

MILITARY LAW REVIEW

Volume 223

Issue 3

OUT OF FOCUS: EXPANDING THE DEFINITION OF CHILD PORNOGRAPHY IN THE MILITARY

MAJOR KENNETH W. BORGNINO*

The sexual abuse and exploitation of children rob the victims of their childhood, irrevocably interfering with their emotional and psychological development. Ensuring that all children come of age without being disturbed by sexual trauma or exploitation is more than a criminal justice issue, it is a societal issue.¹

* Judge Advocate, United States Army. Presently assigned as the Special Victim Prosecutor for Fort Bliss, Texas, Fort Huachuca, Arizona, and White Sands Missile Range, New Mexico. J.D., 2005, Gonzaga University School of Law; B.A., Honors, 2002, Gonzaga University, L.L.M., 2015, The Judge Advocate General's School, United States Army, Charlottesville, Virginia. Previous assignments include Operational Law Attorney, III Corps, Fort Hood, Texas, 2006; Rule of Law Attorney, Multi-National Corps-Iraq, Camp Victory, Iraq, 2006-2008; Trial Counsel, III Corps and 1st Cavalry Division, Fort Hood Texas, 2008-2009; Chief, Military Justice, Multi-National Division-Baghdad, Camp Liberty, Iraq, 2009-2010; Administrative Law Attorney, 1st Cavalry Division, Fort Hood, Texas, 2010; Appellate Attorney, Government Appellate Division, United States Army Legal Services Agency, Fort Belvoir, Virginia, 2010-2013; Chief, Branch IV, Government Appellate Division, United States Army Legal Services Agency, Fort Belvoir, Virginia, 2013-2014; Student, 63d Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia, 2014-2015. Member of the bars of Washington, Army Court of Criminal Appeals, Court of Appeals for the Armed Forces, and the Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the 63d Judge Advocate Officer Graduate Course.

*There can be no keener revelation of a society's soul than the way in which it treats its children.*²

I. Introduction

You are the Special Victim Prosecutor (SVP) stationed at Fort Wherever. You receive a call from the Special Agent in Charge (SAC) at the local Criminal Investigation Command (CID)³ office asking you to review images of suspected child pornography seized from a servicemember's laptop.

Dreading your task, you arrive at the CID office and are escorted to the computer forensic examination room where you are presented with a computer containing all of the seized images. You see there are hundreds of images seized from the servicemember's computer, all of which depict actual girls clearly under the age of eighteen. The images depict young girls in blatantly sexual poses, often lying atop a bed, straddling a chair or pushing up against the floor or wall. Many are topless, wearing a G-string, or are completely naked. A number of the images have also been edited to include offensive captions inviting the viewer to engage in sexual activity with the depicted child. However, none of the images show the genitalia or pubic area of any of the minor girls.⁴

After you have reviewed all of the images, the SAC requests that you authorize her to "title"⁵ the servicemember with possession of child pornography. However, you must inform the SAC that none of the images technically meet the definition of child pornography, and are in fact what are generally referred to as

¹ U.S. DEP'T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 1 (2010) [hereinafter National Strategy Report], <http://www.justice.gov/psc/docs/natstrategyreport.pdf>.

² *Id.* (quoting Nelson Mandela).

³ The mission of Criminal Investigation Command (CID) is to conduct investigations of serious crimes, to include child pornography. See <http://www.cid.army.mil/mission2.html>.

⁴ For a complete description of the images forming the basis for this hypothetical, see *United States v. Warner*, 73 M.J. 1, 5 (Court of Appeals for the Armed Forces [hereinafter C.A.A.F.] 2013) and *United States v. Lang*, No. 20140083, 2014 CCA LEXIS 844, at *4-6 (A. Ct. Crim. App. Oct 31, 2014) (mem. op.).

⁵ For a detailed discussion of the "titling" process, see U.S. DEP'T OF ARMY REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES (9 JUNE 2014); U.S. DEP'T OF DEFENSE INSTR. 5505.7, TITLING AND INDEXING OF SUBJECTS OF CRIMINAL INVESTIGATIONS IN THE DEPARTMENT OF DEFENSE (27 January 2012); Major Patricia A. Ham, *The CID Titling Process—Founded or Unfounded?*, ARMY LAW., Aug. 1998. Generally, it is the determination that an individual should be made the subject of a criminal investigation because there is "credible information" that the individual "may have committed a criminal offense." Ham, *supra* note 5, at 1.

child erotica.⁶ What is even more shocking to the SAC is, after she asks how to “title” the servicemember with possession of child erotica, you inform her that based on recent opinions from the Court of Appeals for the Armed Forces (CAAF) and the Military Service Courts of Criminal Appeals, you likely cannot prosecute the servicemember for the possession of these images.

To anyone not well versed in child pornography law, this would seem like an absurd conclusion. These are offensive images of minor girls in sexually provocative poses. They appear to serve no purpose other than to arouse the sexual interests of viewers. How can these not be considered child pornography and prohibited by law?

The problem, it can be argued, “is found in convoluted statutes and even more convoluted case law, which is missing the forest for the trees.”⁷ As this article will explain, child pornography is defined in an overly specific manner, requiring that any image of a minor, not engaged in some form of sexual act must depict the genitalia or pubic area.⁸ Because none of the images described depict the genitalia or pubic area of the minor girls, they are not, as a matter of law, child pornography. More surprisingly, the CAAF has recently held that because these images do not meet the federal definition of child pornography, the First Amendment protects them.⁹ Finally, any attempt to charge the possession of these images as something other than child pornography under Article 134, Uniform Code of Military Justice (UCMJ),¹⁰ will likely be struck down under constitutional principles of fair notice.¹¹

A change in the law is required to ensure that the creation, possession, or distribution of offensive images, including child erotica, is appropriately criminalized. However, any change in the law must still ensure that it is narrowly tailored to prevent the prohibition of otherwise innocent images of children. To that end, the military should amend its definition of child pornography to remove the requirement that images must depict the genitalia or pubic area, and instead require only that the image of a minor be lewd, under well-established legal

⁶ See, e.g., *United States v. Anderson*, No. 20080669, 2010 CCA LEXIS 328, 2010 WL 3938363 (A. Ct. Crim. App. Sept. 10, 2010) (mem. op.).

⁷ *United States v. Blouin*, 74 M.J. 247, 2015 CAAF LEXIS 584 *33-34 (C.A.A.F. 2015) (Baker, C.J., dissenting).

⁸ See, e.g., *United States v. Anderson*, No. 20080669, 2010 CCA LEXIS 328, 2010 WL 3938363 (A. Ct. Crim. App. Sept. 10, 2010) (mem. op.).

⁹ U.S. CONST. amend I.

¹⁰ Uniform Code of Military Justice (UCMJ) art. 134, otherwise known as the “General Article,” allows for the prosecution of acts not otherwise criminalized under the law which are either prejudicial to good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces. See generally, *Parker v. Levy*, 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974).

¹¹ See *United States v. Warner*, 73 M.J. 1 (C.A.A.F. 2013).

standards.¹² This will ensure that the greatest amount of harmful, offensive images of minors may be punishable for their possession, creation, or distribution, while also ensuring that servicemembers are not convicted for possessing innocent images of minors.

Having addressed the need for re-defining child protection statutes, the following section, Section II, discusses the history of child pornography and the policy and societal justifications for its prohibition. Section III presents the current military definition of child pornography with a discussion of recent case law. Section IV addresses the federal definition of child pornography, including its history and application, and the military's adoption of that standard. Section V discusses various state definitions of child pornography, and how those may differ from the military and federal definitions. Section VI addresses those images not encompassed under the definition of child pornography, such as child erotica. Finally, Section VII presents the proposed military definition of child pornography, along with legal arguments supporting its enactment.

II. An Overview of Child Pornography

Any review of the law relating to child pornography must first address the foundation and catalyst for such laws. This section begins by providing a history of child pornography leading to its prohibition, followed by a discussion relating to the policies underlying its prohibition.

