WHAT COMPRISES A "LASCIVIOUS EXHIBITION OF THE GENITALS OR PUBIC AREA"? THE ANSWER, MY FRIEND, IS *BLOUIN* IN THE WIND

MAJOR DANIEL M. GOLDBERG*

It should not be this hard to plead guilty to possessing child pornography.[1]

I. Introduction

Child pornography typically hews to Potter Stewart's tongue-in-cheek litmus test for hard-core material: you know it when you see it.[2] Simply thinking about a child engaged in a sex act is enough to make most conventionally-wired adults shudder; actually viewing a child so engaged often brings about feelings of revulsion and sorrow.

There is no question that, under the relevant statutory framework, a depiction of a child engaged in a sex act qualifies as child pornography.[3] However, the issue becomes cloudier when the child subject is simply

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* Judge Advocate, United States Army. Presently assigned as Student, 64th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia. J.D., 2004, George Washington University; B.A., 1995, The College of William & Mary. Currently serving as Senior Defense Counsel, Fort Riley, Kansas. Previous assignments include Appellate Attorney, United States Army Government Appellate Division, Fort Belvoir, Virginia, 2013–2015; Brigade Judge Advocate, 513th Military Intelligence Brigade, Fort Gordon, Georgia, 2012–2013; Trial Counsel, 1st Medical Brigade, Fort Hood, Texas, 2012; Trial Counsel, 4th Combat Aviation Brigade, Fort Hood, Texas and Camp Marmal, Afghanistan, 2010–2012; Administrative Law Attorney, III Corps, Fort Hood, Texas, 2009–2010; Claims Attorney, Tripler Army Medical Center, Hawaii, 2008–2009; Legal Assistance Attorney and Special Assistant U.S. Attorney, Fort Sill, Oklahoma, 2007–2008. Member of the bars of Virginia and the Court of Appeals for the Armed Forces. This research paper was submitted in partial completion of the Master of Laws requirements of the 64th Judge Advocate Officer Graduate Course.

[1] United States v. Blouin, 74 M.J. 247, 256 (C.A.A.F. 2015) (Baker, C.J., dissenting).

[2] *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." The movie in question was THE LOVERS (Zenith International Films, 1958). *Id*. at 186.

[3] 18 U.S.C. §§ 2256(2)(A)(i)–(iv) (2008) (defining "sexually explicit conduct" as including sexual intercourse, bestiality, masturbation, sadistic or masochistic sexual abuse).

posing or is photographed unawares while taking part in some non-sexual activity. Sometimes, you only think you know it when you see it.

After the Court of Appeals for the Armed Forces' (CAAF) decision in *United States v. Blouin*, it may very well be impossible to convict a servicemember for possessing an image of an actual child whose genitals are lasciviously exhibited, but covered.[4] Although the CAAF's ruling was not entirely unexpected in light of recent precedent,[5] it runs counter to every circuit that has considered the issue of whether the genitals must be visible in order for an image to qualify as child pornography.[6] After *Blouin*, a depiction of a child that would be considered illegal in federal civilian court when prosecuted under 18 U.S.C. § 2256(8)(A) may very well be protected speech in the military.[7]

Congress criminalized a "lascivious exhibition of the genitals or pubic area," with no requirement that a "lascivious exhibition" include nudity.[8]

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[4] *Blouin*, 74 M.J. at 251.

[5] *See, e.g.*, United States v. Warner, 73 M.J. 1, 3–4 (C.A.A.F. 2013) (holding that appellant was not properly on notice before pleading guilty to possession of non-nude child erotica).

[6] *See* United States v. Grimes, 244 F.3d 375, 380–82 (5th Cir. 2001) (holding that images of naked children with their genitals pixilated can amount to child pornography); United States v. Price, 775 F.3d 828, 837–38 n.7 (7th Cir. 2014) (rejecting the argument that a lascivious exhibition of the genitals requires "full exposure without any covering at all, no matter how minimal or transparent"); United States v. Wallenfang, 568 F.3d 649, 659 (8th Cir. 2009) (holding that lascivious exhibitions of girls clad in pantyhose constitutes child pornography); United States v. Helton, 302 Fed. Appx. 842, 846–47 (10th Cir.2008) (unpublished) (holding that a lascivious exhibition of an eleven year-old girl wearing underwear constitutes child pornography). *See also* DiGiusto v. Farwell, 291 Fed. Appx. 119 (9th Cir. 2008) (stating that it was reasonable for a jury to conclude that pictures of "scantily clad boys" constitute child pornography); United States v. Frabizio, 459 F.3d 80, 88 (1st Cir. 2006) (stating that "other circuits have found that nudity is not required for a lascivious exhibition"); and United States v. Williams, 444 F.3d 1286, 1299 n.63 (11th Cir. 2006), *rev'd on other grounds*, 553 U.S. 285 (stating that nudity is not required in other circuits).

[7] *See* 18 U.S.C. § 2256(8)(A) (2008),

> (8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct . . . .

"Sexually explicit conduct," as referenced in 18 U.S.C. § 2256(8)(A) (2008), is defined in 18 U.S.C. §§ 2256(2)(A)(i)–(iv) (2008).

[8] 18 U.S.C. § 2256(2)(A)(v) (2008).

This article asserts that because the CAAF disregarded the intent of Congress, *Blouin* was mistakenly decided. In addition, this article further asserts that military courts base their interpretation of the term "lascivious exhibition of the genitals or pubic area" on a Third Circuit case, *United States v. Knox* (*Knox II*).[9] Because the *Knox II* interpretation does not require a nude display of the genitals (or even that the genitals be discernible),[10] the decision is in full accord with Congress's intent. No federal court has rejected the holding in *Knox II* other than the CAAF in *Blouin*.[11]

Establishing the outer limit of a "lascivious exhibition" takes on increased importance with the recent promulgation of a specified child pornography offense under Article 134-68b, Uniform Code of Military Justice (UCMJ).[12] Like the corresponding federal civilian law, the term "lascivious exhibition" is used in the *Manual for Courts-Martial* (MCM) to define, in part, "sexually explicit conduct."[13] And, also like federal law, the meaning of "lascivious exhibition" is nowhere explained.

This article analyzes Congress's intent when it legislated the term "lascivious exhibition of the genitals or pubic area," as well as its predecessor language. After discussing Specialist Blouin's crime, his subsequent guilty plea, and the opinion rendered by the Army Court of Criminal Appeals (ACCA), this article traces the extensive history of federal child pornography legislation, paying particular attention to the fact that exposure of the genitals has never been required for a lascivious exhibition. In order to keep the analysis in rough chronological order, the legislative history is interspersed with discussions of pertinent federal court rulings, including the *Knox* line of cases. After an examination of the problems associated with the *Blouin* decision, this article concludes by

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[9] United States v. Knox, 32 F.3d 733 (3d Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995) [hereinafter *Knox II*].

[10] *Id.* at 746.

[11] United States v. Blouin, 74 M.J. 247, 250 (C.A.A.F. 2015) ("We decline to accept the [Army Court of Criminal Appeals'] invitation to adopt the *Knox II* standard as controlling precedent in this jurisdiction.").

[12] Article 134-68b Uniform Code of Military Justice (UCJM) (2012).

[13] *Compare* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 68b (c)(7)(e) (2012) [hereinafter MCM] ("lascivious exhibition of the genitals or pubic area of any person"), *with* 18 U.S.C. § 2256(2)(A)(v) (2008). MCM pt. IV, ¶ 68b (c)(7)(a)–(e) (2012) is a verbatim restatement of 18 U.S.C. §§ 2256(2)(A)(i)–(v) (2008). Note that in both the MCM and the federal civilian law the genitals of "any person" must be exposed–not necessarily the child's. *Id*.

proposing that Article 134-68b define "lascivious exhibition" (as it relates to an actual child) by referencing either *Knox II* or a subsequent declaration of intent passed by Congress.

II. *United States v. Blouin*: The Underlying Facts, Court-Martial, and the ACCA Opinion

A. Underlying Facts

In July of 2011, Specialist Dana P. Blouin was deployed to Torkham, Afghanistan, with the 3d Brigade Combat Team, 25th Infantry Division.[14] Pending an inspection by the command sergeant major, Specialist MW was directed to straighten up a workstation he shared with several other soldiers, including Specialist Blouin.[15] While cleaning, Specialist MW discovered Specialist Blouin's Sony *PlayStation* (PSP) video game console stashed underneath a helmet. Specialist MW turned on the PSP intending to play with it, but was immediately confronted with what "looked like underage kids dressed in swim suits and posing in sexual poses."[16] After Specialist MW reported the discovery to his chain of command, the Army Criminal Investigation Command (CID) commenced its inquiry and interviewed Specialist Blouin. Specialist Blouin waived his rights and admitted his PSP contained "questionable" photographs.[17] Specialist Blouin also consented to a search of his electronic media,[18] whereupon a digital forensic examiner recovered 173 images of "likely child pornography as defined by 18 U.S.C. § 2256(8)":

> The majority of these images included young girls, ranging from the age of approximately six . . . to fourteen years of age either nude[,] in sexually suggestive poses[,] or clothed in a manner . . . that was not age appropriate and posed in a sexually suggestive manner with the focal [point] of the image being on the genital or pubic region of the child. At least ten recovered images were on file with the National Center for Missing and Exploited

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[14] United States v. Blouin, No.20121135, Prosecution Ex. 1, p. 1 of 5 (25th Inf. Div., Schofield Barracks, Haw., Dec. 14, 2012) [hereinafter *Blouin Record*].
[15] *Id.*
[16] *Id.*, p. 2 of 5.
[17] *Id.*
[18] *Id*. (Army Criminal Investigation Command (CID) Report; CID Form 87-R-E).

> Children [NCMEC] as depicting known child subjects.[19]

B. *United States v. Blouin* (Court-Martial)

Specialist Blouin redeployed to Hawaii sometime after CID completed its investigation. In September 2012, the government charged him under clause one of Article 134 with possessing child pornography as defined in 18 U.S.C. § 2256(8).[20] The single specification was referred to a general court-martial.[21] Eventually, Specialist Blouin agreed to plead guilty in exchange for a ten-month cap at sentencing.[22] He signed a stipulation of fact in which he admitted to possessing 173 images of "likely child pornography," depicting "children . . . under the age of eighteen . . . displaying a lascivious exhibition of the genitals or pubic area."[23]

On December 14, 2012, Specialist Blouin pled guilty to the single charge.[24] The military judge advised Specialist Blouin that he was accused of possessing child pornography "as that term is defined in 18 U.S. Code, Section 2256(8)."[25] He then elaborated upon the legal definitions of "sexually explicit conduct" and "child pornography."[26] In accordance with the test first announced in *United States v. Dost* and later adopted by the CAAF in *United States v. Roderick*, the military judge also explained

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[19] *Id*. (Prosecution Ex. 1, p. 3 of 5). For more information regarding the National Center for Missing and Exploited Children (NCMEC), *see About Us*, NAT'L CENT. FOR MISSING AND EXPLOITED CHILDREN, http://www.missingkids.com/About (last visited May 23, 2016).

[20] *Id*. (Department of Army (DA) Form 458) (Charge Sheet))

> The Charge: Violation of the UCMJ, Article 134; The Specification: In that Specialist Dana P. Blouin, U.S. Army, did, between on or about 24 May 2011 and 19 July 2011, at or near Forward Operating Base Torkham, Afghanistan, wrongfully and knowingly possess child pornography, as defined in 18 U.S.C. § 2256(8), which conduct was prejudicial to good order and discipline in the armed forces.

Id. "Clause one" refers to conduct that is alleged under the general article to be prejudicial to good order and discipline. UCMJ art. 134 (2012).

[21] *Id*.

[22] *Id*. (App. Ex. III, IV).

[23] *Id*.

[24] *Id.* at 14.

[25] *Id.* at 22.

[26] *Id.* at 22–23. *See* 18 U.S.C. §§ 2256(2) and (8).

what was meant by a "lascivious exhibition."[27]

The military judge asked Specialist Blouin why he was guilty of the crime of possessing child pornography. Specialist Blouin responded that the children in the photos he possessed were engaging in sexually explicit conduct because they were exhibiting their genitals in a lascivious manner.[28] He also admitted that the subjects "were underage children between the ages of [twelve] and [seventeen]. They were specifically bringing . . . attention to their genital area. Some of them were wearing provocative clothing, unsuitable for underage kids."[29] Next, after confirming the images in question did not depict sexual intercourse, bestiality, masturbation, or sadomasochistic abuse, the military judge inquired as to whether the images depicted "lascivious exhibitions of the genitals or pubic area."[30] Specialist Blouin explained that they did:

> [In] [o]ne of the pictures, [the subject] was bent over with her butt in the air, wearing a G-string. By the way she looked, the development of her physique, she was obviously between [twelve] and [fourteen]. And the way that her butt was in the air, it was obvious[ly] directed to her pubic area.[31]

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[27] *Blouin Record*, *supra* note 14, at 25–26 (citing United States v. Roderick, 62 M.J. 425, 430 (C.A.A.F. 2006), and United States v. Dost, 636 F. Supp. 828, 832 (S.D.Cal.1986), aff'd sub nom. United States v. Weigand, 812 F.2d 1239 (9th Cir. 1987), cert. denied, 484 U.S. 856 (1987)). The *Dost* Factors are:

> (1) [W]hether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Dost, 636 F. Supp. at 832.

[28] *Blouin Record*, *supra* note 14, at 27–28 ("[The subjects] were underage and they were in sexual, provocative poses, and the photos are focused on their genital area, and some were not wearing . . . appropriate attire for their age.").

[29] *Id*. at 36.

[30] *Id.*; *see supra* notes 3, 8.

[31] *Blouin Record*, *supra* note 14, at 37–38.

Sensing a problem with Specialist Blouin's admission that the girl in the picture was wearing a G-string, the military judge probed further:

> Military Judge [MJ]: In that photograph, could you see her genitals or pubic area?
> Accused [ACC]: She was wearing revealing lingerie but you couldn't see it entirely . . . .
> MJ: But it was clothed? Is that what you're telling me? And Specialist Blouin, I'm not trying to put words in your mouth. I'm just trying to understand what it is you're telling me. Is that accurate?
> ACC: Yes, sir.[32]

After clarifying that the girl's genitals were covered, Specialist Blouin again admitted that the girl "was bent over with her butt in the air;" that her pose was "sexual, provocative," unnatural, and inappropriate; and that "the photographer intended that pose to elicit some sort of sexual response in somebody who might see it."[33]

The military judge then asked Specialist Blouin to "tell [him] about another image." Specialist Blouin responded by describing a second image in which the child subject also was clothed: "[T]he girl is laying [sic] down with her legs displayed open and her shorts are kind of pulled to the side, directing her eyes to her genital area."[34] The military judge then questioned Specialist Blouin at length about this particular image.

