious subject of child sex, it seems dangerous to invoke Foucault. In at least two places in his work, he seems to go beyond any analysis of discursive power and to envision a free sexuality between adults and children. First, in what Foucauldian scholars have explained as a lapse, Foucault actually argued that adult-child "consensual sex" should not be restrained by law. See Bell, *supra* note 8, at 151. As one critic describes it, Foucault along with others in the Parisian intellectual elite, published in the wake of the revolution of 1968 a special issue of the scholarly journal *Recherches* "extolling cross-generational sexual encounters." Nancy Scheper-Hughes & Carolyn Sargent, Introduction, in *Small Wars: The Cultural Politics of Childhood* 29 n.3 (1998). This is viewed as a lapse because the notion of a pre-discursive free sexuality seems inconsistent with Foucault's project.

And then there is the controversial and provocative passage in *The History of Sexuality*, Vol. 1, in which Foucault writes of an encounter in 1867 in which a simple-minded "farm hand ... obtained a few caresses from a little girl." Foucault, *History of Sexuality*, *supra* note 271, at 31. Foucault describes this incident of what we would now call child sexual abuse as nothing more than "inconsequential bucolic pleasures." *Id.* He writes of the "pettiness" of how these pleasures "could become, from a certain time, the object not only of a collective intolerance but of a judicial action, a medical intervention, a careful clinical examination" and so on. *Id.*

³²³ [323] "Rather than a massive censorship, beginning with the verbal proprieties imposed by the Age of Reason, what was involved was a regulated and polymorphous incitement to discourse." *Id.* at 34.

³²⁴ [324] *Id.* at 158.

³²⁵ [325] *Id.* at 38.

discourses, as sex has been taken up and turned into a specialized area of scientific, religious, and sociological knowledge.³²⁶ [326]

This “transforming of sex into discourse”³²⁷ [327] served an insidious purpose. First, it opened up channels for disciplinary power: The more we discuss sex, the more we develop norms and then scrutinize our deviations from the norm.³²⁸ [328] But more importantly for our purposes, the transformation of sex into discourse changed the “nature” of sex. Foucault writes, “This is the essential thing: that Western man has been drawn for three centuries to the task of telling everything concerning his sex ... and that this carefully analytical discourse was meant to yield multiple effects of displacement, intensification, reorientation and modification of desire itself.”³²⁹ [329] In this way, sexuality became not only the target of the discourses that surrounded it; it also became their product. By suggesting that discourses about sexuality therefore modified the “nature” of sex, that discourse not only represents but actually forms the object of its inquiries, Foucault presents a radical notion of the power of representation.³³⁰ [330] Discussion changes, indeed produces, the thing discussed.³³¹ [331]

Foucault does not deny that censorship exists. Yet, any emphasis on it is a ruse. Censorship is only “part of the strategies that underlie and [*270] permeate discourses.”³³² [332] He writes, “All these negative elements - defenses, censorships, denials - ... are doubtless only component parts that have a local and tactical role to play in a transformation into discourse,

³²⁶ [326] *Id.* at 78 (“The West has managed ... to annex sex to a field of rationality.”).

³²⁷ [327] *Id.* at 20.

³²⁸ [328] The surveillance invoked by child pornography law, which I described in Part IV.A, *supra*, provides an example. Megan's laws, described above, provide another.

³²⁹ [329] Foucault, *History of Sexuality*, *supra* note 278, at 23.

³³⁰ [330] See Michel Foucault, *The Archaeology of Knowledge* 79 (1972); Foucault, *History of Sexuality*, *supra* note 278, at 23.

³³¹ [331] See Foucault, *History of Sexuality*, *supra* note 278, at 158-59.

³³² [332] *Id.* at 27.

a technology of power, and a will to knowledge ..."³³³ [333] Censorship is just a way of shifting the vocabulary. Thus, restrictions on the way people could speak about sex are "only the counterpart of other discourses, and perhaps the condition necessary in order for them to function."³³⁴ [334] Talking about censorship becomes another way of talking about what is censored. For Foucault, the "very terms by which sexuality is said to be negated become, inadvertently but inexorably, the site and instrument of a new sexualization."³³⁵ [335]

This reinforces my earlier assertion: that child pornography law has shaped the category of children.³³⁶ [336] Discussing Foucault, Charles Taylor writes that discourse "brings about a new kind of subject and new kinds of desire and behavior" that belong to him.³³⁷ [337] Along with all the other discourses surrounding child sexual abuse, child pornography law has come to determine who children are. It constitutes them as a category that is "simultaneously sexual and not sexual, as innocent and as provocative."³³⁸ [338] As the law seeks to liberate children from sexual oppression, it also reinscribes children as sexually violable.³³⁹ [339] And

³³³ [333] *Id.* at 12.

³³⁴ [334] *Id.* at 30.

³³⁵ [335] Butler, *supra* note 214, at 94.