A. A Brief History of Child Pornography

The foundations for child pornography and the sexual exploitation of children can be traced back to ancient times. "Almost since man discovered the ability to write or draw he has recorded the sexual abuse of children. Paintings of adult men having sexual intercourse with boys have been discovered in the remains of

¹² See, e.g., *State v. Meyer*, 120 Ore. App. 319, 325, 852 O.2d 879 (Ct. App. Or. 1993) (citing 53 CJS, "Lewdness," § 1; *Dictionary of Criminology* 127-28 (1965)); see also *State v. Gates*, 182 Ariz. 459, 462, 897 P.2d 1345 (Ariz. Ct. App. 1994) ("We believe a person of ordinary intelligence would understand the term 'lewd' to connote sexual suggestiveness.") (citations omitted); *State v. Limpus*, 128 Ariz. 371, 375-76, 625 P.2d 960 (Ariz. Ct. App. 1981). See also the discussion, *infra* at Sections IV.B and C, concerning the application of the term "lascivious," a synonym for "lewd." See also *United States v. Gaskin*, 12 U.S.C.M.A. 419, 421, 31 C.M.R. 5 (C.M.A. 1961) ("The term 'lascivious' is synonymous with 'lewd' . . ."); *United States v. Johnson*, 4 M.J. 770, 771 (A.C.M.R. 1978) ("The terms 'indecent,' 'lewd,' and 'lascivious,' are synonymous and signify a form of immorality which has relation to sexual impurity.").

Ancient Greek civilisation.”¹³ In Ancient Greece, for example, before a young man in his mid-twenties married a girl of twelve to fourteen years, he would first engage in a relationship with a young boy of twelve years, until that boy reached the age of twenty, and the cycle began anew.¹⁴ Similarly, in the Roman Empire it was common for girls to marry at age fourteen, and, it has been noted that ancient Chinese and Indian societies have “institutionalized sexual abuse of children.”¹⁵

However, the true history of child pornography began with the invention of the camera. “Almost as soon as Louis Daguerre produced photographic plates in 1824, and particularly after the invention of the roll of negative film in 1839, pornographic photographs of children began to be circulated in London.”¹⁶ In fact, one of the most infamous early child pornographers was Lewis Carroll, who was an “avid collector of child pornography,”¹⁷ and who potentially took thousands of pictures of girls as young as six years old.¹⁸

While the camera allowed for the easy creation of child pornography in the 19th century, it was the liberalization of obscenity laws in Denmark in the 1970s and apathy of other governments following the sexual revolution that allowed child pornography to become “an international commercial industry, leading to the relatively widespread availability of magazines, films, and photographs of children depicted in a sexual manner.”¹⁹ This allowed companies such as Rodox/Color Climax Corporation and individuals such as Willy Strauss to create and distribute massive quantities of magazines and movies worldwide depicting child pornography.²⁰ By 1977, approximately 250 child pornography magazines were circulating throughout the United States.²¹ These magazines were

¹³ TIM TATE, CHILD PORNOGRAPHY: AN INVESTIGATION, 33-34 (1990); *see also* CHARLES PATRICK EWING, JUSTICE PERVERTED: SEX OFFENDER LAW, PSYCHOLOGY, AND PUBLIC POLICY 119 (2011).

¹⁴ RICHARD WORTLEY & STEPHEN SMALLBONE, INTERNET CHILD PORNOGRAPHY: CAUSES, INVESTIGATION, AND PREVENTION 9 (2012).

¹⁵ *Id.* at 9.

¹⁶ Tate, *supra* note 13, at 34.

¹⁷ *Id.* at 37.

¹⁸ Wortley, *supra* note 14, at 11. Interestingly, the images that Mr. Carroll took would likely constitute child erotica by today’s standards. *Id.*

¹⁹ Ewing, *supra* note 13, at 119; *see also* Tate, *supra* note 13, at 40-41.

²⁰ Tate, *supra* note 13, at 45-51.

²¹ Richard Wortley and Stephen Smallbone, *Child Pornography on the Internet Guide No. 41*, CENTER FOR PROBLEM ORIENTED POLICING 1 (2006), <http://www.popcenter.org/problems/pdfs/ChildPorn.pdf>. “By 1977, the existence of more than 260 child pornography magazines had been documented—publications said to ‘depict children, some as young as three to five years of age [engaged] in activities [that] ranged from lewd poses to intercourse, fellatio, cunnilingus, masturbation, rape, incest and sadomasochism.’” Ewing, *supra* note 13, at 119 (citing *Sexual Exploitation of Children: Hearings before the Subcommittee on Select Education of the House Committee on Education and Labor*, 95th Cong. 1st Sess., 41-42 (1977)).

apparently “sold over the counter and in considerable quantities,” such that they became “part of the commercial mainstream of pornography.”²²

While child pornography may have been prevalent for quite some time, at least in the United States, public awareness and condemnation did not begin until the late 1970s.²³ The first real mass public awareness of the issue was likely in September 1975, stemming from national media reports of New York City’s *clean-up campaign* against a number of stores known to sell child pornography, in advance of the Democratic National Convention.²⁴ Then, in 1977, a psychiatrist and psychologist held a news conference in Chicago to attract attention to the issue of, and call for the criminalization of, child pornography.²⁵ “The response was immediate: newspapers across the country carried the story and began investigating the commercial production and sale of child pornography.”²⁶ Stories highlighting the serious problem of child pornography ran in *Time Magazine* and the *Chicago Tribune* that year.²⁷

According to one commentator discussing the issue, “[t]he year 1977 marked a turning point The media convergence catalyzed state and federal legislative action.”²⁸ Congress held three committee hearings in May 1977, uncovering evidence that 264 child pornography magazines were published in the United States, and that one commercial producer made between 5-10 million dollars per year selling child pornography.²⁹ Congress subsequently concluded that “[c]hild pornography and prostitution have become highly organized, multi-million dollar industries that operate on a nationwide scale.”³⁰ What followed, in 1978, was the beginning of federal and state laws criminalizing child pornography.³¹

Despite federal and state attempts to curtail child pornography through legislation, by 1990 the issue of child pornography had become a “national emergency.”³² This was only exacerbated by the creation and expansion of the Internet. “There is no doubt that the Internet has been instrumental in the exponential growth of the child pornography problem.”³³ For example, in 1980

²² Tate, *supra* note 13, at 61 (citing U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S COMMISSION ON PORNOGRAPHY: FINAL REPORT (1986)).

²³ Amy Adler, *The Perverse Law of Child Pornography*, 101 Colum. L. Rev. 209, 218 (2001).

²⁴ Tate, *supra* note 13, at 63.

²⁵ *Id.* at 64.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Adler, *supra* note 23, at 230.

²⁹ Tate, *supra* note 13, at 65.

³⁰ *Id.* at 65 (citing S. Rep. No. 95-438, at 5 (1977)).

³¹ Adler, *supra* note 23, at 230. *See* Section IV, *infra*, for a detailed discussion of the history of federal child pornography law following 1977.

³² Amy Adler, *Inverting the First Amendment*, 149 U. Pa. L. Rev. 921, 933 (2001).

³³ Wortley, *supra* note 14, at 25.

the largest child pornography magazine in the United States sold only about 800 copies; in 2000, one Internet child pornography company had over a quarter of a million subscribers worldwide.³⁴

The numbers related to the explosion of child pornography worldwide following the creation of the Internet are staggering. While it is impossible to determine precisely how much child pornography exists,³⁵ a number of sources have listed estimates. The global child pornography industry may earn anywhere between 1-20 billion dollars annually.³⁶ There may be more than one million images of child pornography available on the Internet at any one time, with the addition of an estimated 200 images daily or 20,000 images weekly.³⁷ The number of websites is likely growing as well, going from 261,653 to 480,000 between 2001 and 2004.³⁸

History shows that child pornography has evolved from being a part of societal practice in ancient times, to gradually expanding the sexual exploitation of children as technology advances. Despite the change in attitudes towards child pornography by the general public in the 1970s, the Internet has exacerbated the problem into epidemic proportions.

B. Purpose Behind Prohibiting Child Pornography

Why the change in the 1970s by society to universally decry child pornography? What underlies the basis for prohibiting child pornography, and why is it something that society now has chosen to condemn? The Supreme Court has detailed six primary justifications for why child pornography, in the legal context, should be prohibited.

³⁴ *Id.* (citations omitted).

³⁵ Ewing, *supra* note 13, at 142.