> MJ: Okay. Is her groin area visible?
> ACC: Partly.
> MJ: Genital and pubic area, are they visible in the photograph?
> ACC: Partly.
> MJ: And I'm not talking about unclothed. It may be clothed but is her genital area, even though clothed, visible in that photograph?
> ACC: Yes, sir.[35]

Having reached an agreement with Specialist Blouin that the genitals and

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[32] *Id*. at 38–39.
[33] *Id*. at 39–40.
[34] *Id*.
[35] *Id*. at 41.

pubic area may be exhibited even if clothed, the military judge confirmed with him that the focus of the image was on "[t]he genital area"; that the pose was unnatural; that the pose was inappropriate for a child between the ages of twelve and fourteen; and that the photographer "intended" a "sexual response out of [the] person viewing [the image]."[36] Specialist Blouin also agreed with the military judge that both photographs he described depicted "a lascivious exhibition of the genitals or pubic area . . . ."[37] He further confirmed that "the other images [he] downloaded . . . [met] the same characteristics [they had] just talked about."[38]

The military judge accepted Specialist Blouin's guilty plea and admitted into evidence Prosecution Exhibit 4, a compact disc containing twelve of the 173 examples of "likely child pornography" referenced in the stipulation of fact.[39] However, less than an hour after closing the court to deliberate, the military judge reopened the providence inquiry "based on [his] review of Prosecution Exhibit 4."[40] The military judge confirmed with Specialist Blouin that he downloaded the images with the knowledge that they were child pornography "consistent with the definition" given previously.[41] He then announced:

> Counsel, having [reviewed] Prosecution Exhibit 4, I only find three images of child pornography . . . . The balance of the images on Prosecution Exhibit 4 do not meet that definition. Given further inquiry, I do believe that the accused is guilty of the offense as charged and I stand by my findings. Although as to those three images, I think counsel would be wise to review *Unites* [sic] *States versus Knox*[,] 32 [F. 3d] 733, 3d Circuit 199[4], that it can be a lascivious exhibition even if the genitals and the pubic area are clothed. So, I stand by my findings.[42]

After finding that the genitals may be exhibited lasciviously even when clothed, the military judge sentenced SPC Blouin to reduction to the grade

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[36] *Id*. at 41–42; *see supra* note 27 (the *Dost* factors).
[37] *Blouin Record*, *supra* note 14, at 42; *see supra* note 8 (18 U.S.C. § 2256(2)(A)(v) (2008)).
[38] *Blouin Record*, *supra* note 14, at 42–44.
[39] *Id.* at 45–46 (citing Prosecution Ex. 1, at 3 of 5).
[40] *Id.* at 88.
[41] *Id*. at 89–90.
[42] *Id*. at 91 (citing United States v. Knox, 32 F.3d 733 (3d Cir. 1994)).

of E1, six months' confinement, and a bad-conduct discharge.[43]

C. *United States v. Blouin*: The ACCA Decision

In a published opinion, the ACCA expressly "endorsed" *Knox II* and held that "nudity is not required to meet the definition of child pornography as it relates to the lascivious exhibition of [the] genitals or pubic area under Title 18 of the United States Code or Article 134, UCMJ (child pornography)."[44] Although the genitals of the children in the three images were covered, the ACCA agreed with the military judge that the images met several of the *Dost* factors and amounted to child pornography.[45]

The Army Court also explained that its adoption of *Knox II* was unaffected by the CAAF's previous ruling in *United States v. Warner*. The CAAF in *Warner* ruled that servicemembers were not on notice that it was illegal to possess child erotica (i.e., sexually suggestive images of children that do not amount to child pornography).[46] To show that *Blouin* and *Warner* were in accord and that child erotica and child pornography are two different concepts, the ACCA in *Blouin* quoted the following passage from *Warner*: "'no prohibition against possession of images of minors that are sexually suggestive but do not depict nudity *or otherwise reach the federal definition of child pornography* exists in any of the potential sources of fair notice.'"[47] By highlighting the CAAF's use of the disjunctive, the ACCA concluded that child pornography does not require genital exposure; hence, *Knox II* and *Warner* may coexist.[48]

The implication of the CAAF's subsequent reversal of the ACCA and express rejection of *Knox II* is that nudity is now required to prosecute depictions involving an actual child and a lascivious exhibition of the

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[43] *Id*.

[44] United States v. Blouin, 73 M.J. 694, 696 (A. Ct. Crim. App. 2014), *review granted* (C.A.A.F. Oct. 23, 2014), and *rev'd*, 74 M.J. 247 (C.A.A.F. 2015) (internal citations omitted).

[45] *Id.* at 696–98. *See supra* note 27 (the *Dost* factors).

[46] *Blouin*, 73 M.J. at 698.

[47] *Id*. (quoting United States v. Warner, 73 M.J. 1, 4 (C.A.A.F. 2013)).

[48] *Id.* ("Nothing in the *Warner* decision repudiates adoption of the *Knox* totality of circumstances test for determining whether images contain a lascivious exhibition of genitals or pubic area . . . .").

genitals.[49] If this is indeed what the CAAF intended, then the CAAF has thwarted the express will of Congress. However, before examining the CAAF opinion and its defects, it is necessary to analyze the decades-long legislative history of the term "lascivious exhibition of the genitals or pubic area" as it relates to genital exposure.

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

A. The Impetus for Legislation

On Sunday, May 15, 1977, the following words burst across the entire width of the *Chicago Tribune*'s front page: "Child pornography: Sickness for sale." The article beneath straightaway delivered upon the headline's promise of scandal and shame:

> The smiling, no-longer-innocent faces of little children look up from the pages of more than 280 pornographic magazines sold in America—children engaged in almost every known sexual perversion . . . . For sale also are horror movies such as Hollywood never conceived. The horror is in the celluloid portrayal of children from three to about fifteen years old—some smiling, some bewildered—participating in a variety of sexual perversions with adults and each other.[50]

Just below, in bold, retina-searing typeface was the headline: "[Two] seized in child sex ring; Boys used in film for national sale." The associated article detailed the arrest of two adult men for producing

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[49] *See* United States v. Blouin, 74 M.J. 247, 250–51, 252 (C.A.A.F. 2015). Note that the CAAF also found Specialist Blouin improvident. *Id*. at 251–52. Specialist Blouin's improvidence is beyond the scope of this paper.

[50] Ray Moseley, *Child pornography: Sickness for sale*, CHI. TRIB., May 15, 1977, at A1 ("In Chicago and other cities, adult perverts run boy prostitution rings, luring fuzzy-cheeked youths into street-walking, sending them on cross-country trips to serve a network of customers and selling their young flesh at auction to the highest bidder."). For an in-depth look at the anti-child pornography hysteria that gripped the United States in 1977, *see* Philip Jenkins, *Decade of Nightmares: The End of the Sixties and the Making of Eighties America* Chapter 4 ("The Politics of Children: 1977") (2006) and David Palmer, Politics Negotiating Sexuality And Child Endangerment in 1977 America (2007) (unpublished master's thesis, University of North Carolina at Chapel Hill).

pornographic movies featuring runaway teenaged boys.[51]

Thus began a lurid, four-part investigative series exposing "a national ring of greedy, perverted adults" engaged in prostituting children and creating child pornography. The stated purpose of the exposé was to show that "[c]hild pornography is a nationwide, multimillion-dollar racket that is luring thousands of juveniles into lives of prostitution."[52]

On Monday, the frenzy continued. "Chicago is center of national child porno ring," announced the introductory headline. The associated article described the existence of a locally-based interstate child-trafficking network that had been masterminded by "a convicted sodomist" shortly before his incarceration.[53] More important, however, was what was printed right in the middle of the front page using the same impossible-to-ignore typeface as the Sunday edition: "[United States] orders hearings on child pornography."[54]

The *Tribune's* exposé notwithstanding, the Senate Committee on Human Resources had been discussing the implementation of a federal child pornography law since at least May 6th.[55] On that day, the Human Resources Committee sent to each member of the Senate Committee on the Judiciary a resolution urging it "[to consider] legislation designed to eliminate the exploitation of children in pornographic materials."[56] This resolution would be the impetus for the passage of the Protection of Children Against Sexual Exploitation Act,[57] discussed later in this section. But the issue of child pornography had been on the Justice Department's radar screen since at least 1973, when "the first child pornography ring—involving some fourteen adults using boys under age thirteen for sex and

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[51] George Bliss & Michael Sneed, *2 seized in child sex ring; Boys used in film for national sale*, CHI. TRIB., May 15, 1977, at A1. The suspects revealed to an undercover policeman that they intended to create 2000 copies of one movie and then sell each copy for $50 apiece. *Id*.

[52] Sidebar, CHI. TRIB., May 15, 1977, at A1.

[53] Ray Moseley, *Chicago is center of national child porno ring*, CHI. TRIB., May 16, 1977, at A1.

[54] Ray Moseley, *U.S. orders hearings on child pornography*, CHI. TRIB., May 16, 1977, at A1.

[55] S. REP. NO. 95-438, at 3–4 (1977) *as reprinted in* 1978 U.S.C.C.A.N 41, 49; Pub. L. 95-225, 92 Stat. 7 (1978).

[56] *Id*.

[57] *Id*.

production of pornographic materials—was brought into public view."[58]

Because there was still no federal law criminalizing the production of child pornography, the *Tribune's* investigation gave the issue some measure of urgency.[59] This was especially true now that the four-part series had been reprinted in over 200 newspapers throughout the country.[60] On the same day the *Tribune's* investigation debuted, *CBS* aired a nationally-televised *60 Minutes* segment entitled *Kiddie Porn*. Surveying child pornography production in places as far-flung as Los Angeles, New Orleans, Houston, and rural Tennessee, correspondent Mike Wallace interviewed law enforcement officials, adult bookstore owners, and actual teens used in pornographic films.[61]

Faced with media exposure of a nationwide scourge, those who dwelt in the corridors of power would now have to pass something.[62]

B. The 1977 Act and the Question of Nudity

Although lawmaking is often derided as occurring at a glacial pace, few elected officials even minimally concerned with self-preservation will drag their feet in order to protect the interests of child pornographers. Congress would react swiftly to the media blitz.

1. The Senate Hearings

On Friday, May 27, 1977, a scant ten days after the *Tribune* published its fourth and final installment, the Subcommittee to Investigate Juvenile Delinquency convened a fact-finding hearing in Chicago.[63] On June 16,

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[58] 1 ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, U.S. DEPT. OF JUSTICE, FINAL REPORT 599, n.398 (1986) [hereinafter *MEESE REPORT*]. For additional discussion regarding the history of child pornography through the passage of the 1977 Act, *see* Major Kenneth Borgnino, *Out of Focus: Expanding the Definition of Child Pornography in the Military*, 223 MIL. L. REV. 499, 502–05 (2015).

[59] *Protection of Children Against Sexual Exploitation: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the S. Comm. on the Judiciary*, 95th Cong. 3 (1977) [hereinafter *1977 S. Subcomm. Hearings*] (statement of Sen. Charles McC. Mathias, Jr., ranking minority member of the subcomm.).

[60] *Id*. at 56.

[61] *60 Minutes: Kiddie Porn* (CBS television broadcast May 15, 1977).

[62] *MEESE REPORT*, *supra* note 58, at 600; *1977 S. Subcomm. Hearings*, *supra* note 59, at 5.

[63] *1977 S. Subcomm. Hearings*, *supra* note 59, at 1.

the Subcommittee met again back in Washington, D.C., to evaluate draft legislation criminalizing child pornography.[64]

Three bills were now before the Subcommittee: S. 1011, sponsored by Sen. William Roth (R-DE) (the Roth Bill);[65] S. 1499, sponsored by Sen. Spark Matsunaga (D-HI);[66] and S. 1585, co-sponsored by Sens. Charles Mathias (R-MD) and John Culver (D-IA) (the Mathias-Culver Bill).[67] Senators Mathias and Culver had been active participants at the Chicago hearing, with Sen. Culver serving as presiding officer.[68]

The Roth Bill was considered at length by the Subcommittee. On June 14, 1977, Patricia M. Wald, Assistant Attorney General for Legislative Affairs, sent a letter (the Wald Letter) to Senator James O. Eastland, Chairman of the Senate Judiciary Committee, giving an in-depth analysis of the Roth Bill's shortcomings.[69] Although Ms. Wald found many faults with the Roth Bill, one fault in particular is pertinent to this discussion since it addresses the use of the word "nudity."

In 1977, the landmark Supreme Court decision *Miller v. California* (1973) provided the legal framework for regulating all obscenity, including child pornography.[70] After reaffirming "that obscene material is unprotected by the First Amendment," *Miller* laid out a three-part test to determine whether a work is obscene as a matter of law:

> (a) Whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
>
> (b) Whether the work depicts or describes, in a patently

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[64] *Id*. at 71.

[65] S. 1011, 95th Cong. (1st Sess. 1977) [hereinafter S. 1011].

[66] S. 1499, 95th Cong. (1st Sess. 1977). Because the Matsunaga Bill "was drafted as an amendment to the Child Abuse Prevention and Treatment Act[,] which is within the jurisdiction of the Human Resources Committee," it was not considered. S. Rep. No. 95-438, at 13 (1977), *as reprinted in* 1978 U.S.C.C.A.N 40, 50.

[67] Protection of Children Against Sexual Exploitation Act of 1977, S. 1585, 95th Cong. (1977).

[68] *1977 S. Subcomm. Hearings*, *supra* note 59, at 1.

[69] *Id.* at 75–79 (statement of Assistant Att'y Gen. Patricia M. Wald). Ms. Wald would later serve as a judge on the D.C. Circuit Court from 1979 to 1999, and chief judge from 1986 to 1991.

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

> offensive way, sexual conduct specifically defined by the applicable state law; and
>
> (c) Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[71]

Miller also provided two examples "of what a . . . statute could define for regulation under part (b)" of the three-part test:

> (1) Patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated.
>
> (2) Patently offensive representation[s] or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.[72]

Although *Miller* allows the state to regulate the distribution of obscene materials, the state cannot regulate a patently offensive display or a display that appeals solely to the prurient interest in the event the display possesses serious literary, artistic, political, or scientific value.[73] Instead, laws curbing free expression "must be carefully limited," lest they impermissibly encroach upon the First Amendment.[74]

In 1982, the Supreme Court would rule that even some non-obscene material depicting children could be deemed child pornography.[75] However, in 1977 the obscenity requirement still applied, meaning that Congress could prohibit only material that met all three prongs of the *Miller* test.[76]

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[71] *Id*. at 24 (internal citations omitted).
[72] *Id.* at 25.
[73] *Id.* at 26.
[74] *Id.* at 23–24.
[75] New York v. Ferber, 458 U.S. 747, 757 (1982).
[76] *See* S. REP. NO. 95–438 at 11 (1977), *as reprinted in* 1978 U.S.C.C.A.N 40, 49 (explaining the Justice Department's position as to why the Subcommittee should reject the Roth Bill).

> Finally, the Justice Department concluded that since the section of S. 1011 [the Roth Bill] prohibiting the sale or distribution of materials depicting explicit sexual conduct involving children would cover both obscene and non-obscene materials, there was a very strong possibility that the courts would declare this section unconstitutional on its face.

The Roth Bill criminalized the production and distribution of material depicting children engaging in or simulating "a prohibited sexual act."[77] The term "prohibited sexual act" included "sexual intercourse, anal intercourse, masturbation, bestiality, sadism, masochism, fellatio, cunnilingus, 'any other sexual activity,' and '*nudity*, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction.'"[78]

Assistant Attorney General Wald advised that the language of the Roth Bill failed the very first prong of the *Miller* test: "Whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest."[79] Because "any individual" is not "the average person," the Roth Bill's prohibition was overbroad and would infringe upon constitutionally protected material. Contributing to the overbreadth was the ambiguous "sexual stimulation or gratification" standard, which focused on evaluating "any" viewer's reaction as opposed to the photographer's intent.[80]

In order to ensure that any bill passed by the Subcommittee would ban only obscene material, the Wald Letter recommended drafting language patterned after the second of the two definitions for obscenity proposed by *Miller*:

> We would suggest as an alternative definition [to the proposed definition for obscenity] "lewd exhibitions of the genitals," a phrase used by the Chief Justice in *Miller v. California* . . . to describe one of a variety of types of conduct which could be prohibited under state obscenity statutes. Congress could make clear in the legislative history of the bill what types of nude portrayals of children were intended to be encompassed within this definition.[81]

Id.