³³⁶ [336] For the classic work establishing that the "child" as a category is socially constructed, see Aries, *supra* note 306. Aries argues that prior to the seventeenth century, children were not distinguished as such but rather seen as miniature adults. The seventeenth century introduced the notion of childhood innocence and vulnerability. This conception of childhood flourished in the romantic era, which idealized the child as the standard bearer of purity.

³³⁷ [337] Taylor, *supra* note 319, at 75-76.

³³⁸ [338] Bell, *supra* note 8, at 86.

³³⁹ [339] Cf. Wendy Brown, *Freedom's Silences*, in *Censorship and Silencing: Practices of Cultural Regulation* 319 (Robert C. Post ed., 1998) (discussing women's sexuality); see also *id.* at 322 ("To speak repeatedly of trauma is a mode of encoding it as identity.").

this new understanding of children opens the way for what Foucault describes as further technologies of disciplinary power, for “surveillance” and “normalization.”³⁴⁰ [340]

[*271] The legal reader is likely to resist these arguments. How can talking about a problem make it worse? The very idea runs contrary to two deeply held assumptions: that law is a solution to social problems and that the more speech about a problem the better.

This is perhaps one of the most radical aspects of *The History of Sexuality* for lawyers, and particularly for First Amendment lawyers: its implications for the idea of free speech.³⁴¹ [341] Whereas Foucault argues that talking about a problem

³⁴⁰ [340] For discussion of these concepts, see generally Foucault, *History of Sexuality*, supra note 278. Foucault describes children's sexuality as being both "precious and perilous, dangerous and endangered." Id. at 104. Foucault's work here recalls Frazer's analysis of the ambivalence that is evoked in certain tribal cultures by a person who is deemed taboo. Frazer writes: "The common feature of all these persons is that they are dangerous and in danger." Sir James Gengi Frazer, *The Golden Bough*, Chapter XXI "Tabooed Things," 161 (1972). Freud's work in *Totem and Taboo* of course builds on Frazer's work on the subject.

This power affects not only children, but adults. It governs our behavior with children: I believe it also affects our relationship to ourselves. Freud posited that childhood sexuality holds the key to adult neuroses. From this perspective, as we rethink the meaning of child sexuality, we may also rethink our own histories, and therefore our own "identities."

³⁴¹ [341] Was Foucault right? Obviously, any answer to this is beyond the scope of this Article. I present child pornography as a case study in which Foucault's argument seems plausible. And I also suggest that if we take Foucault's argument seriously - a decision left to the reader - then it presents a dramatic challenge to the conventional view of free speech law.

The most common criticism of Foucault's work is that it is missing "an answer to the question 'What is to be done?'" Barry Smart, *The Politics of Truth and the Problem of Hegemony*, in *Foucault: A Critical Reader* 166 (1986); see also Michel Foucault, *Politics and the Study of Discourse*, 3 *Ideology and Consciousness* 8 (1981) (confronting criticism that his work removes "all basis for a progressive political intervention"). Foucault answered this criticism by identifying a different goal for his work. He aimed for a state in which people "'no longer know what to do'; so that the acts, gestures, discourses which up until then had seemed to go without saying became problematic... ." Michel Foucault, *Questions of Method*, 8 *Ideology and Consciousness* 12 (1981).

In the same way, the reader may question the lack of any normative prescription in this Article. No easy solution presents itself in response to my argument. A first step to any solution, however, must be to articulate a problem in all of its complexity. I have sought to do that here.

often produces it, lawyers and free speech lawyers assume the opposite: that talking about a problem is a means to resolve it.³⁴² [342] This view of talk is implicit in the assumption that law is a tool to solve societal problems. Of course, we view law - which exists in language - as an instrument for solving society's ills.

Beyond this view of law in general, the liberal free speech tradition in particular is premised on the view that more speech is better than less.³⁴³ [343] As Justice Brandeis taught us in his famous defense of speech as a tool for social reform: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."³⁴⁴ [344]

[*272] When it comes to the crises of child abuse and child pornography, we repeatedly hear that we need to break the silence, to speak at last of these "unspeakable" crimes.³⁴⁵ [345] Child pornography law is a tool of liberation for victims. It gives them voice and it wards off future crimes against children by spreading word of the prohibition. Child pornography law has enlarged public discourse about this "unspeakable" crime; in fact, it has become part of the greater cacophony of talk about it. But what if we imagine that speaking about a problem was not a pure act, that speaking about a problem could compound it?

³⁴² [342] This may explain the relative paucity of First Amendment scholarship that enlists a Foucauldian perspective, (when compared, for example, to the more frequent use of Foucault in criminal law scholarship). For one notable exception, see Robert C. Post, *Censorship and Silencing*, in *Censorship and Silencing: Practices of Cultural Regulation* 1 (Robert C. Post ed., 1998).