³⁶ M. Aiken, M. Moran, & M.J. Berry, *Child Abuse Material and the Internet: Cyber-Psychology of Online Child Related Sex Offending 2* (2011) (paper presented at the twenty-ninth meeting of the INTERPOL Specialist Group on Crimes against Children, Lyons, France, Sept. 5-7, 2011), http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.interpol.int%2FMedia%2FFiles%2FINTERPOL-Expertise%2FIGLC%2FChild-abuse-material-and-the-Internet&ei=AkD_VOC2H4qwyQTbk4LADQ&usg=AFQjCNFdSwlDutptLssRkI93tGnn0SjvnA&sig2=Inejnw2h24l_onQielyLMw&bvm=bv.87611401,d.aWw; Adler, *supra* note 23, at 231-32; National Strategy Report, *supra* note 1, at 15.

³⁷ National Strategy Report, *supra* note 1, at 15; Jason Scheff, *Disproving the "Just Pictures" Defense: Interrogative Use of the Polygraph to Investigate Contact Sexual Offenses Committed by Child Pornography Suspects*, 68 N.Y.U. Ann. Surv. Am. L. 603, 606-07 (2013); Ewing, *supra* note 13, at 142-43 (citations omitted).

³⁸ National Strategy Report, *supra* note 1, at 15.

First, the government has a compelling interest in “safeguarding the physical and psychological well-being of a minor.”³⁹ Indeed, “[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.”⁴⁰ “The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.”⁴¹

Second,

[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.⁴²

The possession of child pornography can likewise be prohibited as a means to decrease demand, particularly in light of difficulties associated with “attacking production and distribution.”⁴³

Third, “[t]he advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation.”⁴⁴ Fourth, “[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis.”⁴⁵ Fifth, “[r]ecognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions.”⁴⁶ Sixth and finally, “encouraging destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.”⁴⁷

³⁹ *New York v. Ferber*, 458 U.S. 747, 756-57, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982).

⁴⁰ *Id.* at 757.

⁴¹ *Id.* at 758.

⁴² *Id.* at 759.

⁴³ *Osborne v. Ohio*, 495 U.S. 103, 109-10, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990).

⁴⁴ *Ferber*, 458 U.S. at 761.

⁴⁵ *Id.* at 762.

⁴⁶ *Id.* at 763.

⁴⁷ *Osborne*, 495 U.S. at 111.

Of these rationales, perhaps the most compelling is the protection of children from the lasting and very real effects of being victims of child pornography. The Department of Justice has reported to Congress:

Unlike children who suffer from abuse without the production of images of that abuse, these children struggle to find closure and may be more prone to feelings of helplessness and lack of control, given that the images cannot be retrieved and are available for others to see in perpetuity. They experience anxiety as a result of the perpetual fear of humiliation that they will be recognized from the images.⁴⁸

In addition, Kenneth Lanning from the Federal Bureau of Investigation (FBI) notes that “[c]hildren used in pornography are desensitized and conditioned to respond as sexual objects. They are frequently ashamed of their portrayal in such material. They must live with the permanency, longevity, and circulation of such a record of their sexual victimization.”⁴⁹ Studies show also that even years later the “feelings of shame and anxiety did not fade but intensified to feelings of deep despair, worthlessness, and hopelessness.”⁵⁰

Finally, tangentially related to the sixth rationale discussed by the Supreme Court is the concern that persons who possess or produce child pornography are likely to commit a contact-type sexual assault offense against children. The Department of Justice reported to Congress that “there is sufficient evidence of a relationship between possession of child pornography and the commission of contact offenses against children to make it a cause of acute concern.”⁵¹

This conclusion is not without controversy, and is one of the more hotly debated issues surrounding child pornography.⁵² Anecdotal conclusions strongly

⁴⁸ National Strategy Report, *supra* note 1, at 9.

⁴⁹ Kenneth V. Lanning, *Child Molesters: A Behavioral Analysis* 84 (5th ed. 2010), http://www.missingkids.com/en_US/publications/NC70.pdf.

⁵⁰ Wortley, *supra* note 21, at 17-18.

⁵¹ National Strategy Report, *supra* note 1, at 19.

⁵² See e.g., MAX TAYLOR AND ETHEL QUAYLE, CHILD PORNOGRAPHY: AN INTERNET CRIME 13 (2003) (“It must be noted that we have very little systematic evidence on the relationship between involvement with child pornography and sexual assaults on children.”) “Sensational cases involving the sexual abuse, murder and the commensurate possession of child pornography, such as that of Danielle van Dam, create the perception in the minds of most people that there is arguably a nexus between these crimes.” Debra D. Burke, *Thinking Outside the Box: Child Pornography, Obscenity and the Constitution*, 8 Va. J.L. & Tech. 11, 35 (2003) (citing *Neighbor Convicted in Killing of 7-Year-Old California Girl*, WASH. POST, Aug. 22, 2002, at A2. See also *Westerfield’s Son Describes Finding Porn*, CNN.com (July 24, 2002), <http://www.cnn.com/2002/LAW/07/24/westerfield.trial/> (recounting testimony of defendant’s son to finding CD-ROMs in his father’s home office that contained downloads from pornography site, including child pornography)).

support the connection.⁵³ Some statistics tend to support the correlation between child pornography and sexual contact offenses;⁵⁴ however, studies on the issue have produced widely divergent results.⁵⁵ One of the most famous studies, the Butner Study, which concluded that as many as 85 percent of child pornography offenders are also sexual contact offenders, has been widely discredited.⁵⁶

As Mr. Lanning noted, “An offender’s pornography and erotica collection is the single best indicator of what he wants to do. It is not necessarily the best indicator of what he did or will do. Not all collectors of child pornography physically molest children and not all molesters of children collect child pornography.”⁵⁷ And “[t]he primary producers, distributors, and consumers of child pornography within the United States are child molesters, pedophiles, sexual deviants, and others with a sexual interest in children.”⁵⁸ While research shows that a direct causal link between child pornography and sexual contact offenses may not be currently supported utilizing social sciences, there is clearly a link between child pornography and a sexual desire for children.

C. Summary

The sexual exploitation of children through child pornography has existed since ancient times; however, it is the relatively recent advent of the Internet that has allowed the proliferation of such abuse to spread to epidemic proportions. In

⁵³ National Strategy Report, *supra* note 1, at 9 (“[L]aw enforcement officers and prosecutors interviewed for this Assessment universally report connections between child pornography offenses and sexual contact offenses against children.”). *Id.*

⁵⁴ See Wortley, *supra* note 21, at 13; Eva J. Klain, Heather J. Davies, Molly A. Hicks, *Child Pornography: The Criminal–Justice–System Response* CENTER FOR PROBLEM ORIENTED POLICING 4 (Mar. 2001), http://www.popcenter.org/problems/child_pornography/PDFs/Klain_etal_2001.pdf (“[Thirty–five] percent of cases involving 595 individuals arrested since 1997 for using the mail to sexually exploit children were active abusers.”); National Strategy Report, *supra* note 1, at 20 (“An analysis of 1663 federally prosecuted child pornography cases indicates contact offenses were discovered in approximately one–third of cases.”); Tate, *supra* note 13, at 109 (1976 L.A. Police Department Sexually Exploited Children Unit interviewed 150 victims and suspected offenders of sexual abuse—all cases involved child pornography).

⁵⁵ See Scheff, *supra* note 37, at 651–53; Wortley, *supra* note 14, at 39–41; Lanning, *supra* note 49, at 79 (“This correlation between child pornography and pedophilia, which was recognized by law enforcement and documented in my presentations and publications for many years, has been corroborated by research conducted in Canada.”) (citing Michael C. Seto, James M. Cantor, & Ray Blanchard, *Child Pornography Offenses Are a Valid Diagnostic Indicator of Pedophilia*, *Journal of Abnormal Psychology*, 115(3): 610–615 (2006)).

⁵⁶ See Scheff, *supra* note 37, at 651–52; *United States v. Johnson*, 588 F. Supp. 2d 997, 1005–07 (S.D. Iowa 2008).

⁵⁷ Lanning, *supra* note 49, at 107.

⁵⁸ *Id.* at 81.

light of this, and the contemporary recognition by society that child pornography is an evil that must be prevented in order to protect children, the law has attempted to respond accordingly.