[77] S. 1011, *supra* note 65 (proposed 18 U.S.C. § 2253(2)).

[78] *Id*. (emphasis added).

[79] *1977 S. Subcomm. Hearings*, *supra* note 59, at 77 (citing Miller v. California, 413 U.S. 15, 24 (1973)).

[80] *Id*. *See also* Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) ("[W]here conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.").

[81] *1977 S. Subcomm. Hearings*, *supra* note 59, at 77–78 (citing Miller, 413 U.S. at 25).

The bill that actually passed Congress and was signed into law, the Mathias-Culver Bill, took the Wald Letter's practical advice and used the term "lewd exhibition of the genitals."[82] This language is the direct ancestor of the term "lascivious exhibition of the genitals," the genesis of which will be discussed, *infra*.[83] However, Congress did not take up the Wald Letter's suggestion to describe "what type of nude portrayals of children were intended to be encompassed within [the] definition."[84] The evidence (or, more precisely, the lack of evidence) indicates that Congress had no intention of limiting the term "lewd exhibition of the genitals" solely to nude exhibitions. Even under the narrower *Miller* standard, which permitted the government to restrict obscene materials only, Congress was signaling that a lewd exhibition need not be nude in order to be obscene.

In fact, additional evidence within the legislative history lends support to the argument that Congress never intended a nudity requirement. Professor Paul Bender of the University of Pennsylvania School of Law testified at the Washington, D.C., hearing.[85] Like Assistant Attorney General Wald, Professor Bender found fault with the Roth Bill's nudity provision:

> Nudity generally, I think, may be a bit overbroad in terms of the purposes of the legislation. I would not want to classify as child abuse anyone who takes a picture of a child without any clothes on. Lots of people do that of their children. They send it to the child's grandparents in interstate commerce. I don't think you would want to cover that. So I think it's right to qualify "nudity." But this qualification strikes me as vague.[86]

The Roth Bill qualified nudity as it pertained to "prohibited sex acts," if only to prevent a police raid after mom and dad snap and send to grandma a photo of a wholly innocent bathtub scene.[87] However, Professor Bender

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[82] S. 1585, 95th Cong. § 3(a) (1977) (proposed 18 U.S.C. § 2251(c)(2)(E)).
[83] *See infra* Part V.C.
[84] *1977 S. Subcomm. Hearings*, *supra* note 59, at 78.
[85] *Id.* at 101–12.
[86] *Id*. at 103.
[87] S. 1011, *supra* note 65 (proposed 18 U.S.C. § 2253(2)(J). "[N]udity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction.").

was critical of the proposed language because it was unclear "whose purpose [the Roth Bill] is talking about and when that has to be the purpose":

> Is the notion of this that the person taking the picture has to take the picture for the purpose of stimulating or gratifying someone else sexually, or is it enough if the picture is simply used that way for that purpose by somebody later even if that was not the purpose of the person who took the picture?[88]

Nudity in itself is not obscene.[89] The Subcommittee therefore was on uncertain ground by prohibiting nudity, because any such prohibition would depend upon a precise qualifier. What's more, the concept of "lewdness" does not hinge on nudity; it hinges on the three prongs of the *Miller* test.[90] It follows that a depiction may be lewd whether or not it features nudity, and a nude depiction may not necessarily be lewd, as with the aforementioned bathtub scene, a medical textbook, or Michelangelo's David. Overall, the Roth Bill's nudity and sexual gratification requirements were so sweeping as to be unworkable.

The Roth Bill ultimately died in committee.[91] As explained in the associated Senate Committee Report, one reason for its rejection was the extreme overbreadth of the nudity requirement, which would have criminalized both obscene and non-obscene depictions of minors "engaging in sexually explicit conduct."[92]

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[88] *1977 S. Subcomm. Hearings*, *supra* note 59, at 103.

[89] Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 (1975) (striking down as overbroad a local ordinance prohibiting films depicting nudity from being shown at drive-in theaters; "Clearly all nudity cannot be deemed obscene even as to minors").

[90] Miller v. California, 413 U.S. 23–24 (1973); *see supra* notes 71-75 and accompanying text.

[91] S. REP. NO. 95-438, at 11–13 (1977), *as reprinted in* 1978 U.S.C.C.A.N 40, 48–51.

[92] *Id*. at 11 (citing Roth v. United States, 354 U.S. 476 (1957), and *Miller*, 413 U.S. 15 (1973)).

> Similarly, S. 1011 [the Roth Bill] would prohibit the depiction [of] "nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction." Once again their language is so broad that it could conceivably prohibit such innocent scenes as "skinny dipping" or even nude snapshots of babies that were mailed to grandparents. This is particularly true since the proposed test for offensiveness is the sexual

2. The Mathias-Culver Bill

The Mathias-Culver Bill addressed Ms. Wald's concerns with the Roth Bill. "Specifically, the definition of 'sexually explicit conduct' was more tightly drawn so as to include only those activities where the child was engaged in sexually oriented acts."[93] By defining "sexually explicit conduct" in terms of depicting sexual abuse as opposed to nudity (or whether the depiction was intended to conjure feelings of "sexual stimulation or gratification"), the drafters were confident their proposed restrictions on child pornography would be sufficiently expansive and yet survive judicial scrutiny.[94]

At the time only the sale, distribution, and importation of obscene materials were regulated by the federal government.[95] The Mathias-Culver Bill proposed to "add a new section 2251 to Title 18, making it a federal offense for anyone to use children under the age of [sixteen] in the *production* of pornographic materials."[96] "By favorably reporting [the Mathias-Culver Bill], the committee intends to fill the existing gap in federal law by declaring that the use of children in the production of such materials is a form of child abuse."[97]

The Mathias-Culver Bill prohibited depictions of minors engaged in "sexually explicit conduct," defined as "[a]ctual or simulated sexual

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> stimulation or gratification of any individual rather than using the standard of the average individual as required by the Supreme Court in *Roth* and *Miller*.

Id.

93 S. REP. NO. 95-438, at 13 (1977), *as reprinted in* 1978 U.S.C.C.A.N 40, 51.

94 *Id.* at 52.

95 *Id.* at 53 ("Current federal laws dealing with pornography focus almost exclusively on the sale, distribution and importation of obscene materials, and do not directly address the abuse of children inherent in their participation in the production of such materials.").

96 *Id.* at 52 (emphasis added).

97 *Id.* at 53. The Mathias-Culver Bill also sought to amend the Mann Act (18 U.S.C. § 2423) in order to criminalize the transport of boys across state lines for the purposes of prostitution. (S. Rep. 95-435, 16–17 (1977), *as reprinted in* 1978 U.S.C.C.A.N 40, 53–55). The bill also sought to amend 18 U.S.C. §§ 1461, 1462, and 1465 in order to increase the penalties associated with mailing, importing, or transporting (for sale or distribution) child pornography. *Id.*

intercourse (including genital-to-genital, oral-genital, anal-genital, or oral-anal)[,] whether between persons of the same or opposite sex; bestiality; masturbation; sado-masochistic abuse . . . and the lewd exhibition of the genitals or pubic area."[98] Not only did the proposed definition hew to the example set forth in *Miller*,[99] there is no evidence suggesting Congress required nudity for a "lewd exhibition."

After passage by both houses of Congress, the Mathias-Culver Bill, now officially known as the Protection of Children Against Sexual Exploitation Act of 1977 (the 1977 Act), was signed into law by President Jimmy Carter on February 6, 1978.[100] The new legislation was inserted into Title 18 of the United States Code as Chapter 110.[101] Section 2253 defined key terms.[102] Similar to the Mathias-Culver Bill, "sexually explicit conduct" was, in part, defined in the new 18 U.S.C. §2253(2)(E) as a "lewd exhibition of the genitals or pubic area of any person."[103] No nudity requirement was expressed or even implied.

It is also worth noting that in accordance with *Miller*, § 2253(2)(E) expressly referred to genital "exhibition" instead of genital "exposure."[104] If Congress had meant "lewd exposure" instead of "lewd exhibition," then it stands to reason Congress would have forbidden precisely that.[105]

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[98] S. 1585, 95th Cong. § 3(a) (1977) (proposed 18 U.S.C. §§ 2251(A)–(C)).

[99] Miller v. California, 413 U.S. 23–24 (1973); *see supra* text accompanying note 72.

[100] Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 [hereinafter *1977 Act*].

[101] In this article, "Chapter 110" will be used to refer to federal child pornography legislation as a whole.

[102] 18 U.S.C. § 2253(2) (1978) uses the following definition:

> (2) "[S]exually 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) sado-masochistic abuse (for the purpose of sexual stimulation); or (E) lewd exhibition of the genitals or pubic area of any person.

Id. Note that "producing," as defined in 18 U.S.C. § 2253(3) (1978), required a profit motive ("'producing' means producing, directing, manufacturing, issuing, publishing, or advertising, *for pecuniary profit*" (emphasis added)). Also, a "minor" was defined as a person under the age of sixteen. 18 U.S.C. § 2253(1) (1978).

[103] 18 U.S.C. § 2253(2)(E) (1978); S. 1585, 95th Cong. § 3(a) (1977) (proposed 18 U.S.C. § 2251(c)(2)(E)).

[104] *Id.*

[105] *See* 18 U.S.C. §2253(2)(E), and *Miller*, 413 U.S. at 25 ("lewd exhibition of the

IV. *New York v. Ferber* Child Pornography and Obscenity

When the 1977 Act was debated, passed, and signed into law, *Miller* still set the outer perimeter on depictions the government could lawfully restrict. Accordingly, criminal penalties under the 1977 Act would attach only if a sexually explicit depiction of a minor was found to be obscene under the *Miller* three-pronged test.[106]

Nevertheless, state legislatures began pushing against the limits of *Miller* by passing child pornography laws that lacked an obscenity requirement. By 1982, "20 [s]tates prohibit[ed] the distribution of material depicting children engaged in sexual conduct without requiring that the material be legally obscene."[107] One such state was New York.[108]

Paul Ferber operated an adult bookstore in Manhattan.[109] After selling to an undercover police officer movies featuring teenaged boys masturbating, he was arrested and charged with two counts of distributing obscene material depicting a child engaged in sexual conduct, and one count of distributing non-obscene material depicting a child engaged in sexual conduct.[110] Although a jury acquitted Ferber of the obscenity charges, it convicted him of distributing non-obscene child pornography.[111] Subsequently, the New York Court of Appeals reversed Ferber's conviction, finding that the statute in question impermissibly criminalized non-obscene depictions.[112]

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genitals").

[106] *Miller*, 413 U.S. at 24. *See supra* note 71 and accompanying text.

[107] New York v. Ferber, 458 U.S. 747, 751 (1982).

[108] New York enacted its law in 1977, before the Mathias-Culver Bill was signed into law. *Id*.

[109] *Id.* at 751–52. *See also Protecting Free Speech and Our Children*, WASH. POST, May 19, 1981, at A13, https://www.washingtonpost.com/archive/politics/1981/05/19/protecting-free-speech-and-our-children/34f43bbe-e1ef-41bb-91e6-8ad90da4ae2b/ ("Paul Ira Ferber owned a bookstore in Times Square. If you have ever been to Times Square, I don't have to tell you what kind of a bookstore.").

[110] *Ferber*, 458 U.S. at 752. *See* N.Y. STAT. § 263.15 (1980) ("A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age." Under N.Y. STAT. §263.00(5) (1980), to "promote" means, among other things, to "distribute.").

[111] *Ferber*, 458 U.S. at 752.

[112] *Id.* at 752, (citing Ferber v. New York, 52 N.Y.2d 674, 681 (1981)). *See also* Ferber v. New York, 52 N.Y.2d at 678.

However, in spite of *Miller*, the Supreme Court ruled in *New York v. Ferber* that a legislature may prohibit the distribution of non-obscene child pornography.[113] Because "[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children," such recordings constitute a "permanent record of abuse" that exacerbates the original trauma.[114] The Court held that the state's interest in protecting children from such trauma is more compelling than permitting unfettered free expression.[115] Although a distributor of child pornography like Paul Ferber may not have been the one actually subjecting a child to harm, the distributor's efforts nevertheless spur greater demand for what is essentially recorded sex abuse.[116] "Thus, the question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work."[117]

Because of the potential for lasting harm, the Court also found that a sexually explicit depiction of a child may be criminalized even if the work is not patently offensive; does not appeal to the prurient interest; or even if it contains some measure of serious literary, artistic, political, or

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> Thus on its face the statute would prohibit the showing of any play or movie in which a child portrays a defined sexual act, real or simulated, in a nonobscene manner. It would also prohibit the sale, showing, or distributing of medical or educational materials containing photographs of such acts. Indeed, by its terms, the statute would prohibit those who oppose such portrayals from providing illustrations of what they oppose. In short, the statute would in many, if not all, cases prohibit the promotion of materials which are traditionally entitled to constitutional protection from government interference under the First Amendment.

Id.

[113] *Ferber*, 458 U.S. at 759.

[114] *Id.*

[115] Preventing child endangerment is central to the *Ferber* decision. *See id.* at 756 ("It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling."); s*ee also id.* at 757 ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.").

[116] *Id.* at 759–60 ("Whereas the production of pornographic materials is a low-profile, clandestine industry, the need to market the resulting products requires a visible apparatus of distribution.").

[117] *Id.* at 761.

scientific value.[118] Also, since "the material at issue need not be considered as a whole," even a sliver of child sex in a larger work would render the entire work devoid of constitutional protection.[119]

After *Ferber*, *Miller* was no longer the final word on sexually explicit depictions of children. Child pornography was now its own category of unprotected speech, subject to even broader prohibitions than adult pornographic material.

V. The Child Protection Act of 1984

A. The 1984 Act, Generally

The *Ferber* decision could not have come at a more opportune time. Not a single person had been convicted under the 1977 Act of producing child pornography, and only a scant few had been prosecuted for distribution.[120] Congress took the opportunity to shore up existing gaps in the law and explore the enlarged universe created by the Supreme Court.[121]

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[118] *Id.* (citing Memorandum of Assemblyman Lasher in Support of N.Y. STAT. § 253.15) ("It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value."). *See id.*at 758, n.9, and 766, n.19, wherein the Court cites to the 1977 Senate Subcommittee hearings for evidence as to the deleterious effects of child pornography on children. *1977 S. Subcomm. Hearings*, *supra* note 59, at 6.

[119] *Ferber*, 458 U.S. 763.

[120] H.R. REP. NO. 98-536, at 2 (1983), *as reprinted in* 1984 U.S.C.C.A.N 492, 493.

> The impetus for amended legislation also provided a forum to review the effectiveness of the 1977 law. Since May 1977, only [twenty-eight] persons have been indicted under 18 U.S.C. 2252. Twenty-three defendants were convicted of this violation, two were convicted of other obscenity violations, and the cases of two defendants are still pending. One defendant committed suicide. Convictions under the production offense, 18 U.S.C. 2251 are, to date, nonexistent. Only four individuals have been indicted under 18 U.S.C. 2251. Two pled guilty to other charges under 18 U.S.C. 2252, one pled guilty to a conspiracy charge, and one case is still pending. The few prosecutions under the act indicate that the protection of children against sexual exploitation act requires some modification.