³⁴³ [343] There are notable exceptions. First, Catharine MacKinnon and anti-pornography feminists, as well as many at the forefront of the critical race studies movement to ban "hate speech," have challenged the liberal free speech tradition. See Adler, *What's Left*, supra note 168, at 1500. Second, there simply is no liberal movement to uncensor child pornography. But even in this most forbidden of realms, it is assumed I think that discussion of child pornography is a positive, or at least necessary, remedy.

³⁴⁴ [344] Louis Brandeis, *Other People's Money* 92 (1933).

³⁴⁵ [345] See, e.g., 142 Cong. Rec. S11,900 (daily ed. Sept. 30, 1996) (statement of Sen. Biden) (stating that child pornography causes "a harm that is unspeakable"). The idea that child pornography and sexual abuse were, until recently, a vast societal secret is reflected in the consistent use of the word "silence" in the literature - to refer to the silence of the victims and our societal silence on the subject. See John Crewdson, *By Silence Betrayed* 42 - 54 (1988) (describing experience of victims and their subsequent reluctance to tell others of the abuse); see also Bell, supra note 8, at 79 (describing feminist task of "breaking the silence" regarding incest). This talk of silence has become deafening. For a discussion of the way in which silence functions as part of discourse within Foucault's framework, see Wendy Brown, *Freedom's Silences*, in *Censorship and Silencing: Practices of Cultural Regulation*, supra note 339, at 313.

We think of child pornography law as prohibiting speech. And it does - it has criminalized sexual pictures of children. Yet, as I have documented above, it has also produced new ways of speaking: legal opinions with their meditations on the meaning of "lasciviousness" and public areas, congressional debates and legislation, law enforcement manuals, jury deliberations, child abuse experts, and newspaper reports.³⁴⁶ [346] As Foucault writes of censorship more broadly, "Not any less was said ... on the contrary. But things were said in a different way; it was different people who said them, and from different points of view."³⁴⁷ [347]

Child pornography law represses sexual representations of children in child pornography, but it also produces a new kind of sexual representation of children - child pornography law. And there may be further harm in that representation than we care to admit. It is another way in which we saturate children with sexuality.³⁴⁸ [348] Of course this shift seems preferable. It still seems better to have proliferating discourses about the danger of child exploitation than to have the exploitation itself. But if we take the argument seriously - that speech can expand what it critiques,³⁴⁹ [349] that the very act of putting child sexuality into an official discourse has [*273] ensnared us further into a pedophilic web³⁵⁰ [350] - then the benefits gained from this shift seem less obvious than they once did. Given the choice, child pornography law

³⁴⁶ [346] And law review articles. This Article, of course, contributes to the discursive explosion surrounding child pornography. It may therefore participate in some of the very problems surrounding discourse that it exposes. I make no claim that I can escape the dangers I describe.

³⁴⁷ [347] Foucault, *History of Sexuality*, supra note 278, at 27.

³⁴⁸ [348] One effect of "our obsessive focus on protection is to saturate children with a sexual discourse that inevitably links children, sexuality, and erotic appeal." Kincaid, *Erotic Innocence*, supra note 40, at 101.

³⁴⁹ [349] In this way, the Foucauldian position bears something in common with Freud's view that there is no negation in the unconscious. Butler, supra note 214, at 84. (I note the similarity in spite of Foucault's view of his work as an attack on Freud).

³⁵⁰ [350] Vikki Bell writes that, in light of Foucault's work, the feminist hope to "break the 'conspiracy of silence' around sexual abuse" is "naïve" and "slavish []." Feminists are in a trap of "producing more and more talk on sex that, far from liberating us, ensnares us deeper into the web." Bell, supra note 8, at ix; cf. Kincaid, *Producing Erotic Children*, supra note 87, at 250 ("Turning the accuser into the accused, swapping villain and victim, does not, when you look at it, seem like that much of a change.").

still remains preferable to child pornography. But the two have more in common than we might like to think.

CONCLUSION

“She says she only said ‘if.’”

“But she said a great deal more than that!” the White Queen moaned, wringing her hands... .

“I’m sure I didn’t mean - “ Alice was beginning, but the Red Queen interrupted her impatiently.

“That’s just what I complain of! You should have meant!

What do you suppose is the use of a child without any meaning?”

- Lewis Carroll³⁵¹ [351]

Child pornography law, and the culture in which it has grown, allow us an occasion to reconsider some basic assumptions that underlie the First Amendment - questions about the relationship between prohibition and desire, between censorship and speech, between law and culture. Censorship law does not only react to cultural trends. It also reflects, amplifies, and creates them.

In our present culture of child abuse, is child pornography law the solution or the problem? My answer is that it is both. This reading pictures law and culture as unwitting partners. Both keep the sexualized child before us. Children and sex become inextricably linked, all while we proclaim the child’s innocence. The sexuality prohibited becomes the sexuality produced.

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³⁵¹ [351] Lewis Carroll, *Alice in Wonderland and Through the Looking Glass* 283 (Grosset & Dunlap, Inc. 1999) (1872).