III. The Current Status of the Definition of Child Pornography in the Military

Until recently, the military did not specifically prohibit or define child pornography within the UCMJ, but instead prosecuted servicemembers for its possession, distribution, or creation under the *general* article of Article 134, UCMJ.⁵⁹ Effective January 12, 2012, the President signed into law a newly listed offense under Article 134, UCMJ that specifically prohibited servicemembers from possessing, distributing or producing child pornography as well as additionally proscribing receiving and viewing.⁶⁰ The analysis to the rule recognizes that the new law “is generally based on 18 U.S.C. §2252A, as well as military custom and regulation,” along with the historical practice of prosecuting servicemembers “under clause 1 or 2 of Article 134, or under clause 3 as an assimilated crime under 18 U.S.C. §2251.”⁶¹

The President has defined “child pornography,” in relevant part, as any “visual depiction of an actual minor engaging in sexually explicit conduct.”⁶² A “minor” is anyone under the age of eighteen.⁶³ “Sexually explicit conduct” is defined, in relevant part, as a “lascivious exhibition of the genitals or pubic area of any person.”⁶⁴ Lascivious exhibition of the genitals is not further defined within the manual. However, as discussed in greater detail in Section IV, the military generally adheres to the federal interpretation of this term.⁶⁵

⁵⁹ UCMJ art. 134 (2012); *See* United States v. Finch, 73 M.J. 144, 152 (C.A.A.F. 2014) (Effron, S.J., dissenting) (“Although the Uniform Code of Military Justice does not contain an article that expressly addresses child pornography, such offenses are prosecuted in courts-martial under Article 134, UCMJ, 10 U.S.C. § 934 (2012), which prohibits conduct that is prejudicial to good order and discipline, conduct that is service discrediting, and conduct that violates federal criminal statutes.”).

⁶⁰ MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 68b (2012) [hereinafter MCM]; 2012 Amendments to the Manual for Courts-Martial, United States, Exec. Order No. 13,593, 76 Fed. Reg. 78451 (Dec. 13, 2011). The President is allowed to list examples of offenses under Article 134, UCMJ, which is considered “persuasive” to the courts. *United States v. Jones*, 68 M.J. 465, 471-72 (C.A.A.F. 2010).

⁶¹ MCM, part IV, ¶ 68b analysis, at A23-22 (2012).

⁶² MCM, part IV, ¶ 68b.c.(1). This is the second clause of the definition. The first clause defines “child pornography” as “material that contains . . . an obscene visual depiction of a minor engaging in sexually explicit conduct . . .” *Id.* Because this alternate definition involves the obscenity standard, which is distinct from child pornography, it is not pertinent to this article. *See e.g.*, *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982) (discussed in greater detail throughout this article in Section VII.A).

⁶³ MCM, part IV, ¶ 68b.c.(4).

⁶⁴ MCM, part IV, ¶ 68b.c.(7)(e).

⁶⁵ *See* United States v. Roderick, 62 M.J. 425, 429-30 (C.A.A.F. 2006).

A number of recent military cases discuss the meaning of “lascivious exhibition of the genitals or pubic area,” and the legal effect of images not meeting that technical definition. One of the more comprehensive discussions of this term was in an unpublished case from the United States Army Court of Criminal Appeals (ACCA): *United States v. Anderson*.⁶⁶ In *Anderson*, Judge Ham explained how this term has been interpreted and applied in both federal and military law, but emphasized that the “prerequisite” for any image to be considered “child pornography” is that it actually depict the “genitals or pubic area.”⁶⁷ Even when a servicemember is charged under clause 1 or 2 of Article 134, UCMJ, as opposed to the federal statute, the images must still depict the genitals or pubic area.⁶⁸

The importance of *Anderson* is not necessarily its rather straightforward application of the statutory definition of child pornography, requiring a depiction of the genitalia or pubic area. Rather, its import stems from the foresight with which Judge Ham foreshadowed the issues that have since been addressed by the CAAF in recent years and which have inspired the proposal herein. Judge Ham noted that the federal definition of child pornography does “not address other lascivious images lacking an exhibition of the genitals or pubic area, such as so-called ‘child erotica.’”⁶⁹ Because the question of whether those images could be prohibited under clause 1 or 2 of Article 134, UCMJ, was not an issue in the case,⁷⁰ the court took no position on the subject.⁷¹ Judge Ham did, however, perfectly frame the issue: “[W]hat would constitute the offense and how would a service member be on notice of what conduct is prohibited? Extreme care should be taken in any decision to charge ‘child erotica’ in light of the potentially substantial constitutional and legal issues that could arise in such a case.”⁷²

⁶⁶ *United States v. Anderson*, No. 20080669, 2010 CCA LEXIS 328, 2010 WL 3938363 (A. Ct. Crim. App. Sept. 10, 2010) (mem. op.).

⁶⁷ *Id.* at *25 (“In *Roderick*, in fact, the C.A.A.F. plainly recognized that a ‘prerequisite for any analysis under *Dost* is that the image depict the genitals or pubic area, and that such a depiction is ‘a requirement of [18 U.S.C.] § 2256(2).’”) (quoting *Roderick*, 62 M.J. at 430).

⁶⁸ *Id.* at *26 (citing *United States v. Villard*, 885 F.2d 117, 124 (3rd Cir. 1989)). Interestingly, a recent case from the ACCA calls into question the holding in *Anderson* that a depiction of the genitalia or pubic area is always required in the military. See *United States v. Miedama*, No. 20110496, 2013 CCA LEXIS 377, at *9, 2013 WL 1896280 (A. Ct. Crim. App. May 2, 2013). In *Miedama*, the ACCA held that in cases charged under clauses 1 or 2 of Article 134, UCMJ, an image need not actually depict the genitalia or pubic area to constitute child pornography. *Id.* It is unclear how this unpublished case will be applied, as the C.A.A.F. denied review. *United States v. Miedama*, No. 13-0609/AR, 2013 CAAF LEXIS 1144 (C.A.A.F. Sep. 25, 2013) (denying petition for review).

⁶⁹ *Anderson*, 2010 CCA LEXIS 328 at *24.

⁷⁰ *Id.* at *27.

⁷¹ *Id.* at *29 n.11.

⁷² *Id.*

The first significant case from the CAAF confronting the constitutionality of ‘child erotica’ was *United States v. Barberi*.⁷³ While that term was not actually at issue in the case, the CAAF considered the constitutional effect of an accused being convicted of possessing six images of child pornography, where four of those six images did not depict child pornography, because they lacked exhibition of genitalia or the pubic area of the minor child.⁷⁴

Incredibly, the CAAF held that the four images that failed to meet the federal definition of child pornography were constitutionally protected speech. It recognized that the First Amendment protects speech that does not fall within certain categories, such as defamation, incitement, obscenity, and child pornography.⁷⁵ However, the court then summarily concluded that the four images that did not meet the federal definition of child pornography “constitute constitutionally protected speech, and ‘[t]he Government may not suppress lawful speech as the means to suppress unlawful speech.’”⁷⁶ In response to Chief Judge Baker’s vigorous dissent concerning the “constitutionality” of these images,⁷⁷ the majority noted only that “[a]lthough these images are disturbing and distasteful, that alone does not place them into the category of unprotected speech in this case.”⁷⁸

The CAAF overruled *Barberi* three years later in the case of *United States v. Piolunek*.⁷⁹ However, it was overruled solely on the grounds that *Barberi* misapplied the general verdict doctrine.⁸⁰ The majority never discussed the question of whether images that do not meet the federal definition of child pornography are constitutionally protected, other than to recognize that “the Court in *Barberi* divided on whether there is an *additional* category of images that constitute child pornography.”⁸¹ To be sure, in his dissent in *Piolunek*, Judge Erdmann continued to rely heavily on that legal conclusion from *Barberi*.⁸² Consequently, while *Barberi* may have been overruled on general verdict grounds, its conclusion that images which do not meet the federal definition of child pornography are constitutionally protected has not been overruled, and remains the current state of the law in the military.

⁷³ *United States v. Barberi*, 71 M.J. 127 (C.A.A.F. 2012) (overruled by *United States v. Piolunek*, 74 M.J. 107 (C.A.A.F. 2015)).