Id.

[121] "The [House] Judiciary Committee noted that the purpose of the 1977 Act had been frustrated by the obscenity requirement because it limited the types of depictions which could be banned under the statute." Annemarie J. Mazzone, *United States v. Knox:*

In order to secure more child pornography convictions, The Child Protection Act of 1984 (the 1984 Act) made significant changes to the 1977 Act.[122] In accordance with *Ferber*, the 1984 Act eliminated the obscenity requirement by removing the word "obscene" wherever it appeared in the existing law.[123] The 1984 Act also raised the age of minority from sixteen to eighteen, removed the commercial requirement for distribution, criminalized the knowing reproduction of child pornography, and redesignated the statute's definitions from § 2253 to § 2255.[124] In 1986, the definitions would move unchanged from § 2255 to § 2256, where they have remained ever since.[125]

The entire purpose of the 1984 Act was to expand the reach of the 1977 Act.[126] As discussed above, there was no nudity requirement under the 1977 Act, which was based upon the more restrictive *Miller* obscenity standard. It follows that there would be no nudity requirement under the broader, post-*Ferber* 1984 Act.

B. The Question of Nudity

The legislative history of the 1984 Act shows that Congress never intended a nudity requirement.[127] As with the 1977 Act, the evidence comes from the testimony of a Justice Department attorney regarding a bill that would die in committee.

Congressman Earl Hutto (D-FL) sponsored H.R. 2432 (the Hutto Bill), one of four bills under consideration by the House Subcommittee on Crime.[128] One change the Hutto Bill proposed was to provide a definition for the word "simulated," which was used in the 1977 Act though nowhere

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Protecting Children from Exploitation Through the Federal Child Pornography Laws, 5 FORDHAM INTELL. PROP., MEDIA AND ENT. L.J. 167, 182 (1994) (citing H.R. Rep. No. 98-536 (1983) at 2, reprinted in 1984 U.S.C.C.A.N. 492, 493).

122 Child Protection Act of 1984, Pub. L. No. 98-292, § 4, 98 Stat. 204.

123 *Id.*

124 *Id*. §§ 5(a)–(b).

125 Child Abuse Victims' Rights Act of 1986, Pub. L. No. 99-500 § 703(a), 100 Stat. 1783.

126 *See, e.g.*, United States v. Dost, 636 F. Supp 828, 831 (S.D. Cal. 1986) ("Congress'[s] intent, as evidenced by the change in the subsection [2255](E) terminology and other changes, was to broaden the scope of the existing 'kiddie porn' laws."); *see also* MAZZONE, *supra* note 121, at 182.

127 *See generally* MAZZONE, *supra* note 121, at 182–86 (discussing passage of the 1984 Act and testimony regarding proposed requirements for nudity).

128 *See 1977 Act*, *supra* note 100.

explained.[129] The Hutto Bill's proposed definition for "simulated" required genital exposure: "'simulated' means [sexually explicit conduct] which creates the appearance of such conduct *and which exhibits any uncovered portion of the genitals or buttocks*."[130]

Testifying before the Subcommittee on Crime was Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice. Mr. Richard expressed strong reservations regarding the Hutto Bill's nudity requirement, asserting that it would compromise the statute to such an extent as to render it inert:

> Another problematic aspect of [the Hutto Bill] is its definition of the word "simulated," a term which is used but not defined in the current child pornography provisions [i.e., the 1977 Act]. The bill defines this term to mean "the explicit depiction of any ['sexually explicit conduct,' as defined] which creates the appearance of such conduct and which exhibits any uncovered portion of the genitals of buttocks." *We believe that the bill defines the term "simulated" too narrowly and that certain conduct excluded by the definition should be included within the law's proscriptions*. For example, the requirement that the simulated sexual conduct exhibit any uncovered portion of the genitals or buttocks would exclude simulated sexual conduct in which the unclothed portions of the body are simply out of view of the camera. H.R. 2432's definition of "simulated" in our view could prove to be a significant loophole to imaginative pornographers.[131]

Although the verbiage pertained only to "simulated" conduct, the stated concern was that an on-screen 'simulation' would be completely

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[129] *Id.*; H.R. 2432, 98th Cong. § 3 (1983) (proposed change to 18 U.S.C. § 2251(3)).

[130] H.R. 2432, 98th Cong. § 3 (1983) (proposed change to 18 U.S.C. § 2251(3)) (emphasis added).

[131] Protection of Children Against Sexual Exploitation: Hearing Before the Subcomm. On Crime of the Comm. of the Judiciary H. of Rep., 98th Cong. 40 (1983) [hereinafter *1983 H.R. Subcomm Hearing*] (emphasis added). Mr. Richards's remarks were republished in H.R. REP. NO. 98-536, at 13 (1984), *as reprinted in* 1984 U.S.C.C.A.N 492, 504.

legal despite the very real abuse taking place off-screen.[132] Mr. Richard suggested that ". . . the term 'simulated' should not be defined or that the definition *should not* require the exhibiting of any uncovered portion of the genitals or buttocks."[133] The House signaled its agreement with Mr. Richard by neither defining the term "simulated" nor requiring genital exposure in its final version of the bill.[134]

Senator Arlen Specter (R-PA) sponsored S. 57 (the Specter Bill), the Senate version of the Hutto Bill.[135] Using virtually the same language as Mr. Richard, Assistant Attorney General Robert McConnell expressed his reservations with the Specter Bill's equivalent definition for "simulated."[136] The Senate, too, signaled its agreement by neither defining the word "simulated" nor requiring genital exposure in its final version of the bill.[137]

Based on the testimony of Messrs. Richard and McConnell, the Justice Department's position, post *Ferber*, was that a legislature may permissibly ban lewd exhibitions in which the genitals are covered. In accordance with their advice, the bill enacted ultimately left the word "simulated" undefined and jettisoned the proposed nudity requirement.[138] Once again,

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[132] *See* MAZZONE, *supra* note 121, at 184-85, 224–25 (discussing Congress's finding that simulated sex acts can cause significant trauma to exploited minors and the desire to avoid creating a loophole in the law).

[133] *1983 H.R. Subcomm Hearing*, *supra* note 131, at 40.

[134] *See* Bill to Amend Ch. 110 (Relating to Sexual Exploitation of Children) of Title 18 of the United States Code, and for Other Purposes, H.R. 3635, 98th Cong. (1984).

[135] *1983 H.R. Subcomm Hearing*, *supra* note 131, at 21.

[136] S. REP. NO. 98-169, at 13 (1983), *as reprinted in* 1984 U.S.C.C.A.N 504. The Senate Judiciary Committee's final report reprinted a letter dated April 15, 1983, from Assistant Attorney General Robert McConnell to Sen. Strom Thurmond (R. SC), Committee Chairman.

[137] *See* Bill to Amend Title 18 of the United States Code Relating to the Sexual Exploitation of Children, S. 1469, 98th Cong. (as introduced in the Senate, June 14, 1983).

[138] Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204. *See also* 130th Cong. Rec. 7198 (1984), and the remarks of Sen. Charles Grassley,

> The substitute before us *preserves current law* as it relates to simulations of sexual conduct. Hence, sexually explicit conduct is defined as actual or simulated conduct that utilizes any of the prohibited depictions delineated in 18 U.S.C. 2253. This preservation, in our opinion, discourages imaginative pornographers from discovering significant loopholes.

Id. (emphasis added). *See also* MAZZONE, *supra* note 121, at 184–86, for further analysis of Congress's decision to leave the word "simulated" undefined.

the legislative history shows that Congress was well aware it could have criminalized only those exhibitions in which the genitals were uncovered, yet instead chose not to.

C. From "Lewd" to "Lascivious"

During the Senate debates on H.R. 3635, the bill upon which the 1984 Act was ultimately based, Senator Specter proposed replacing the word "lewd" with "lascivious":

> [T]his amendment would replace the current law's prohibition of the "lewd exhibition of the genitals." "Lewd" has in the past been equated with "obscene"; this change is intended to make it clear that an exhibition of a child's genitals does not have to meet the obscenity standard to be unlawful.[139]

As discussed above, the *Miller* majority opinion suggested use of the word "lewd."[140] By recommending that "lewd" be changed to "lascivious," Senator Specter was further clarifying that the 1984 Act was operating within the expansive new universe created by *Ferber*.[141] The recommendation was approved, and "sexually explicit conduct" was now defined, in relevant part, as an actual or simulated "*lascivious* exhibition of the genitals or pubic area of any person."[142]

VI. *Osborne v. Ohio* and the 1988 and 1990 Acts

In the years following the 1984 Act, several important milestones were reached that continue to influence how child pornography crimes are

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[139] 130 Cong. Rec. 7196 (1984) (remarks of Sen. Arlen Specter).
[140] *See supra* note 72 and accompanying text.
[141] *See, e.g.*, United States v. Dost, 636 F. Supp 828, 831 (S.D. Cal 1986) ("Congress believed that the term 'lewd' used in subsection (E) was too restrictive since it had been closely associated with the more stringent standard of obscenity."). However, Senator Specter's change may have been more symbolic than anything else. *See id.* n.4 ("In spite of Congress's perceived significance in the change in terms, 'lewd' and 'lascivious' have frequently been used interchangeably." (citations omitted) (emphasis added)).
[142] *Compare* 18 U.S.C. § 2253(2)(E) (1977) ("lewd"), *with* 18 U.S.C. § 2255(2)(E) (1984) ("lascivious") (emphasis added).

prosecuted in civilian federal courts today.[143] First, in 1988, Congress amended Chapter 110 to include computer transfer under the rubric of distribution or receipt within interstate commerce.[144] Second, in 1990, Congress criminalized simple possession of child pornography.[145] Previously, in 1969, the Supreme Court had ruled in *Stanley v. Georgia* that a state cannot regulate the private possession of obscene materials.[146] However, since child harm replaced obscenity as the key criterion for child pornography, the Supreme Court in *Osborne v. Ohio* (1988) ruled that a state could, in effect, enter one's home by prohibiting the private possession of child pornography.[147] Congress responded to *Osborne* by passing the Child Protection Restoration and Penalties Enhancement Act of 1990, which, in relevant part, criminalized the possession of child pornography.[148] Soon after, the Federal Bureau of Investigation (FBI) would investigate a graduate student named Stephen A. Knox.

VII. The *Knox* Line of Cases and the Question of Nudity

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[143] For an in-depth analysis of Osborne v. Ohio and the post-1984 revisions, *see generally* MAZZONE, *supra* note 121, at 186–91.

[144] Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690 § 7501, 102 Stat. 418. *Id*. at §§ 7511(a)–(b), amending 18 U.S.C. §§ 2251(c), 2252(a). Congress also criminalized the sale of children for the purposes of producing child pornography (§ 7512), and required pornographers to keep detailed records regarding the identity of their models (§ 7513).

[145] Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, § 323, 104 Stat. 4808; 18 USC §§ 2252(a)(2), (4)(B) (1992) (criminalizing the possession of three or more books, magazines, periodicals, films, video tapes, or other matter transported in interstate commerce) [hereinafter, *the 1990 Act*].

[146] 394 U.S. 557, 565 (1969):

> Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

Id.

[147] Osborne v. Ohio, 495 U.S. 103, 111.

[148] Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, § 323, 104 Stat. 4808; 18 USC §§ 2252(a)(2), (4)(B) (1992) (criminalizing the possession of three or more books, magazines, periodicals, films, video tapes, or other matter transported in interstate commerce).

A. The Underlying Facts and Trial

In March 1991, Stephen Knox was completing a Ph.D. in History at Penn State.[149] Several years before, as an undergraduate at Temple University, Knox was convicted of receiving child pornography in interstate commerce.[150] Although he was sentenced only to probation, his name and address were placed on an FBI watch list.[151] Using the watch list, customs officials "intercepted a mailing to France which contained [an order for] two videos, 'Little Girl Bottoms (Underside)' and 'Little Blondes,' as well as a check drawn to his account."[152] Pursuant to a search warrant, both federal and state law enforcement officers searched Knox's apartment and seized three video tapes.

> The tapes contained numerous vignettes of teenage and preteen females, between the ages of ten and seventeen, striking provocative poses for the camera . . . . All of the children wore bikini bathing suits, leotards, underwear, or other abbreviated attire while they were being filmed . . . . The photographer would zoom in on the children's pubic and genital area and display a close-up for an extended period of time . . . . The films themselves and the [associated] promotional brochures . . . demonstrate that the video tapes clearly were designed to pander to pedophiles.[153]

Nevertheless, "no child in the films was nude, and . . . the genitalia and pubic areas of the young girls were always concealed by an abbreviated article of clothing."[154] Knox was charged with receiving and possessing materials depicting minors engaging in sexually explicit conduct.[155] The "'[s]exually explicit conduct' at issue was a 'lascivious exhibition of the genitals or pubic area.'"[156]

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[149] Brief for Petitioner at 4, United States v. Knox, 776 F. Supp. 174 (M.D. Pa. 1991) (No. 92-1183).
[150] *See 1990 Act*, *supra* note 145.
[151] *Supreme Court to Decide if Child Pornography Includes Clothed Minors*, UNITED PRESS INT'L (June 7, 1993), http://www.upi.com/Archives/1993/06/07/Supreme-Court-to-decide-if-child-pornography-includes-clothed-minors/9085739425600/.
[152] United States v. Knox, 977 F.2d 815, 817 (3d Cir. 1992) [hereinafter *Knox I*].
[153] *Id*.
[154] *Id*. at 817.
[155] *Id*. (citing 18 U.S.C. §§ 2252(a)(2), (4) (1988 & 1992)).
[156] *Id*. (citing 18 U.S.C. § 2256(2)(E) (1988 & 1992)).

Knox moved for dismissal. He argued, in part, that the child subjects were not engaging in sexually explicit conduct because the genitals cannot be lasciviously exhibited if they are covered.[157] The district court rejected Knox's assertion. Because § 2256(2)(E) requires an exhibition of the genitals *or* pubic area, the court held that the videos in question could be child pornography because the subjects' pubic areas were exposed.[158] At the ensuing bench trial, Knox was found guilty on both counts.[159] He was sentenced to two five-year terms to run concurrently.[160]

B. *United States v. Knox* (*Knox I*)

On appeal, the Third Circuit upheld Knox's conviction, although it rejected the district court's finding that the inner thigh comprises the pubic area.[161] Instead, the court held that the genitals may be lasciviously exhibited even when covered.[162] Knox reasserted his previous argument that the genitals must be exposed in order to constitute a lascivious exhibition. The court looked to the plain text of the law and concluded, "Knox attempts to read a nudity requirement into a statute which has none."[163]

The court also drew support from the legislative history, finding that "Congress failed to articulate anywhere in its extensive legislative history any desire that the statute, as enacted, prohibit only nude portrayals."[164] First, the court looked at Congress's rejection of the Roth Bill, which "would have proscribed 'nudity . . .'":[165]

> Since Congress considered including nudity as an element of a criminal depiction, the decision to eliminate this

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157 United States v. Knox, 776 F. Supp. 174, 179 (1991).
158 *Id*. at 180.
159 *Id.*
160 United States v. Knox (*Knox I*), 977 F.2d 815, 818 (3d Cir. 1992).
161 *Id.* at 819 ("The district court's novel definition of the pubic area is anatomically and legally incorrect. The most widely accepted human anatomy treatises make clear that the pubic area is entirely above the genitals and not below or alongside that portion of the anatomy.").
162 *Id.* at 817, 823.
163 *Id.* at 820.
164 *Id.* at 821. *See also id.* at 820 ("An examination of the relevant legislative history, however, strengthens not undermines our construction of the statutory language.").
165 *Id*. (citing S. 1011, *supra* note 65 (the Roth Bill)).

> requirement must be deemed intentional. When Congress passed the 1977 Act prohibiting a "lewd exhibition of the genitals or pubic area of any person," it must have desired to criminalize both clothed and unclothed visual images of a child's genitalia if they were lewd.[166]

The court then examined the Wald Letter's assumption that Congress only sought to ban nude portrayals. "By subsequently eliminating the word 'nudity,' Congress appears to have repudiated its earlier intention to confine the statute's coverage to nude exhibitions."[167] Also, since the purpose of the statute was to protect children from being sexualized at a vulnerable age and thus enduring a lifetime of trauma, "the rationale underlying the statute's proscription applies equally to any lascivious exhibition of the genitals or pubic area whether the areas are clad or completely exposed."[168] The court concluded its analysis by asserting that although nudity alone cannot constitute a lascivious exhibition, it does not follow that nudity is *required* for a lascivious exhibition.[169] Rather, because the Third Circuit had adopted the *Dost* factors, nudity was only one of six criteria a court may consider when evaluating an image.[170] The court also analyzed the definition of the word "exhibition," concluding that covered genitals may be "exhibited" for the purposes of Chapter 110.[171]

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[166] *Id*. (citing 18 U.S.C. § 2253(2)(E) (1978)). *See* Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225 § 2a, 92 Stat. 7.

[167] *Knox I*, 977 F.2d at 821. Note that the Wald Letter was written when only the Roth Bill was under consideration by the Subcommittee to Investigate Juvenile Delinquency. *See supra*, Part III.B.1 for a discussion of the Wald Letter and Roth Bill.

[168] *Id*. at 822.

[169] *Id*. at 822–23.

> No one seriously could think that a . . . family snapshot of a naked child in the bathtub violates the child pornography laws. Nudity must be coupled with other circumstances that make the visual depiction lascivious or sexually provocative in order to fall within the parameters of the statute.

Id.

[170] *Id*. (citing United States v. Villard, 855 F. 2d 117, 122 (3d Cir. 1989), and United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986)).

[171] *Id*. at 820.

> Exhibit means "to present to view: show, display . . . to show publicly: put on display in order to attract notice to what is interesting or instructive". . . . The genitals and pubic area of the young girls in [Knox's] tapes were certainly "on display" as the camera focused for prolonged time intervals on close-up views of these body parts.

After the Third Circuit ruled against him, Stephen Knox filed a writ of certiorari with the Supreme Court. The Court granted his petition on June 7, 1993.[172]

C. Salvos in the Culture War

Responding on behalf of the United States was William C. Bryson, solicitor general under President George H.W. Bush. Because Bill Clinton had only recently been elected president, Bryson was serving as acting solicitor general until President Clinton's nominee, Drew S. Days III, could be approved by the Senate.[173] Bryson's response (the Bryson Brief) asked the Supreme Court to uphold the Third Circuit's ruling.[174]

After his confirmation, Drew Days reviewed the *Knox* casefile. The new solicitor general did not agree with his predecessor or the Third Circuit, believing instead that the genitals could not be lasciviously exhibited if completely covered.[175] As he later recounted, "I went through it very carefully and I just decided that the Third Circuit got it wrong by using the wrong standard in upholding the conviction."[176]

Days then took the highly unusual step of "confessing error" and filing a substitute brief (the Days Brief).[177] The Days Brief acknowledged the Third Circuit was correct in rebuffing Knox's argument that the genitals

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> Additionally, the obvious purpose and inevitable effect of the videotape was to "attract notice" specifically to the genitalia and pubic area. Applying the plain meaning of the word "exhibition" leads to the conclusion that nudity is not a prerequisite for the occurrence of an exhibition.

Id. (internal citations omitted).

[172] Knox v. United States, 508 U.S. 959 (1993).

[173] MAZZONE, *supra* note 121, at 168, 207–08 (discussing the brief filed by Solicitor General William Bryson).

[174] *Id*. At 168, 207.

[175] Rodger D. Cintron, *A Life in the Law: An Interview with Drew Days*, 30 TUORO L. REV. 153, 172 (2014).

[176] *Id*.

[177] *Id*. (citing Brief for the United States, Knox v. United States, 508 U.S. 959 (1993) (No. 92-1183) 1993 WL 723366 [hereinafter *Days Brief*]). *See also* David M. Rosenzweig, *Confession of Error in the Supreme Court by the Solicitor General*, 82 Geo. L. J. 2079, 1 (1994) (stating that confessions of error are particularly rare).

must be fully exposed in order to constitute a lascivious exhibition. But while an "exhibition" may not require *full* exposure, it does require that the genitals be "discernable either through or beneath the clothing" since the word "exhibition" implies "at least some substantial degree of genital or pubic visibility."[178] Days reasoned that Congress intended this requirement due to the nudity assumption made by the Wald Letter.[179] Although Ms. Wald's assumption was based on language found in the rejected Roth Bill, the Days Brief contended that the term "lascivious [sic, lewd] exhibition of the genitals or pubic area" was "replacement" language for the Roth Bill's nudity requirement.[180] This must be the case, Days asserted, because "[t]he most natural meaning of that term [i.e., "exhibition"] is that one of those parts of the body—rather than the clothing covering them—must be 'on exhibit.'"[181]

The Days Brief's discernibility standard was something of a middle ground between the opposite poles represented by Stephen Knox and the Third Circuit. Although Days posited that a minor's genitals may still be lasciviously exhibited if covered by transparent or tight-fitting material, he nevertheless rejected the Third Circuit's analysis.[182] Images depicting a minor's genitals entirely covered by an opaque layer could be contraband only in the event the genitals were discernable.[183] In addition to discernibility, the Days Brief also asserted that "lasciviousness" is contingent upon the conduct in which the child subject is engaged, not the intent of the photographer.[184] Days argued that this interpretation of the statutory language was in accord with *New York v. Ferber*.[185] The Days Brief concluded that Knox's conviction should be affirmed under a proposed two-element test for a lascivious exhibition: (1) discernibility of the genitals, and (2) "lascivious posing or acting."[186] The solicitor general also asked the Court to vacate the conviction and remand the case for reconsideration in accordance with the proposed new test.[187]

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178 *Days Brief*, *supra* note 177, at 10–11; *see also* MAZZONE, *supra* note 121, at 210.
179 *Id.*
180 *Days Brief*, *supra* note 177, at 11; *see also* MAZZONE, *supra* note 121, at 210.
181 *Id*.
182 *Days Brief*, *supra* note 177, at 12.
183 *Id.* at 12, 23, n.7.
184 *Id*. at 12-13.
185 *Id.* at 13 (citing New York v. Ferber, 458 U.S. 747, 764 (1982) ("[T]he nature of the harm to be combatted requires that the . . . offense be limited to works that visually depict sexual conduct by children . . . .")).
186 *Id.* at 13, 17–21.
187 *Id.* at 13, 21–23.

The Days Brief was filed on September 17, 1993.[188] The immediate reaction was nothing short of seismic.[189] As Days himself recalled, "There were forty thousand calls to the Justice Department within a week. It shut down the telephone system to the Justice Department. We had to go to a back-up system."[190] Then "all hell broke loose" beginning on November 1st, when the Supreme Court granted the government's request for remand and ordered the Third Circuit to reevaluate Knox's conviction in light of the Solicitor General's new test.[191]

The Senate struck back first. A mere three days after the Supreme Court remanded *Knox*, the Senate made it known by a 100-0 vote that nudity was not required for a lascivious exhibition.[192] The Senate declaration, known as the "Confirmation of Intent of Congress in Enacting Sections 2252 and 2256 of Title 18, United States Code" (the Confirmation of Intent), made the following unequivocal pronouncement:

> [T]he scope of "exhibition of the genitals or pubic area" in section 2256(2)(E), in the definition of "sexually explicit conduct," is not limited to nude exhibitions or exhibitions in which the outlines of those areas were discernable through the clothing. . . . It is the sense of the Congress that in filing its brief in United States v. Knox [sic, Knox v. United States] . . . the Department of Justice did not accurately reflect the intent of Congress in arguing that "the videotapes constitute 'lascivious exhibition' of the genitals or pubic area" only if those body parts are visible in the tapes and the minors posed or acted lasciviously.[193]

The Confirmation of Intent was sponsored by Senator Charles Grassley (R-IA) and Senator William Roth, who had sponsored the Roth Bill in

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188 *Id.* at 1.

189 *See generally* MAZZONE, *supra* note 121, at 212–14 (discussing public and congressional reaction to the Days Brief).

190 CINTRON, *supra* note 175, at 173.

191 Drew S. Days III, *When the President Says No: A Few Thoughts on Executive Power and the Tradition of Solicitor General Independence*, 3 J. OF APP. PRAC. & PROC. 509, 515 (2001).

192 139 Cong. Rec. 27, 493–94 (1993). This was a non-binding resolution. MAZZONE, *supra* note 121, at 212.

193 139th Cong. Rec. 27, 449 (1993) (citing 18 U.S.C. § 2256(2)(E) (1988), and *Days Brief*, *supra* note 177).

1977.[194] Senator Grassley spoke simply and frankly about the role of nudity in a lascivious exhibition of the genitals: "We did not require that those children being used for pornographic purposes be nude . . . . Nudity is not required for the material to be child pornography."[195] Senator Roth followed, declaring the Days Brief "a travesty in that it completely misrepresents congressional intent in passing the Child Protection Act of 1984."[196] Senator Roth also praised *Knox I*:

> What was the pornography involved in this case? The key holding of the third circuit was that, under Federal law, "clothed exhibitions of the genitalia are proscribed" when "a photographer unnaturally focuses on a minor child's clothed genital area with the obvious intent to produce an image sexually arousing to pedophiles." That is exactly what the facts show happened in this case.[197]

Later that day, while Attorney General Janet Reno was giving testimony before the Senate Committee on Banking, Housing, and Urban Affairs regarding racial discrimination in home mortgage lending, Senator Roth changed the subject and grilled Ms. Reno regarding the Justice Department's "flip flop" on *Knox*. "I would point out," said Senator Roth, "that on the floor, both Democrats and Republicans, including the Democratic chairman of the Judiciary Committee, agreed that . . . this act was clearly intended to apply to the situation at hand, where the genitals were clothed."[198] Attorney General Reno replied that she supported the Solicitor General.[199] She also went so far as to give Senator Roth her phone number, suggesting he call to discuss any similar cases the Justice Department might drop in light of its flip flop.[200]

Sensing that his attorney general had been too glib, President Clinton

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[194] *Id*.

[195] *Id.* Senator Grassley also expressed dismay over the Days Brief's position that the child must be engaging in lascivious conduct: "So we prohibited materials that used the minor engaging in lascivious displays of their private parts. We did not require that the minor herself intend to act lasciviously. Of course not. No young child even knows what it means to act lasciviously." *Id*. (citing *Days Brief*, *supra* note 177).

[196] 139th Cong. Rec. 27, 450 (1993).

[197] *Id.* (quoting United States v. Knox (*Knox I*), 977 F.2d 815, 822 (1992)).

[198] Fair Lending Enforcement and the Data on the 1992 Home Mortgage Disclosure Act, Hearing Before the Comm. on Banking, Housing, and Urban Affairs, United States Senate, 103d Cong. at 32 (1993)).

[199] *Id*. at 32–33.

[200] *Id*. at 33 (giving her phone number as "514-2001").

jumped into the fray. On November 10th, he sent a testy letter to Ms. Reno, chiding her for letting the Justice Department drag him into a political battle he could never win.[201] The president explained in no uncertain terms that he "fully agree[d] with the Senate about what the proper scope of the child pornography law should be."[202] He also admonished his attorney general "to lead aggressively in the attack against the scourge of child pornography."[203] The White House made the letter public.[204]

A week later, Senators Roth and Grassley performed a figurative end-zone dance on the Senate floor. Said Senator Roth:

> [U]nder the 1984 Child Protection Act, the term "exhibition of the genitals" is not limited to nude exhibitions or exhibitions in which the outline of those areas are discernible through clothing, as the Department of Justice Brief argued . . . . *The Senate view of the meaning of the law is also the view of the Third Circuit Court of Appeals*, which affirmed the conviction in the *Knox* case, and the view which President Clinton's Acting Solicitor General [i.e., William Bryson] took in the brief he filed with the Supreme Court in March 1993. It apparently is also the view of President Clinton . . . .[205]

Interestingly, Senator Grassley voiced his agreement with Senator Roth by citing the rejection of the Roth Bill's nudity requirement:

> In fact, Congress, when it considered the forerunner to the Child Protection Act, in 1977, deleted language that would have required nudity in order to meet the definition of child pornography. *The issue was settled*. The 1984 Act does not require nudity. Yet in the *Knox* case, the Reno Justice Department took just that view. It reversed

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[201] Gerhard Peters & John T. Woolley, *Letter to Attorney General Janet Reno on Child Pornography*, AMER. PRESIDENCY PROJ. (Nov. 10, 1993), http://www.presidency.ucsb.edu/ws/?pid=46095.

[202] *Id*.

[203] *Id*.

[204] *See, e.g.*, Aaron Epstein, *Clinton Chastises on Child Porn*, PHIL. INQUIRER, Nov. 12, 1993. The controversy likely cost Drew Days the Supreme Court slot that later went to Justice Steven Breyer. Newsweek Staff, *Uneasy Days in Court*, NEWSWEEK, Oct. 9, 1994.

[205] 139th Cong. Rec. 29,569 (1993) (emphasis added).

> congressional intent and longstanding [Department of Justice] interpretation of the law.[206]

Both senators justifiably referenced the unanimous vote and President Clinton's letter in order to validate their argument regarding the law's intent.[207]

Five months later the House voiced its overwhelming concurrence, voting 425-3 in favor of its own version of the Confirmation of Intent.[208] Citing *Knox I*, the House made the following important findings:

> (12) Congress specifically repudiated a "nudity" requirement for child pornography statutes (see *United States v. Knox*, 977 F.2d 815, at 820–823 (3rd Cir. 1992));
>
> (13) the "harm Congress attempted to eradicate by enacting child pornography laws is present when a photographer unnaturally focuses on a minor's clothed genital area with the obvious intent to produce an image sexually arousing to pedophiles." (see *Knox* at 822). . . .[209]

Ultimately, the 525-3 combined vote became § 160003 of the Violent Crime Control and Law Enforcement Act of 1994 (the "1994 Crime Act"), which said in pertinent part,

> (a) DECLARATION—The Congress declares that in enacting sections 2252 and 2256 of title 18, United States Code, it was and is the intent of Congress that—
>
> (1) the scope of "exhibition of the genitals or pubic area" in section 2256(2)(E), in the definition of "sexually explicit conduct," is not limited to nude exhibitions or

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[206] *Id.* (citing S. 1011, *supra* note 65 (the Roth Bill). (emphasis added)). Clearly Senator Roth accepted the Wald Letter's critique of his bill, since he had no intention of limiting the law's reach solely to nude depictions. *Id.* For discussion of the Roth Bill's nudity requirement and its subsequent rejection, *see supra* Part III.B.