⁷⁴ *Id.* at 129-30.

⁷⁵ *Id.* at 130-31.

⁷⁶ *Barberi*, 71 M.J. at 130-31 (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002)).

⁷⁷ *Id.* at 134-37 (Baker, C.J., dissenting).

⁷⁸ *Id.* at 131 n. 4. The legal efficacy of this case will be discussed in more detail *infra* Section VII.

⁷⁹ *United States v. Piolunek*, 74 M.J. 107 (C.A.A.F. 2015).

⁸⁰ *Id.* at 110-12.

⁸¹ *Id.* at 111.

⁸² *Id.* at 113-15 (Erdmann, J., dissenting).

In 2013, the CAAF directly addressed child erotica in *United States v. Warner*.⁸³ In that case, the accused appealed his conviction for possessing images that “depict minors as sexual objects or in a sexually suggestive way.”⁸⁴ The government argued at trial that these images constituted “child erotica.”⁸⁵ However, none of the images depicted actual nudity, a critical fact in the court’s analysis.⁸⁶ The CAAF set aside the conviction because the accused was deprived of constitutional “fair notice” that he could be prosecuted under Article 134, UCMJ, for possessing images of minors “as sexual objects or in a sexually suggestive way.”⁸⁷ The CAAF pointed out that none of the sources of “fair notice,” which include “federal law, state law, military case law, military custom and usage, and military regulations,” prohibited “possession of images of minors that are sexually suggestive but do not depict nudity or otherwise reach the federal definition of child pornography.”⁸⁸ Consequently, the accused could not have been on notice that he could be punished for their possession.

The CAAF again addressed child erotica the next year. While the lack of nudity was central to the holding in *Warner*, the case of *United States v. Moon*⁸⁹ makes clear that even nudity itself is insufficient to uphold a conviction where the images do not meet the federal definition of child pornography. There, the accused was charged with possessing images of “nude minors and persons appearing to be nude minors.”⁹⁰ The images at issue depicted “prepubescent and pubescent girls in a variety of poses and locations who are either completely naked or wearing only hats or jewelry.”⁹¹ The court sidestepped the notice concern in *Warner* by presuming the accused was on notice that he could be charged with possessing these images.⁹² Nevertheless, the court set aside the conviction because the providence inquiry failed to establish why the images in question lost their constitutional protection.⁹³ Again, the court assumed, without discussion, that the images were constitutionally protected.

The impact of these recent decisions involving images that do not meet the federal definition of child pornography is twofold: (1) servicemembers lack sufficient notice that possessing those images may be criminalized, even under Article 134, UCMJ; and (2) those images are protected under the First

⁸³ *United States v. Warner*, 73 M.J. 1 (C.A.A.F. 2013). This author was lead appellate government counsel in *Warner*.

⁸⁴ *Id.* at 2.

⁸⁵ *Id.* at 3.

⁸⁶ *Id.* at 3-4.

⁸⁷ *Id.*

⁸⁸ *Warner*, 73 M.J. at 3-4 (citing *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003)).

⁸⁹ *United States v. Moon*, 73 M.J. 382 (C.A.A.F. 2014).

⁹⁰ *Id.* at 383.

⁹¹ *Id.* at 389 (Ohlson, J., dissenting).

⁹² *Id.* at 383, 386.

⁹³ *Id.* at 389.

Amendment, significantly hindering the government's ability to prosecute servicemembers for possessing them.⁹⁴ To be sure, the Military Service Courts of Criminal Appeals have already followed suit, with both the Army and the Navy-Marine Corps Courts of Criminal Appeals recently dismissing charges in cases involving images that did not meet the federal definition of child pornography.⁹⁵

As the law stands now, it is unlikely that servicemembers can be prosecuted for images depicting child erotica, such as those described in the introduction to this article; consequently, a change in the law is necessary to prohibit these images. Before deciding how best to amend the law, it is important to first discuss the origins of child pornography legislation, the purposes behind it, and examples of how child pornography is defined elsewhere.

IV. The Federal Definition of Child Pornography, Its Interpretation and Application

The federal government's prohibition of child pornography has evolved over the past four decades. However, it has consistently required that for an image to constitute child pornography it must contain a depiction of the "genitals or pubic area," and be either lewd or lascivious.⁹⁶ The meaning of the latter term occupies considerable case law in federal and military jurisprudence. This section discusses the legal history of child pornography under federal law, its application, and how federal and military courts have subsequently interpreted it.

A. History of Federal Child Pornography Law

Congress first directly addressed child pornography in 1978 through the Protection Against Sexual Exploitation Act.⁹⁷ This statute defined child pornography as, in part, a "lewd exhibition of the genitals or pubic area of any

⁹⁴ See *United States v. Wilcox*, 66 M.J. 442 (C.A.A.F. 2008) (discussing the heightened evidentiary standard required in cases where servicemembers are charged with conduct or speech protected by the First Amendment).

⁹⁵ *United States v. Rapp*, No. 201200303, CCA LEXIS 355, 2013 WL 1829157 (N-M. Ct. Crim. App. Apr. 30, 2013); *United States v. Lang*, No. 20140083, 2014 CCA LEXIS 844 (A. Ct. Crim. App. Oct. 31, 2014).

⁹⁶ Images that depict sexual activity also constitute child pornography. These include images that depict: (1) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-genital, whether between persons of the same or opposite sex; (2) bestiality; (3) masturbation; or (4) sadistic or masochistic abuse. 18 U.S.C. §§ 2256(2)(A)(i)-(iv); MCM, part IV, ¶¶ 68b.c.(7)(a)-(d). However, because these images are readily identifiable as child pornography, they are outside the scope of this article.

⁹⁷ Pub. L. No. 95-225, 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. §§ 2251-2253); Adler, *supra* note 23, at 236 n.154.

person.”⁹⁸ Congress crafted this definition to conform to the requirements for obscenity under *Miller v. California*,⁹⁹ because it believed that it could not constitutionally do so otherwise.¹⁰⁰

At the time, the Supreme Court had set forth that obscenity is not protected under the First Amendment;¹⁰¹ however, jurisdictions could only limit their regulations to images “which depict or describe sexual conduct.”¹⁰² In doing so, the jurisdiction was required to “specifically” define such conduct, and limit its application to “works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”¹⁰³

However, four years after Congress enacted its original definition of child pornography, the Supreme Court addressed a case in which a state adopted a definition that did not require the images to be obscene. In *New York v. Ferber*,¹⁰⁴ the Supreme Court held that jurisdictions are free to enact laws that ban “child pornography,” and crafted a new exception to the protections of the First Amendment for such child pornography.¹⁰⁵ The Court specifically stated that the *Miller* standard for obscenity is not required when reviewing statutes prohibiting child pornography, because the government has a strong interest in the protection of children.¹⁰⁶

In response to *Ferber*, Congress quickly acted to amend its definition of child pornography in the Child Protection Act of 1984.¹⁰⁷ It replaced the term “lewd” with the term “lascivious,” thereby modifying the definition to a “lascivious exhibition of the genitals or pubic area of any person,”¹⁰⁸ which remains in place today.¹⁰⁹ “This was supposedly in order to emphasize the distinction between child pornography law and obscenity law, with which the term ‘lewd’ is often

⁹⁸ 18 U.S.C. § 2253(2)(E) (1978).

⁹⁹ *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).

¹⁰⁰ Adler, *supra* note 23 at 236 (citing Annemarie J. Mazzone, *United States v. Knox: Protecting Children from Sexual Exploitation Through the Federal Child Pornography Laws*, 5 Fordham Intell. Prop. Media & Ent. L.J. 167, 174-79 (1994)). *Miller*, in fact, actually used the term “lewd exhibition of the genitals” as a specific example of what would constitute obscene conduct. *Miller*, 413 U.S. at 25.

¹⁰¹ *Roth v. United States*, 354 U.S. 476, 485, 77 S. Ct. 1304, 1 L.Ed. 2d. 1498 (1957).

¹⁰² *Miller*, 413 U.S. at 24.

¹⁰³ *Id.* at 24.

¹⁰⁴ *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d. 1113 (1982). *Ferber* is addressed in more detail in Section VII.A.