[207] 139th Cong. Rec. 29, 569–70 (1993).

[208] 140th Cong. Rec. 7942 (1994). Perhaps the vote would have been 426-3. Said Rep. Cardiss Collins (D-IL), "I rise, Mr. Chairman, because I was in the Cloakroom and did not realize the vote had been completed. Had I been recorded, I would have voted 'aye' [on the measure]." *Id.*

[209] 140th Cong. Rec. 7940 (1994) (citing United States v. Knox, 977 F.2d 815, 820–23) (all citations in the quotations are as published in the original).

> exhibitions in which the outlines of these areas were discernible through clothing . . . .[210]

It is important to note that in § 160003(a), Congress "declare[d]" its intent. Sections 160003(b) and (c), which, respectively, urged every state to pass child pornography legislation and asserted that the Days Brief did not reflect the intent of Congress, were assigned the heading, "Sense of the Congress."[211] The difference in terminology may have been a signal that Congress intended its "declaration" to amend Chapter 110. Said the Supreme Court, "a legislative body may by statute declare the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the law."[212] A retroactive declaration was preferable to rewriting the statute, as any revision would be a concession that "lascivious exhibition" did not mean what Congress insisted it had always meant.[213]

Ultimately, Congress would go much further than simply legislating its intent. Two-hundred and thirty-four congresspersons took the bold step of signing onto an amicus brief "urg[ing the Third Circuit] to reaffirm Knox's conviction on the theory adopted in [its] prior opinion."[214] In a final effort to get its point across, the Judiciary Committee haled before it Solicitor General Days, compelling him to admit not only that it was his decision to confess error and withdraw the Bryson Brief, but also that he personally drafted the Days Brief.[215]

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[210] Pub. L. No. 103-322, § 160003(a)(1), 108 Stat. 1796 (1994). Note that Subsection (a)(1) restates the Senate Confirmation of Intent. *See supra* note 193 and accompanying text. Subsection (a)(2) repudiated Solicitor General Days's stance that the word "lascivious" applies to the child's conduct rather than the intent of the photographer. *Id*. § 160003(a)(2).

[211] *Id.* § 160003(b)–(c).

[212] HENRY COHEN, CONG. RESEARCH SERV., CHILD PORNOGRAPHY: CONSTITUTIONAL PRINCIPLES AND FEDERAL STATUTES, 7, n.11 (1999) (quoting Stockdale v. The Ins. Cos., 20 Wall. (87 U.S.) 323, 331 (1874)). Congress "apparently amended the statute." *Id*.

[213] *See, e.g.*, Pub. L. No. 103-322, § 160003(a), 108 Stat. 1796 (1994). Note that shortly after the 100-0 vote, the Senate for this very reason rejected an amendment suggested by Attorney General Reno that would have made genital exposure irrelevant to any prosecution. MAZZONE, *supra* note 121, at 213–14.

[214] United States v. Knox (*Knox II*), 32 F.3d 733, 741 (1994); *see id*. at 744 ("Several amici parties, including the amici Members of Congress, support our prior statutory interpretation that no nudity is required.").

[215] Hearing Before the S. Comm. on the Judiciary, Examining the Operation and Activities of the Office of the Solicitor Gen. of the Dep't of Justice, 104th Cong. 13–14 (1995).

D. *United States v. Knox* on Remand (*Knox II*)

With Congress expressing its near-unanimous approval of the holding in *Knox I*, it was unsurprising that in *Knox II* the Third Circuit reaffirmed Stephen Knox's conviction. Once again, the court held that covered genitals may be lasciviously exhibited in accordance with 18 U.S.C. § 2256(2)(E).[216] In addition, the court rejected the "discernibility" test now advocated by the Justice Department.[217]

As in *Knox I*, the court in *Knox II* examined the text of the statute, noting that "[appellant] attempts to read a nudity requirement into a statute which has none." The court again looked to the ordinary meanings of the words "exhibit" and "lascivious," concluding that neither definition "contain[s] any requirement of nudity . . . ."[218] The court also pointed out that examining the words surrounding "lascivious exhibition of the genitals" reveals the obvious purpose of the statute was to "combat[] 'the use of children as subjects of pornographic material [because it is] harmful to [the] physiological, emotional, and mental health of the child.'"[219] Accordingly, the trauma that arises from sexualizing children is not

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[216] *Knox II*, 32 F.3d at 751.

> [W]e hold that the statutory term "lascivious exhibition of the genitals or pubic area," as used in 18 U.S.C. § 2256(2)(E), does not contain any requirement that the child subject's genitals or pubic area be fully or partially exposed or discernible through his or her opaque clothing. The statutory language is clear and contains no ambiguity.

Id.

[217] *Id.* at 744. The court also rejected the government's new argument that "lascivious" refers to the behavior of the child subject, as opposed to the intent of the photographer. *Id*. at 747.

[218] *Id.* 32 F.3d at 744, 745. "Exhibit" means "to display that which is interesting or instructive." *Id* at 744. If exhibitions of covered genitals were not interesting to pedophiles, there would be no market for the video tapes possessed by Stephen Knox. Said the court:

> Hence, as used in the child pornography statute, the ordinary meaning of the phrase "lascivious exhibition" means a depiction which displays or brings forth to view in order to attract notice to the genitals or pubic area of children, in order to excite lustfulness or sexual stimulation in the viewer.

Id. at 745.

[219] *Id.* at 746, 749–50 (quoting New York v. Ferber, 458 U.S. 747, 758 (1982)).

contingent upon whether the genitals are exposed or covered.[220]

The court referenced the nudity requirement within the text of the rejected Roth Bill, concluding that "the decision to eliminate this requirement must have been intentional."[221] Congress was aware it could have limited the 1977 Act to include only nude exhibitions, but instead chose not to. However, the court now found that the Wald Letter did not decisively reveal Congress's intent. Upon reconsideration of Assistant Attorney General Wald's concerns, Congress very well could have "repudiated its earlier intention to confine the statute's coverage to nude exhibitions."[222] Alternately, however, "it is arguably significant that the language suggesting that Congress clarify what types of nude portrayals would be prohibited was contained in the very letter recommending the substitution of the phrase 'lewd exhibition of the genitals.'"[223] In any event, since no nudity requirement appeared in the final legislation, the Third Circuit refused to read one into it.[224]

The court also ruled that its rejection of a nudity requirement was consistent with the Circuit's previous adoption of the *Dost* factors.[225] While the question of whether an image "visually exhibits the genitals or pubic area is a threshold determination not necessarily guided by the *Dost* factors," the fact that nudity is only one of several non-exhaustive considerations is consistent with the court's rejection of a nudity *requirement*.[226]

After the holding in *Knox II* was handed down, Stephen Knox once again petitioned the Supreme Court for review. This time, however, his petition was denied.[227]

VIII. Hurtling Toward the 21st Century: The Virtual Child Pornography Conundrum

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[220] *Id.* at 750 ("The rationale underlying the statute's proscription applies equally to *any lascivious exhibition* of the genitals or pubic area where these areas are clad or completely exposed.").
[221] *Id.* at 748 (citing S. 1011, *supra* note 65 (the Roth Bill)).
[222] *Id.* (citing *1977 S. Subcomm. Hearings*, *supra* note 59, at 77–78 (the Wald Letter)).
[223] *Id*.
[224] *Id.*
[225] *Id.* at 751 (citing United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986)).
[226] *Id.*
[227] Knox v. United States, 513 U.S. 1109 (1995).

A. The Child Pornography Prevention Act of 1996 (CPPA) and *Ashcroft*

Emboldened by *Knox II*, Congress now sought to stanch the emergence of a "computer-generated loophole" in Chapter 110. By passing the Child Pornography Prevention Act of 1996 (the "CPPA"), Congress sought to prohibit technology-savvy pornographers from producing child pornography by "alter[ing] perfectly innocent pictures or videos of children," or even "by computer without using . . . actual children." Although neither paradigm involves child sex abuse, it was feared that such "pseudo child pornography" could be used both to seduce children and to "stimulate the sexual appetites of child molesters and pedophiles."[228] The threat may not have been direct, but Congress considered it just as pernicious.

Under the CPPA, 18 U.S.C. § 2252 still criminalized producing and possessing depictions of children engaging in sexually explicit conduct.[229] However, the new § 2252A generally outlawed virtual "child pornography,"[230] a term of art that was now defined in four separate subheadings under 18 U.S.C. § 2256(8). The first, § 2256(8)(A), defined "child pornography" using language that had appeared elsewhere in the statute since 1978: "'child pornography' means any visual depiction . . . where (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct."[231] Although prohibiting child pornography that depicts an actual child was neither controversial nor novel, the new § 2256(8)(B) for the first time criminalized computer-generated (or "virtual") child pornography, as well as pornographic depictions of adults who appeared to be minors; the new § 2256(8)(C) criminalized "morphing" (i.e., modifying an existing image of an actual child to make it appear as if the child is engaging in sexually explicit conduct); and the new § 2256(8)(D) criminalized the "pandering" or promotion of material as child pornography.[232] The definition of "sexually

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[228] *The Child Pornography Prevention Act of 1995: Hearing on S. 1237 Before the Senate Comm. on the Judiciary*, 104th Cong. 1–2 (1996) (statement of Sen. Orrin Hatch, Member, S. Comm. on the Judiciary) [hereinafter *1996 S. CPPA Hearing*].

[229] 18 U.S.C. § 2252 (1996).

[230] Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, sub. 3, 110 Stat. 3009 [hereinafter *CPPA*].

[231] *See, e.g.*, 18 U.S.C. § 2252(a)(1)(A) (1978) (prohibiting (for interstate transfer) "the produc[tion] of such visual or print medium [that] involves the use of a minor engaging in sexually explicit conduct").

[232] *CPPA*, *supra* note 230, § 121, sub. 2 (amending 18 U.S.C. § 2256(8)).

explicit conduct" remained unchanged, as did the term "lascivious exhibition of the genitals or pubic area of any person."[233]

The CPPA went one step beyond *Ferber* by proscribing non-obscene materials that did not depict an actual child.[234] Because this was a bridge too far, the Supreme Court in *Ashcroft v. Free Speech Coalition* struck down § 2256(8)(B).[235] In accordance with *Miller*, a legislature may restrict obscene depictions; and in accordance with *Ferber*, a legislature may restrict depictions of actual children engaged in sexually explicit conduct regardless of whether the depiction is obscene.[236] However, any restriction falling outside of these categories impermissibly suppresses free speech.[237] It follows that § 2256(8)(B), which banned what "appears to be" child pornography, was unconstitutionally overbroad since it would suppress lawful, non-obscene material. The Court rejected the government's assertion that such images remain powerful weapons in a pedophile's quiver, since "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it."[238] Also, the purported harm was too indirect.[239] While convicting child pornographers might be made more difficult with the advent of virtual child pornography, "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . . ."[240]

Despite the Supreme Court's rejection of § 2256(8)(B), the legislative history of the CPPA offers no evidence that Congress sought to legislatively overrule or limit the holding in *Knox II*. This is unsurprising considering the lengths to which Congress had gone in order to get its point across only months earlier. By breaking from the past and criminalizing child pornography that involved no actual children, Congress sought to

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233 *Compare* 18 U.S.C. § 2256(2) (1988), *with* 18 U.S.C. § 2256(2) (1996).
234 *CPPA*, *supra* note 230, § 121, sub. 2.
235 Ashcroft v. Free Speech Coalition, 535 U.S. 234, 258 (2002).
236 *Id*. at 251–52 (citing California v. Miller, 413 U.S. 13 (1973), and Ferber v. New York, 458 U.S. 747 (1982)).
237 *Id*.
238 *Id*. at 252.
239 *Id*. at 253 (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).
240 *Id*. at 255 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)). *Ashcroft* also declared overbroad the § 2256(8)(D) prohibition on pandering, since "even if a film contains no sexually explicit scenes involving minors, it could be treated as child pornography if the title and trailers convey the impression that the scenes would be found in the movie." *Id*. at 257.

expand the reach of the existing law. Scaling back simply was not on the agenda. Expressly referencing "the *Knox* case" during a Senate Judiciary Committee hearing, Senator Grassley compared the "loophole" of computer-generated child pornography with "the back-door way of getting around the 1986 [sic] legislation if children were depicted while they were wearing underwear or a bathing suit."[241] There is no evidence that in closing off one loophole Congress intended to reopen another.

If anything, additional evidence in the CPPA legislative history shows that Congress had every intention of preserving the holding in *Knox II*. The final committee report accompanying S. 1237, the Senate version of the bill, expressly stated that the Third Circuit's ruling with regard to the term "lascivious exhibition of the genitals" was still applicable to the proposed new law:

> To ensure that the statute, and in particular the classification of a visual depiction which "appears to be" of a minor engaging in sexually explicit conduct as child pornography, is not unconstitutionally overbroad, S. 1237 does not change or expand the existing statutory definition (at 18 U.S.C. 2256(2)) of the term "sexually explicit conduct." This definition, including the use of the term "lascivious," has been judicially reviewed and upheld.[242]

Although the Supreme Court eventually voided the section of the CPPA criminalizing depictions that "appear to be" child pornography, Congress's intent remains clear when applied to those sections left untouched by *Ashcroft*. Put simply, "lascivious exhibition" was unchanged by the new law and meant what it had always meant.

Overall, neither *Knox* nor the term "lascivious exhibition of the genitals" was hotly debated, suggesting that Congress was satisfied it had made its intent sufficiently known with the 525-3 combined vote and subsequent passage of § 160003 of the 1994 Crime Act.

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[241] *1996 S. CPPA Hearing*, *supra* note 228, at 5 (Statement of Senator Chuck Grassley, Member, S. Comm. on the Judiciary) (citing Child Pornography Prevention Act of 1996, S. 1237, 104th Cong. (1995)). After discussing how Congress helped close the genital coverage loophole, Senator Grassley declared, "S. 1237 is simply a replay of this drama." *Id*. at 26.

[242] S. Rep. No. 104-358, at 20 (1996) (citing *United States v. Knox*, 32 F.3d 733 (3rd Cir. 1994); cert denied, 115 S. Ct. 897 (1995)).

B. The PROTECT Act of 2003 and the Bifurcation of "Sexually Explicit Conduct"

Following *Ashcroft*, the Judiciary Committee quickly went back to work and passed the PROTECT Act of 2003.[243] The PROTECT Act was an outgrowth of Senate Bill S. 151, which was sponsored by Senators Orrin Hatch (R-UT) and Patrick Leahy (D-VT).[244] Since the definitions for both child pornography using an actual minor and "morphed" child pornography survived *Ashcroft*, the PROTECT Act did nothing to change §§ 2256(8)(A) and (C).[245] However, after the Supreme Court declared § 2256(8)(B) overbroad,[246] Congress sought to craft a more robust definition for child pornography for which there was no proof an actual minor was used (that is, digital or computer generated child pornography). To this end, Congress made several important revisions to the law.

First, Congress recognized the distinction between obscenity and child pornography by enacting new 18 U.S.C. § 1466A, which criminalized obscene or graphic depictions of a child.[247] Despite the use of the disjunctive, the word "graphic" was intended to mean something along the lines of especially obscene or "hardcore." Senator Hatch described the term as follows:

> S. 151 also creates a new obscenity section . . . that applies to sexually explicit depictions of minors. It contains two prongs. The first criminalizes any obscene depiction of a minor engaged in a broad variety of sexually explicit conduct. The second [i.e., the "graphic" prong] is a focused and careful attempt to define a subcategory of "hardcore" child pornography that is per se obscene.[248]

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[243] Prosecutorial Remedies and Other Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 1117 Stat. 650 [hereinafter *PROTECT Act*].

[244] PROTECT Act, S. 151, 108th Cong. (2003).

[245] *Compare* 18 U.S.C. §§ 2256(8)(A), (C) (1996), *with* 18 U.S.C. §§ 2256(8)(A),(C) (2003). For more on "morphing," *see supra* text accompanying note 232.

[246] *See supra* notes 235–41 and accompanying text.

[247] 18 U.S.C. § 1466A (2003), "Obscene visual representations of the sexual abuse of children."

[248] S. Rep. No. 108-2, at 10–11 (2003) (remarks of Senator Orrin Hatch). Importantly, because the "[new § 1466A] relies to a large extent on obscenity doctrine, [it is] thus . . .

"Graphic," as enacted under the new § 1466A obscenity provision, was defined in terms of genital exposure: "the term 'graphic' . . . means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted."[249]

Second, Congress redrafted § 2256(8)(B) in order to criminalize "digital image[s]" in which the subject is "indistinguishable from . . . that of a minor engaging in sexually explicit conduct."[250] The word "indistinguishable" was defined in terms of whether "an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct."[251]

Because Congress was attempting once again to criminalize child pornography in which no children were harmed, it bifurcated the § 2256(2) definition of "sexually explicit conduct." The new § 2256(2)(A), which was simply the old § 2256(2) reorganized under a new subheading,[252] defined "sexually explicit conduct" for the entire statute *except* with respect to digital child pornography. The definition for "sexually explicit conduct" as it relates to digital child pornography was now found under the new § 2256(2)(B).[253]

The §§ 2256(2)(A) and (B) definitions for "sexually explicit conduct" were nearly identical save for one key difference: the word "graphic" was used as a modifier throughout § 2256(2)(B). For example, digital child pornography prosecuted under § 2256(8)(B) could not simply depict a lascivious exhibition; rather, in order to be prosecutable, an image would

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more rooted in the Constitution than other parts of the bill," including the old § 2256. *Id.* at 21–22 (remarks of Senators Joe Biden, Russ Feingold & Patrick Leahy).

[249] 18 U.S.C. § 1466A(f)(3) (2003).

[250] 18 U.S.C. § 2256(8)(B) (2003).

[251] 18 U.S.C. § 2256(11) (2003). To help ensure the new law was not overbroad, Congress expressly stated, "This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults." *Id.* Congress also tightened the § 2252A affirmative defense by eliminating the requirement that the accused show the material was not pandered (i.e., promoted or advertised) as child pornography.[251] *Compare* 18 U.S.C. § 2252A(C) (1996), *with* 18 U.S.C. § 22(C)(c) (2003).

[252] *Compare* 18 U.S.C. § 2256(2) (1996), *with* 18 U.S.C. § 2256(2)(A) (2003). Note that the bifurcation caused the term "lascivious exhibitions of the genitals or pubic area," when applied to an actual minor, to move from 18 U.S.C. § 2256(2)(E) to 18 U.S.C. § 2256(2)(A)(v).

[253] 18 U.S.C. § 2256(2)(B) (2003).

have to depict a "graphic . . . lascivious exhibition . . . ."[254] As with the virtually identical § 1466A definition for "graphic," the § 2256(10) definition required exposed genitals.[255]

Genital exposure was now required for any child pornography prosecution in which the government could not show an actual minor was used.[256] Conversely, genital exposure was *not* required for any child pornography prosecution in which the government *could* show an actual minor was used. Although the inclusion of obscenity verbiage in § 2256(8)(B) muddles what is supposed to be a child pornography law, the alteration was necessary in the wake of *Ashcroft*: if an actual minor is not used, then the image must be obscene in order to be illegal.[257] Because a digital image may be entirely computer generated, the obscenity (graphic) requirement was added in order to ensure the revised law was constitutional.[258]

Since the PROTECT Act's definition of sexually explicit conduct for depictions involving an actual child had remained static since 1984,[259] there is no reason why *Knox II* should not apply to prosecutions under § 2256(8)(A). Nowhere in the PROTECT Act's legislative history was the holding in *Knox II* renounced or even questioned, and there is nothing to suggest that child pornography involving an actual minor now requires genital exposure.[260]

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[254] *Id.* § 2256(2)(B)(iii) (2003). Both the *United States v. Blouin* majority and dissent refer to the 18 U.S.C. § 2256(2)(B)(iii) "'graphic' requirement." *See* United States v. Blouin, 74 M.J. 247, 251 (2015); *Blouin*, 74 M.J. at 253–56 (Baker, C.J. dissenting). However, since § 2256(2)(B)(iii) requires proof of a "graphic *or* simulated lascivious exhibition," an image need not be "graphic" if it depicts a "simulated" exhibition. *Id.* (emphasis added). Instead, a simulated depiction must only be lascivious in order to be prosecutable. *Id.* The inclusion of the word "simulated" within § 2256(2)(B)(iii) is somewhat confusing, since any computer generated depiction is *per se* simulated. Unless otherwise stated, hereinafter in this article it will be assumed that no lascivious exhibition falling under § 2256(2)(B)(iii) is simulated.

[255] *Compare* 18 U.S.C. § 2256(10) (2003), *with* 18 U.S.C. § 1466A(f)(3) (2003).

[256] *Id.*

[257] *See supra* note 234-240 and accompanying text.

[258] S. Rep. No. 108-2, at 6–7 (2003); 149 Cong. Rec. 4230 (2003) (containing the remarks of Senator Patrick Leahy).

[259] *Compare* 18 U.S.C. § 2256(2)(A) (2003), *with* 18 U.S.C. § 2255(2) (1984).

[260] The legislative history reveals that the *Knox* line of cases was referenced only once, not surprisingly by Senator Charles Grassley, when he said the following:

> Additionally, commercial pornography distributors began selling videotapes of scantily-clad young people. These pornography

If anything, the introduction of a "graphic" requirement for virtual child pornography suggests the opposite is true. In *Ashcroft*, the Supreme Court reasserted that a legislature could permissibly restrict material that was either obscene or depicted harm to an actual child (regardless of whether the depiction was obscene).[261] Because *Ashcroft* voided the CPPA's restriction on non-obscene virtual child pornography, Congress responded by inserting the graphic requirement.[262] Virtual child pornography now would have to be graphic—obscene—in order to comply with *Ashcroft*.[263] A virtual depiction now required genital exposure where, as before, actual child pornography did not.

Several members of the Judiciary Committee contemplated adding an obscenity requirement for all child pornography: "[W]e could be avoiding these problems were we to take the simple approach of outlawing 'obscene' child pornography of all types . . . . That approach would produce a law beyond any possible challenge even without any affirmative defense."[264] However, despite the fact that a comprehensive obscenity requirement would have ensured the entire law's constitutionality, Congress ultimately did not require graphic exposure for images involving an actual child under § 2256(2)(A). Accordingly, non-graphic exhibitions still fell within the law's reach. Since a graphic depiction necessarily exhibits the exposed genitals, there is no reason why the established interpretation of "lascivious exhibition" should not still apply to non-obscene child pornography. This is especially true in light of the fact that

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> merchants found what they had believed was a loophole in the Federal child pornography laws, and for a time, the Clinton administration agreed, but many of my colleagues will remember the *Knox* case. Fortunately, Congress did intervene and closed that loophole. Computer imaging technology gave child pornographers yet another way to sidestep Federal law by creating synthetic child pornography, which is virtually indistinguishable from traditional child pornography.

Stopping Child Pornography: Protecting our Children and the Constitution, Hearing Before the S. Comm. on the Judiciary, 107th Cong. 24 (2002) (statement of Sen. Charles Grassley, Member, S. Comm. on the Judiciary).

[261] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 248–52 (2002).

[262] *See* S. Rep. No. 108-2, at 26 (2003) (remarks of Senators Joe Biden, Russ Feingold, & Patrick Leahy, recommending that a graphic requirement be included for prosecutions of "'virtual child porn[ography'] . . . to better focus it on hard core conduct . . .").

[263] *See* 149 Cong. Rec. 4229 (2003), remarks of Senator Patrick Leahy ("These provisions [i.e., 'the definition of virtual child pornography'] rely to a large extent on obscenity doctrine . . . .").

[264] S. Rep. No. 108-2, at 23 (2003) (suggesting a universal obscenity requirement).

Congress did nothing to renounce its embrace of *Knox I* and *Knox II* less than ten years earlier.

IX: The CAAF's Opinion in *United States v. Blouin*

In its 3-2 decision reversing SPC Blouin's conviction, the CAAF stated unequivocally, "[w]e decline to accept [ACCA's] invitation to adopt the *Knox II* standard as controlling precedent in this jurisdiction."[265] By rejecting *Knox II* without adequate clarification, the CAAF may be suggesting that, like a digital image of a person indistinguishable from an actual child, genital exposure is now required when an actual child is depicted. If this is what the CAAF intended, that court has turned the law on its head. There is no reason why *Knox II* does not still apply to a non-graphic, non-obscene lascivious exhibition involving an actual child.[266]

A. The *Blouin* Majority Fails to Address the Extensive Legislative History

One key reason the majority declined to accept the ACCA's "invitation" is that *Knox II* predates the bifurcation of sexually explicit conduct into graphic and non-graphic prongs.[267] However, the fact that Congress chose to bifurcate the definition is, in itself, proof that *Knox II* still applies to non-graphic exhibitions. Otherwise, genital exposure would be required for both graphic and non-graphic exhibitions, a result that is both absurd and contrary to the definition of "graphic" found in § 2256(10). Congress certainly could have required genital exposure for images of an actual child, yet it limited this more stringent requirement to images in which the subject is "indistinguishable" from an actual child.

During the PROTECT Act hearings, some members of the Judiciary Committee suggested adding an obscenity requirement to the entire law.[268] Ultimately, Congress added the equivalent graphic requirement only to digital images—images for which there was a possibility no actual minors were used. The text pertaining to actual minors remained unchanged.[269]

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[265] United States v. Blouin, 74 M.J. 247, 250 (C.A.A.F. 2015).
[266] 18 U.S.C. § 2256(2)(A)(v) (2008).
[267] *Blouin*, 74 M.J. at 251 (citing *PROTECT Act*, *supra* note 245, § 502(c)).
[268] *See supra* note 264 and accompanying text.
[269] *Compare* 18 U.S.C. § 2256(2)(A) (2003), *with* 18 U.S.C. § 2255(2) (1996).

In his dissent, Chief Judge Baker correctly pointed out that the PROTECT Act simply "reorganized" language in existence at the time *Knox II* was decided.[270] Conversely, the majority failed to cite the PROTECT Act's legislative history in support of its assertion that *Knox II* is now irrelevant. Congress never said as much, which is unsurprising since the entire purpose of the PROTECT Act was to close an emerging loophole, not reopen an old loophole that had been closed after a very public fight.[271] For that matter, the majority never addressed the contentious legislative history immediately following *Knox I*, including the Senate's unanimous Confirmation of Intent; the House's subsequent 425-3 concurrence; or § 160003(a)(1) of the 1994 Crime Act, wherein Congress went so far as to promulgate what constitutes a lascivious exhibition of the genitals.[272]

Moreover, the majority failed to address the very origins of the terminology it endeavored to interpret. As discussed above, the Judiciary Committee in 1977 rejected the nudity requirement found in the Roth Bill, the first proposal for federal child pornography legislation. Based on the recommendation made by Assistant Attorney General Wald, lewdness, not nudity, became the standard for a criminal depiction of a child's genitals.[273] Both the House and Senate Judiciary Committees revisited this issue in 1984, when they considered defining "simulated sexually explicit conduct" in terms of genital exposure.[274] The proposal died in committee after two justice department attorneys testified that the suggested verbiage was too limiting and would create unintentional loopholes.[275]

Congress's intent with respect to genital exposure remained the same despite the 1984 change from "lewd" to "lascivious." As explained, *supra*, the purpose of the change was to signal a move away from the narrower

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[270] *Id.* at 255 (Baker, C.J. dissenting). Assuming for a moment that moving the text of a law to a different subheading nullifies all previous associated legislative history, consider that § 160003(a) of the 1994 Crime Act addresses "the intent of Congress" as it pertains to "sections 2252 and 2256." Since the term "lascivious exhibition of the genitals or pubic area" still appears in "section[] 2256" of the United States Code, § 160003(a) of the 1994 Crime Act would continue to apply. The text in question simply moved from 18 U.S.C. § 2256(2) (1996) to 18 U.S.C. § 2256(2)(A)(v) (2003). *See supra* note 252 and accompanying text.

[271] *See supra* note 228–30.

[272] *See supra* Part VII.C.

[273] *See supra* text accompanying note 82.

[274] *See supra* Part V.B.

[275] *Id.*

obscenity standard.[276] Years later, Congress reintroduced the obscenity standard only with regard to child pornography in which the subject is indistinguishable from an actual minor, when it expressly linked genital exposure to graphic depictions.[277] The pre-*Knox* non-graphic verbiage still applied to actual children.[278]

Of all things, the majority references the discredited Days Brief when detailing the history of *Knox II*.[279] As discussed, the Days Brief represented the short-lived intent of the executive branch, not the legislators who passed Chapter 110 and later went to great lengths to challenge the solicitor general's revised argument.[280] The Days Brief also became an orphan within the Justice Department, as Attorney General Reno herself disowned it after succumbing to pressure from the White House.[281] Moreover, the *Blouin* majority failed to note that 234 members of Congress submitted an amicus brief arguing that the Days Brief misinterpreted the law,[282] and that the solicitor general himself later was interrogated by the Senate Judiciary Committee regarding his confession of error.[283]

B. The *Blouin* Majority Overlooks and Misinterprets Relevant Judicial Precedent

The majority in *Blouin* explained that "neither [the ACCA] nor the government have cited any case which has adopted the rationale of *Knox II* as applied to 18 U.S.C. § 2256(8)(A)-(C) after its 2003 amendment."[284] However, simply because "neither [the ACCA] nor the government" may have cited any post-bifurcation cases, it does not necessarily follow that no such cases exist. Notwithstanding the majority's misleading assertion,

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[276] *See supra* Part V.C.
[277] *See supra* Part VIII.B.
[278] *See supra* note 245 and accompanying text.
[279] United States v. Blouin, 74 M.J. 247, 251 (C.A.A.F. 2015) (citing *Days Brief*, *supra* note 177).
[280] *See supra* Part VII.C.
[281] Linda Greenhouse, *U.S. Changes Stance in Case on Obscenity*, N.Y. TIMES, Nov. 11, 1994, at A15, *available at* http://www.nytimes.com/1994/11/11/us/us-changes-stance-in-case-on-obscenity.html.
[282] *See supra* note 214 and accompanying text.
[283] *See supra* note 215 and accompanying text.
[284] *Blouin*, 74 M.J. at 251. Technically, "the rationale of *Knox II*" could never apply to § 2256(8)(B) due to the "graphic" requirement. *See supra* notes 254–58 and accompanying text.

many such cases do in fact exist.[285]