¹⁰⁵ *Ferber*, 458 U.S. at 756-64.

¹⁰⁶ *Id.* at 764-65.

¹⁰⁷ Pub. L. No. 98-292, 98 Stat. 204 (1984); 18 U.S.C. §§ 2251-2254, 2256, 2516; Adler, *supra*, note 23, at 237.

¹⁰⁸ 18 U.S.C. §2253(2)(E) (1984); 98 Stat. 204, 205 (1984).

¹⁰⁹ 18 U.S.C. § 2256(2)(A)(v) (2014).

associated.”¹¹⁰ The elimination of the obscenity standard within the definition had immediate impact on federal prosecutions: only twenty–three individuals had been convicted between 1977 and 1984; however, after the law was amended, “at least 214 defendants were convicted in the twenty–eight months following.”¹¹¹

Within the Child Protection Act of 1984, Congress made a number of findings explaining why it was expanding the definition of child pornography, including:

- (1) child pornography has developed into a highly organized, multi-million-dollar industry which operates on a nationwide scale;
- (2) thousands of children including large numbers of runaway and homeless youth are exploited in the production and distribution of pornographic materials; and
- (3) the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the individual child and to society.¹¹²

While the federal definition of child pornography has not changed since 1984, the manner in which the federal government regulates child pornography has greatly expanded through various legislative acts. The first was the Child Sexual Abuse and Pornography Act, which “banned the production and use of advertisements for child pornography.”¹¹³ Two years later, Congress began to modernize the statute by prohibiting the use of a “computer to transport, distribute, or receive child pornography,” with the Child Protection and Obscenity Enforcement Act.¹¹⁴

Congress attempted to expand the definition of child pornography even further in 1996 by passing the Child Pornography Prevention Act (CPPA), which amended part of the definition to “include any visual depiction that ‘is, or appears

¹¹⁰ Adler, *supra*, note 23, at 238, n.167 (citing *United States v. Dost*, 636 F. Supp. 828, 830-32 (S.D. Cal. 1986)). It appears that the distinction is one without a difference, however. The terms “lewd” and “lascivious” have been considered synonyms, and used interchangeably to define the same conduct. See *United States v. Gaskin*, 31 C.M.R. 5, 7, 12 U.S.C.M.A. 419 (1961); *United States v. Johnson*, 4 M.J. 770, 771 (A.C.M.R. 1978); *United States v. Fabrizio*, 459 F.3d 80, 84-85 (1st Cir. 2006) (collecting cases); *Schmitt v. State*, 590 So. 2d 404, 410 (Fla. 1991); *Rhoden v. Morgan*, 863 F. Supp 612, 618 (M.D. Tenn. 1994).

¹¹¹ Adler, *supra* note 23, at 237.

¹¹² Pub. L. No. 98-292, 98 Stat. 204 (1984).

¹¹³ Pub. L. No. 99-628, § 2, 100 Stat. 3510 (1986) (codified as amended at 18 U.S.C. § 2251); Klain, *supra* note 54, at 13.

¹¹⁴ Klain, *supra*, note 54, at 13; Pub. L. No. 100-690, § 7512, 102 Stat. 4181 (1988) (codified as amended at 18U.S.C. §§ 2251A-2252).

to be, of a minor engaging in sexually explicit conduct.”¹¹⁵ This was in response to the growth in computer technology “which makes it possible to create realistic images of children who do not exist,”¹¹⁶ so-called “virtual child pornography.”¹¹⁷ However, the Supreme Court struck down this provision as overbroad and unconstitutional because images that do not depict actual minors do not meet the policies announced in *Ferber* that justify the constitutional exception for child pornography.¹¹⁸

In response, Congress enacted the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act).¹¹⁹ Congress amended the definition of child pornography from the overbroad “appears to be” to the term “indistinguishable from” in order to rebut defenses in court that the government failed to prove the images depicted an actual child.¹²⁰ In addition, the PROTECT Act enacted 18 U.S.C. § 1466A, which prohibits “virtual child pornography” as a type of obscenity.¹²¹

The current definition of child pornography is located at 18 U.S.C. § 2256(8). Based on all past legislation, this definition is sub-divided into three parts. The first involves images of actual children,¹²² while the second and third encompass images that are “indistinguishable from” actual children or have been modified to appear to be actual children.¹²³ All three of these sub-parts require that the image depict the minor engaging in “sexually explicit conduct.”¹²⁴ The definition of “sexually explicit conduct” depends on which sub-part is alleged as well. For the first and third sub-parts, “sexually explicit conduct” requires only that there be a “lascivious exhibition of the genitals or pubic area of any person.”¹²⁵ For the second sub-part, which does not necessarily require actual children, the “lascivious exhibition of the genitals or pubic area of any person” must also be “graphic or simulated.”¹²⁶ This article deals solely with images depicting actual children.

¹¹⁵ Klain, *supra*, note 54, at 14; Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009-26 (1996); 18 U.S.C. § 2256(8)(B) (1999) (emphasis added).

¹¹⁶ Ashcroft v. Free Speech Coalition, 535 U.S. 234, 239-40, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

¹¹⁷ *Id.* at 242.

¹¹⁸ *Id.* at 256.

¹¹⁹ Pub. L. No. 108-21, 117 Stat 650 (2003).

¹²⁰ James N. Kornegay, *Protecting Our Children and the Constitution: An Analysis of the “Virtual” Child Pornography Provisions of the PROTECT Act of 2003*, 47 WM. & MARY L. REV. 2129, 2149 (2006).

¹²¹ 18 U.S.C. § 1466A; Kornegay, *supra* note 120, at 2163.

¹²² 18 U.S.C. § 2256(8)(A).

¹²³ 18 U.S.C. §§ 2256(8)(B)-(C).

¹²⁴ 18 U.S.C. §§ 2256(8)(A)-(C).

¹²⁵ 18 U.S.C. § 2256(2)(A)(v). The definition also includes sexual acts or acts of abuse; however, for purposes of this article, those definitions are not discussed.

¹²⁶ 18 U.S.C. § 2256(2)(B)(iii).

Through the various amendments and modifications to federal law, Congress has defined child pornography as a “lascivious exhibition of the genitals or pubic area of any person,” where the image is either of an actual child, or indistinguishable from an actual child. The key legal question left to the courts was what constitutes a “lascivious exhibition”?

B. Lascivious Exhibition—Its Interpretation and Application by Federal Courts

The nearly universally accepted¹²⁷ test for determining whether a particular image is a “lascivious exhibition of the genitals or pubic area of any person” is derived from *United States v. Dost*.¹²⁸ Known as the *Dost* factors, these are:

- (1) whether the focal point of the visual depiction is on the child’s genitalia or pubic area;
- (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
- (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
- (4) whether the child is fully or partially clothed, or nude;
- (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; or
- (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.¹²⁹

The court in *Dost* noted, however, that “a visual depiction need not involve all of these factors” and “[t]he determination will have to be made based on the overall content of the visual depiction, taking into account the age of the minor.”¹³⁰ Indeed, other courts have recognized “other factors may be relevant, depending upon the particular circumstances involved,”¹³¹ and those must be analyzed on a case-by-case basis.¹³² Thus, while the *Dost* factors provide a useful guide for evaluating images of child pornography, they are not dispositive.

¹²⁷ See *United States v. Roderick*, 62 M.J. 425, 429 (C.A.A.F. 2006) (noting that “[a]ll of the federal courts to address” the meaning of “lascivious exhibition” have relied on *Dost*).

¹²⁸ *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff’d sub nom.* *United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *United States v. Amirault*, 173 F.3d 28, 31 (1st Cir. 1999); see also *United States v. Campbell*, 81 Fed. Appx. 532, 536 (6th Cir. 2003); *United States v. Knox*, 32 F.3d 733, 747 (3rd Cir. 1994).

¹³² *Amirault*, 173 F.3d at 32.

The *Dost* factors have met some level of criticism.¹³³ In response, the Second Circuit has explained, “[T]he *Dost* factors impose useful discipline on the jury’s deliberations. They may do so imperfectly, but they have not been much improved upon.”¹³⁴

Merely reciting the *Dost* factors does not end the inquiry. There have been a number of different areas of interpretation that have been addressed by the courts. First, “[i]n deciding if a picture contains a ‘lascivious exhibition of the genitals,’ a threshold question presents itself: does ‘lascivious’ describe the child depicted, the photographer, or the viewer?”¹³⁵ The federal circuit courts view this question of lasciviousness through different lenses.