The majority cited a footnote in an Eleventh Circuit case, *United States v. Williams*, for the proposition that "the requirement that lascivious exhibitions be 'graphic' under the PROTECT Act's amended *obscenity* definition likely eliminates a *Knox* result under the *obscenity* statute."[286] However, this footnote is completely irrelevant to prosecutions under § 2256(8)(A): the graphic (or nudity) requirement applies *only* to the obscenity definition and can never apply to non-obscene child pornography.[287] As explained above, Congress intended the word "graphic" to describe "hardcore" obscene depictions.[288] The graphic requirement applies only to child pornography as defined under § 2256(8)(B), not § 2256(8)(A), because child pornography in which there is no proof an actual child was harmed must be obscene in order to be prosecutable. No obscenity or graphic requirement is needed if real

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[285] *See Blouin*, 74 M.J. at 256–57 (Baker, C.J. dissenting) ("Moreover, contrary to the lead opinion's assertion, several federal circuits have cited *Knox II* favorably since the 2003 amendments, some for the proposition that child pornography includes 'lascivious' images of minors with clothed genitals or pubic area." *See* United States v. Franz, 772 F.3d 134, 157 (3d Cir.2014) (citing *Knox II* favorably); United States v. Wallenfang, 568 F.3d 649, 659 (8th Cir.2009) (citing *Knox II* to support its holding that images of children whose genitals were covered by pantyhose still constituted child pornography under the CPPA even though the genitals were technically clothed); United States v. Helton, 302 Fed. Appx. 842, 846–47 (10th Cir. 2008) (unpublished) (stating that the CPPA "does not specify the genitals or pubic area must be fully or partially uncovered in order to constitute an exhibition and, like our sister circuits, we decline to read such a requirement into the statute," in finding that a video of a minor wearing underpants was child pornography (citation omitted)."). *See also* United States v. Kearn, 2015 WL 3904061, at *1 (D. Kan. June 25, 2015) (citing *Knox II* favorably); United States v. Morris, 2014 WL 4292024, at *2 (N-M. Ct. Crim. App. May 21, 2013) (citing favorably to *Knox II* for the proposition that there is no requirement that the genitals be exposed or discernible); United States v. Romero, 558 Fed. Appx. 501, 504–05 (5th Cir. 2014) (Mem. Op.) ("Lascivious exhibition does not require nudity. Nor does it require that the contours of the genitals or pubic area be discernible or otherwise visible through the child subject's clothing.") (internal citations omitted); United States v. Lohse, 993 F.Supp.2d 947, 955 (N.D. Iowa 2014) (citing *Knox II* for the proposition that nudity is not required for a lascivious exhibition); United States v. Andersen, 2010 WL 3938363, *8, n.10 (A. Ct. Crim. App. Sept. 10, 2010) (Mem. Op.) (citing *Knox II* for the proposition that nudity is not required for a lascivious exhibition); United States v. Hill, 322 F. Supp.2d. 1081, 1086, n.7 (C.D. Cal. 2004) (citing favorably to *Knox II*).

[286] *Blouin*, 74 M.J. at 251 (quoting United States v. Williams, 444 F.3d 1286, 1299 n.63 (11th Cir. 2006)) (emphasis added). *See also supra* notes 248–55 and accompanying text for an explanation of the "graphic requirement."

[287] Chief Judge Baker said in his dissent, "[T]he majority's reliance on a footnote in United States v. Williams . . . to suggest that *Knox II* is no longer good law is, respectfully, too thin a reed on which to hang a rejection of the application of *Knox II*." *Id*. at 256, n.4 (Baker, C.J. dissenting) (internal citations omitted).

[288] *See supra* note 248 and accompanying text.

children are involved. This was the intent of *Ashcroft* and the ensuing bifurcation of "sexually explicit conduct" into graphic and non-graphic prongs.

Similarly, *Knox II* does not apply to the PROTECT Act's graphic provisions—that is, the PROTECT Act's "obscenity definition"—because the definition of "graphic" expressly requires genital exposure.[289] Rather, *Knox II* applies to non-graphic, non-obscene depictions prosecuted under § 2256(8)(A). Nowhere in the cited footnote does the *Williams* court explain why *Knox II* should not continue to apply to the PROTECT Act's non-graphic, non-obscene prong, which has remained static since before *Knox II* was decided.

Note that the 1984 change from "lewd" to "lascivious" was made in order to signal a move *away* from obscenity.[290] Moreover, as Chief Judge Baker wrote in his dissent,

> [I]n deciding "[w]hat exactly constitutes a forbidden 'lascivious exhibition of the genitals or pubic area,'" the *Williams* court expressly stated that "the pictures needn't always be 'dirty' or even nude depictions to qualify." Arguably, then, the *Williams* court accepted *Knox II*'s continuing application to the phrase "lascivious exhibition of the genitals or pubic area," appearing in subsection 8(A), while still relating in a footnote that *Knox II* "likely" did not apply to subsection 8(B), which contains a "graphic" requirement.[291]

Although the *Williams* court correctly analyzed the PROTECT Act's graphic and non-graphic provisions, the *Blouin* majority's interpretation of *Williams* is in error.

The *Blouin* majority also asserts that "despite the [A]CCA's assertion to the contrary, at least two federal circuits have undermined *Knox II*, including the Third Circuit itself."[292] To this end, the majority cites two decisions, *United States v. Vosburgh* and *United States v. Gourde*, but provides virtually no insight as to how either "undermined" *Knox II*'s

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[289] 18 U.S.C. § 2256(8)(B), § 2256(10) (2008).
[290] *See supra* Part V.C.
[291] *Blouin*, 74 M.J. at 256, n.4 (Baker, C.J. dissenting) (internal citations omitted).
[292] *Id.* at 251.

application to non-graphic child pornography.[293] The appellant in *Vosburgh*, the Third Circuit case, argued on appeal that the trial court judge abused his discretion by allowing the government to introduce images of child erotica in his possession in order to prove he intended to download child pornography.[294] The *Blouin* majority implies the Third Circuit disavowed *Knox II* when it confirmed that child erotica is legal to possess.[295] The problem, however, is that the *Blouin* majority conflates legal child erotica with illegal, non-graphic child pornography. Just because *Vosburgh* acknowledges in dicta that child erotica is legal to possess, it does not automatically follow that non-graphic child pornography is also legal to possess. Despite the *Blouin* majority's misapplication of *Vosburgh*, the *Vosburgh* court (citing to *Gourde*) properly makes the distinction between child erotica and non-graphic child pornography:

> The government distinguishes child pornography from child erotica by defining the latter as material that depicts "young girls as sexual objects or in a sexually suggestive way," but is not "sufficiently lascivious to meet the legal definition of sexually explicit conduct" under 18 U.S.C. § 2256. *See also United States v. Gourde*, 440 F.3d 1065, 1068 (9th Cir.2006) (*en banc*) (citing FBI affidavit describing child erotica as "images that are not themselves child pornography but still fuel . . . sexual fantasies involving children").[296]

Like child pornography, child erotica sexualizes children, though without a lascivious exhibition of the genitals.[297] Since a lascivious exhibition is the cutoff for what is legal to possess,[298] it follows that child erotica and child pornography are two entirely different concepts. By confusing the two, the *Blouin* majority appears to assert that non-graphic child pornography is no different than legal child erotica, a position that is

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[293] *Id.* (citing United States v. Vosburgh, 602 F.3d 512, 538 (3d Cir. 2010), and United States v. Gourde, 440 F.3d 1065, 1070 (9th Cir. 2006)).
[294] *Vosburgh*, 602 F.3d at 538.
[295] *Blouin*, 74 M.J. at 293.
[296] *Vosburgh*, 602 F.3d at 520, n.7 (citing *Gourde*, 440 F.3d at 1068).
[297] *See generally* BORGNINO, *supra* note 58, at 501, 532–34. Major Borgnino goes far beyond the scope of this article by advocating for the revision of existing child pornography laws to include child erotica (or "offensive images"). *Id*. at 501–02. Such an expansion of the law would criminalize images that do not depict even covered genitals. *Id*. at 534–35.
[298] *See infra* notes 303–04 and accompanying text.

entirely consistent with its ill-advised rejection of *Knox II*. However, by essentially reading § 2256(2)(A) out of the statute, the *Blouin* majority renders the United States military the only federal jurisdiction giving a special dispensation to non-graphic child pornography. If Congress had intended for non-graphic child pornography to be legal, then it would not have retained the long-established definition now found under § 2256(2)(A). It also would have expressly repudiated its fervent, almost unanimous agreement with the Third Circuit that exposure is not required for a lascivious exhibition of the genitals.

To support its position, the majority quotes another CAAF case, *United States v. Warner*:

> "[Although] Title 18 of the United States Code addresses at length and in considerable detail the myriad of potential crimes related to child pornography, these sections provide no notice that possession of images of minors that depict no nudity, let alone sexually explicit conduct, could be subject to criminal liability."[299]

Although the holding in *Warner* is beyond the scope of this paper, the passage quoted by the *Blouin* majority is flawed. Contrary to the quoted language, material that does not depict nudity may be sufficiently lascivious to fall within the ambit of § 2256(8)(A)—e.g., Stephen Knox's video collection. Since 1978, the question of whether an exhibition is illegal hinges on lewdness or lasciviousness, not nudity. Adding to the confusion, in a different passage, the *Warner* court *correctly* stated that non-nude child pornography is a different species than child erotica.[300] Moreover—and perhaps most important—§ 160003(a)(1) of the 1994 Crime Act provides the "meaningful notice" both the *Warner* and *Blouin* majorities demand.[301] Congress's intent is also demonstrated by the 525-3 combined vote following *Knox I*, as well as the myriad favorable references to *Knox I* and *Knox II* throughout the congressional record.

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[299] *Blouin*, 74 M.J. at 251 (quoting United States v. Warner, 73 M.J. 1, 3 (C.A.A.F. 2013)). For an analysis of CAAF's decision in *Warner*, see BORGNINO, *supra* note 58, at 512–13.

[300] *See supra* text accompanying note 47.

[301] *United States v. Vaughan* lists the sources of fair notice: "federal law, state law, military case law, military custom and usage, and military regulations." United States v. Vaughan, 58 M.J. 29, 31 (C.A.A.F. 2003). *See supra* notes 211–13 and accompanying text for an explanation as to why § 160003(a) of the 1994 Crime Act may be binding. Whether servicemembers are on notice that child erotica is illegal is beyond the scope of this paper. *See* BORGNINO, *supra* note 58, at 512–13.

C. *Blouin* Conflicts with CAAF Precedent in *United States v. Roderick*

In order to determine whether an exhibition of the genitals is, in fact, lascivious, the CAAF in *United States v. Roderick* adopted an approach that combines an analysis of the six *Dost* factors with an overall consideration of the totality of the circumstances.[302] *Roderick* treats the *Dost* factors as non-exhaustive because "there may be other factors that are equally if not more important in determining whether a photograph contains a lascivious exhibition."[303] Nevertheless, as a "prerequisite to any analysis under *Dost*, the images in question *must* depict the child's genitals or pubic area."[304] *Roderick* therefore compels an affirmation of the first *Dost* factor, "whether the focal point of the visual depiction is on the child's genitalia or pubic area."[305] This makes sense, although technically § 2256(2)(A)(v) requires the "lascivious exhibition of the genitals or pubic area *of any person*."[306] However, notwithstanding this one requirement, factfinders are free to weigh each *Dost* factor based on its relative importance to the depiction in question.

Now that *Blouin* seemingly has mandated nudity, the fourth *Dost* factor, "whether the child is fully or partially clothed, or nude," no longer makes sense. Either the CAAF intended *Blouin* to reduce the amount of latitude factfinders have when analyzing the totality of circumstances, or *Blouin* unintentionally conflicts with well-settled and almost universally-accepted precedent.[307] Either way, *Blouin* and *Roderick* cannot logically coexist since *Blouin* strips away the discretion a factfinder has in deciding the extent to which nudity is relevant.

X. Conclusion

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[302] United States v. Roderick, 62 M.J. 425, 430 (C.A.A.F. 2006) (citing United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986)). *Roderick* cites to *Knox II* for support. *Id.* *See supra* note 27 for the *Dost* factors.

[303] *Roderick*, 62 M.J. at 430.

[304] *Id.* at 430 (emphasis added).

[305] *Dost*, 636 F. Supp. at 832.

[306] 18 U.S.C. § 2256(2)(A)(v) (2008) (emphasis added).

[307] *Roderick*, 62 M.J. at 430 (noting that "[a]ll of the federal courts to address this question have relied, at least in part, on a set of six factors developed . . . in *United States v. Dost*)" (internal citations omitted).).

The CAAF in *Blouin* was wrong to spurn the ACCA's invitation to adopt *Knox II*. Congress has consistently rejected a genital exposure requirement for non-graphic, non-obscene child pornography—first in 1984, and then very publicly following the Supreme Court's remand of *Knox*. The Senate voted 100-0 that genital exposure was not required; the House agreed by a 425-3 margin. So there would never again be any question, Congress declared its intent in an actual piece of legislation, § 160003(a)(1) of the 1994 Crime Bill. At no time since has Congress repudiated or undermined its stated intent. Congress also rejected a nudity requirement in 1977, when the *Miller* obscenity standard still applied.

Moreover, the unique graphic requirement for child pornography prosecuted under § 2256(8)(B) demonstrates an obvious awareness that the same standard is not applicable to child pornography prosecuted under § 2256(8)(A). If it was applicable, then Congress would not have gone through the effort of bifurcating the definition of "sexually explicit conduct."

Having been decided only recently, *Blouin* likely will not be overruled in the near future. This is problematic since the relevant portions of the recently-promulgated Article 134-68b are lifted verbatim from Chapter 110.[308] To ensure that the term "lascivious exhibition of the genitals or pubic area," as it is found in Article 134-68b, comports with Chapter 110, the UCMJ Code Committee[309] could simply state within the explanation accompanying *MCM*, pt. IV, ¶ 68b, that genital exposure is not required for a depiction of an actual minor. Conceivably, the committee may cite directly to *Knox II* or quote § 160003(a)(1) of the 1994 Crime Act, *mutatis mutandis*.

If the Code Committee takes this route, it should also endeavor to define the word "obscene" since it is used in the definition of child pornography.[310] As discussed during the PROTECT Act hearings, a "graphic" depiction is "per se obscene."[311] Although Article 134-68b does not bifurcate the definition of "sexually explicit conduct," like § 2256(8)(B), Article 134-68b adds an obscenity requirement when the

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[308] *See* MCM, *supra* note 13.
[309] *See* UCMJ art. 146 (2012).
[310] MCM, *supra* note 13, pt. IV, ¶ 68b(c)(1).
[311] *See supra* text accompanying note 248.

government does not or cannot prove an image depicts an actual child.[312] Accordingly, an "obscene" image should be defined as one that includes a lascivious exhibition of the exposed genitals.

Leaving the matter to the CAAF is an unwise gamble if the intent of Article 134-68b is to track closely with its civilian equivalent. Since the CAAF will not apply *Knox II* to § 2256(8)(A), it may very well insist upon genital exposure for a charge brought under Article 134-68b when an actual child is depicted. The Code Committee must make its intent known; otherwise, images that should be prosecutable under Article 134-68b will remain unpunished.

[312] MCM, *supra* note 13, pt. IV, ¶ 68b(c)(1). "Child pornography" can either be "obscene" or it can depict "sexually explicit conduct." *Id.* Although the word "obscene" is not defined, the term "sexually explicit conduct" is. *Id*. pt. IV, ¶ 68b.(c)(7).