For example, the First Circuit has explained, “[I]t is a mistake to look at the actual effect of the photograph on the viewer, rather than upon the intended effect.”¹³⁶ “If [an accused’s] subjective reaction were relevant, a sexual deviant’s quirks could turn a Sears catalog into pornography.”¹³⁷ The court also rejected the idea of looking at the issue through the lens of a “deviant photographer” because of the danger that “a deviant’s subjective response could turn innocuous images into pornography.”¹³⁸ The court concluded that “in determining whether there is an intent to elicit a sexual response, the focus should be on the objective criteria of the photograph’s design.”¹³⁹

The Third Circuit agrees.

Although it is tempting to judge the *actual* effect of the photographs on the viewer, we must focus instead on the *intended* effect on the viewer Child pornography is not created when the pedophile derives sexual enjoyment from an otherwise innocent photo. As the Ninth Circuit stated, “Private fantasies are not within the statute’s ambit.” When a picture does not constitute child pornography, even though it portrays nudity, it does not become child pornography because it is placed in the hands of a pedophile, or in a forum where pedophiles might enjoy it.¹⁴⁰

¹³³ See Adler, *supra* note 32, at 953-57.

¹³⁴ United States v. Rivera, 546 F.3d 245, 253 (2d Cir. 2008).

¹³⁵ Adler, *supra* note 32, at 954.

¹³⁶ *Amirault*, 173 F.3d at 34 (citing United States v. Villard, 885 F.2d 117, 125 (3d Cir. 1989)).

¹³⁷ *Id.*

¹³⁸ *Amirault*, 173 F.3d at 34.

¹³⁹ *Id.* at 34-35.

¹⁴⁰ *Villard*, 885 F.2d at 125.

Other circuits have taken a different approach. The Sixth Circuit found that “it is appropriate to apply a ‘limited context’ test that permits consideration of the context in which the images were taken, but limits the consideration of contextual evidence to the circumstances directly related to the taking of the images.”¹⁴¹ The court considers: “(1) where, when, and under what circumstances the photographs were taken, (2) the presence of any other images of the same victim(s) taken at or around the same time, and (3) any statements a defendant made about the images.”¹⁴² Similarly, the Second Circuit agrees that the context of the image may “reinforce[] the lascivious impression.”¹⁴³

When viewing the context of the photograph, is the intent of the child relevant? Regardless of whether one looks to the image itself or the intended effect of the image, “lasciviousness is not a characteristic of the child photographed but of the exhibition which the photographer sets up for an audience that consists of himself or likeminded pedophiles.”¹⁴⁴ “This is because ‘[c]hildren do not characteristically have countenances involving sexual activity,’ but ‘an innocent child can be coaxed to assume poses or expressions that bespeak sexual availability when viewed by certain adults.’”¹⁴⁵ The intent of the child in the photograph is wholly irrelevant to the analysis.¹⁴⁶

Must nudity be depicted for an image to be “lascivious”? The landmark case considering this question comes from the Third Circuit in *United States v. Knox*. The court determined that nudity is not actually required under the federal statute, and the definition “encompasses visual depictions of a child’s genitals or pubic area even when these areas are covered by an article of clothing and are not discernible.”¹⁴⁷ The court considered the plain meaning of the term “exhibition,”¹⁴⁸ as well as the purpose of the images in the following:

[I]t is not true that by scantily and barely covering the genitals of young girls that the display of the young girls in seductive poses destroys the value of the poses to the viewer of child pornography. Although the genitals are covered, the display and focus on the young girls’ genitals or pubic area apparently still provides considerable interest and excitement for the

¹⁴¹ *United States v. Brown*, 579 F.3d 672, 683 (6th Cir. 2009).

¹⁴² *Id.* at 683-84.

¹⁴³ *Rivera*, 546 F.3d at 250.

¹⁴⁴ *United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987).

¹⁴⁵ *United States v. Overton*, 573 F.3d 679, 689 (9th Cir. 2009) (internal citations omitted).

¹⁴⁶ *United States v. Knox*, 32 F.3d 733, 747 (3rd Cir. 1994).

¹⁴⁷ *Id.* at 754.

¹⁴⁸ *Id.* at 744.

pedophile observer, or else there would not be a market for the tapes in question in this case.¹⁴⁹

In sum, the *Dost* factors provide the most universally accepted and easily applied method to determine whether a particular image constitutes a “lascivious exhibition of the genitals or pubic area.” While courts may disagree as to which lens to view the image through in every case, it is clear that the intent of the child is not relevant, and the focus should appropriately be on how the image would appear to the pedophile viewer. Whether that is through looking at the image alone or at external factors is left up to debate.

C. The Military’s Interpretation of “Lascivious Exhibition”

The military, in large part, follows mainstream federal law concerning the application of the term “lascivious exhibition of the genitals or pubic area.” It adopted the *Dost* factors for evaluating the lasciviousness of particular images of suspected child pornography.¹⁵⁰ In addition, the military chose to follow other circuits that evaluate images “with an overall consideration of the totality of the circumstances.”¹⁵¹

The ACCA recognizes that the CAAF “has not specifically decided whether the ‘totality of the circumstances’ ‘limits the consideration of contextual evidence to the circumstances directly related to the taking of the images.’”¹⁵² The scope of the type of contextual evidence and how it would apply in any given case remains debatable.

Most recently, the ACCA adopted the holding in *Knox* and found 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.”¹⁵³ Both the Navy–Marine Corps Court of Criminal Appeals and Air Force Court of Criminal Appeals have cited that decision favorably.¹⁵⁴ However, in a less than clear opinion, the CAAF has recently overruled the ACCA.¹⁵⁵ The CAAF considered the application of *Knox*, decided in 1994, to the current definition of federal child pornography, amended in 2003.¹⁵⁶ Because Congress in 2003 added the requirement that a

¹⁴⁹ *Id.* at 745.

¹⁵⁰ *United States v. Roderick*, 62 M.J. 425, 429-30 (C.A.A.F. 2006).

¹⁵¹ *Id.* at 430.

¹⁵² *United States v. Anderson*, No. 20080669, 2010 CCA LEXIS 328, at *24, 2010 WL 3938363 (A. Ct. Crim. App. Sept. 10, 2010) (mem. op.).

¹⁵³ *United States v. Blouin*, 73 M.J. 694, 696 (A. Ct. Crim. App. 2014).

¹⁵⁴ *United States v. Morris*, No. 201300348, 2014 CCA LEXIS 645 at *6 (N–M Ct. Crim. App. Aug. 28, 2014) (unpublished); *United States v. Puckett*, 60 M.J. 960, 963 (A.F. Ct. Crim. App. 2005).

¹⁵⁵ *United States v. Blouin*, 74 M.J. 247, 2015 CAAF LEXIS 584 (C.A.A.F. 2015).

¹⁵⁶ *Id.* at *10-11.

“lascivious exhibition of the genitals or pubic area” be “graphic” when dealing with digital images under 18 U.S.C. § 2256(8)(B), the CAAF found that *Knox* is inapplicable to the current statute.¹⁵⁷

However, as Chief Judge Baker pointed out in his dissent to *Blouin*, “the majority does not elaborate on why *Knox II* is inapplicable to subsection 8(A), which contains identical language to the pre-2003 version of the CPPA the *Knox II* court interpreted,” and does not require that the images also be “graphic.”¹⁵⁸ So while the CAAF has held that the reliance on *Knox* by the ACCA was based on “an erroneous view of the law,” in fact it appears that the CAAF itself has relied on “an erroneous view of the law” to wholesale declare *Knox* invalid.¹⁵⁹ Consequently, whether a lascivious exhibition of the genitals or pubic area under 18 U.S.C. § 2256(8)(A) must depict nudity remains an unclear issue in the military. It is also an important issue, as the current military definition is identical to that particular federal definition.

In short, the military applies the term “lascivious exhibition of the genitals or pubic area” in similar fashion to federal courts, though the outer limits of what context may be considered under the totality of the circumstances is yet to be fully developed. It is clear, however, that when employing the statutory definition, either the genitalia or pubic region must be displayed in some fashion.

V. State Definitions of Child Pornography

In addition to the military and the federal government, all 50 states prohibit the possession, distribution, or production of child pornography, or some combination of the three. Each state has adopted its own definition and interpretation of the term child pornography. State definitions can be broken into two different groups: those that define child pornography either the same as or more narrowly than the federal government does, and those that define child pornography more broadly. A consideration of these diverging definitions is important to determine the outer bounds of what an offensive image of a minor must actually depict in order to survive constitutional scrutiny.¹⁶⁰

¹⁵⁷ *Id.* at *11.

¹⁵⁸ *Id.* at *16 (Baker, C.J., dissenting).

¹⁵⁹ *Id.* at *11.

¹⁶⁰ The international community also generally has laws regulating child pornography, in various forms. For an in-depth discussion of international laws and treaties related to the sexual exploitation of children in the international community, see Klain, *supra* note 54, at 34-38; YAMAN AKDENIZ, INTERNET CHILD PORNOGRAPHY AND THE LAW: NATIONAL AND INTERNATIONAL RESPONSES (2008).

A. States That Follow or Restrict the Federal Definition of Child Pornography

Within this first group, there are two separate sub-categories. The first is states that follow the federal definition, either exactly or with minor changes. The second includes states that only prohibit images that meet the more stringent constitutional obscenity standard. Only one-third of all states fall within this group.

1. States that Apply the Federal Definition

Thirteen states define child pornography in line with the federal government. These are: Alaska, Connecticut, Florida, Hawaii, Indiana, Minnesota, Mississippi, Missouri, Nevada, New York, North Carolina, Rhode Island, and Wyoming.¹⁶¹ However, there are a number of differences between specific definitions. For example, Alaska, Florida, Minnesota, Nevada, and New York use the term “lewd” instead of “lascivious,” and do not include the “pubic area.”¹⁶² However, there is legally no difference because the term “lewd” is generally considered to be synonymous with “lascivious.”¹⁶³ Rhode Island utilizes “lascivious,” but adds the term “graphic” as an alternative qualifier.¹⁶⁴

Indiana’s unique definition uses neither the term “lewd” nor “lascivious,” but rather defines child pornography as the “exhibition of the uncovered genitals intended to satisfy or arouse the sexual desires of any person.”¹⁶⁵ Indiana courts have upheld this definition, however, because they have found that this modifier “is essentially the definition of ‘lewd’ conduct, which the [Supreme] Court discussed at length in *Ferber* and found no constitutional infirmity.”¹⁶⁶

In addition, while Connecticut and North Carolina define child pornography in line with the federal government, they also penalize images that depict a broader array of nudity, but only where those images also meet the obscenity standard. For example, Connecticut prohibits the “showing of the human male or

¹⁶¹ ALASKA STAT. § 11.41.455(a)(6); CONN. GEN. STAT. §§ 53a-193(13)-(14); FLA. STAT. § 827.071(1)(h); HAWAII REV. STAT. § 707-750(2); IND. CODE § 35-42-4-4(a)(4); MINN. STAT. § 617.246(e)(4); MISS. CODE ANN. § 97-5-31(b)(v); MO. REV. STAT. § 573.010(21)(e); NEV. REV. STAT. § 200.700(3); N.Y. PENAL LAW § 263.00(3); N.C. GEN. STAT. § 14-190.13(5)(g); R.I. GEN. LAWS § 11-9-1.3(c)(6)(5); WYO. STAT. ANN. § 6-4-303(a)(iii).

¹⁶² ALASKA STAT. § 11.41.455(a)(6); FLA. STAT. § 827.071(1)(h); MINN. STAT. § 617.246(e)(4); NEV. REV. STAT. § 200.700(3); N.Y. PENAL LAW § 263.00(3).

¹⁶³ See *Schmitt v. State*, 590 So. 2d 404, 410 (Fla. 1991); *Rhoden v. Morgan*, 863 F. Supp. 612, 618 (M.D. Tenn. 1994).

¹⁶⁴ R.I. GEN. LAWS § 11-9-1.3(c)(6)(5).

¹⁶⁵ IND. CODE § 35-42-4-4(a)(4).

¹⁶⁶ *Logan v. State*, 836 N.E.2d 467, 473 (Ind. Ct. App. 2005) (citing *New York v. Ferber*, 458 U.S. 747, 765, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982)).

female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering . . . ,” where such showing would be obscene.¹⁶⁷ North Carolina similarly prohibits the obscene showing of “uncovered, or less than opaquely covered, human genitals, pubic area, or buttocks, or the nipple or any portion of the areola of the human female breast.”¹⁶⁸

The question of whether nudity is required has led to different results. For example, Florida specifically disagrees with the federal and military interpretation in *Knox* that nudity is not required for a “lascivious exhibition.”¹⁶⁹

2. States That Apply the Obscenity Standard

Despite the clear holding in *Ferber* that child pornography need not meet the requirements of obscenity to be properly prohibited by a jurisdiction, four states continue to employ the obscenity standard when defining child pornography. Those are Alabama, Georgia, New Mexico, and South Carolina.¹⁷⁰ It is unclear why they apply the obscenity standard, particularly because their definitions otherwise appear similar to the federal definition.¹⁷¹ While there are interesting aspects to each of the state’s definitions, because their interpretations apply the higher obscenity standard, and do not interpret the concept of child pornography under *Ferber*, they are not helpful to this discussion.

B. States That Define Child Pornography More Broadly Than the Federal Government

The remaining two-thirds of the states define child pornography more broadly than does the federal government. While they mirror the federal definition by utilizing some form of qualifier, such as lewd or lascivious, their definitions are broader because they allow for the depiction of body parts other than the genitalia and pubic area, such as the female breast. These can be broken down to five separate categories: (1) Breast; (2) Buttocks, Rectal Area, or Anus; (3) Buttocks and Breast; (4) ‘Intimate Parts’; and (5) Nudity.

¹⁶⁷ CONN. GEN. STAT. § 53a-193(4).

¹⁶⁸ N.C. GEN. STAT. § 14-190.13(6).

¹⁶⁹ *Breeze v. State*, 634 So. 2d 689, 690-91 (Fla. Dist. Ct. App. 1st Dist. 1994).

¹⁷⁰ ALA. CODE §§ 13A-12-190(10)-(11); GA. CODE ANN. § 16-12-102(7); N.M. STAT. ANN. § 30-gA-2(A)(5); S.C. CODE ANN. § 16-15-375(6).

¹⁷¹ *Id.*

1. States that Include Images of the Breast

Five states fall within this first category: Arkansas, Colorado, Idaho, Maryland, and Nebraska.¹⁷² A number of these states include additional limiting language beyond mere lasciviousness to ensure that the statutes pass constitutional muster. For instance, Colorado requires that the depiction be “for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.”¹⁷³ This limitation ensures that “the statute does not reach constitutionally protected materials depicting nude children for family, educational, medical, artistic, or other legitimate purposes.”¹⁷⁴ Further, it “provides citizens with a specific warning of what conduct is prohibited and ensures protection from arbitrary or discriminatory enforcement of the statute.”¹⁷⁵ Idaho has identical language, and its statute was found to be constitutional.¹⁷⁶

Each of these states also has a unique requirement for how the breast must be depicted. For example, Maryland requires that the “human female breasts” be in a “state of sexual stimulation.”¹⁷⁷ Colorado, Idaho, and Nebraska all define it as including the “undeveloped” or “developing” female breast, while Arkansas refers to it simply as the female breast.¹⁷⁸ Importantly, the depiction of a female breast by itself, so long as it meets the lewd/lascivious standard, is sufficient on its own to constitute child pornography in these states.¹⁷⁹

2. States That Include Images of the Buttocks, Rectal Areas, or Anus

The following eight states include within their definition of child pornography, a depiction of either the buttocks, rectal area, or anus of the minor: Arizona, California, Louisiana, Maine, Michigan, New Hampshire, Vermont, and West Virginia.¹⁸⁰ While not directly confronted with the question of whether a

¹⁷² ARK. CODE ANN. § 5-27-601(15)(F); COLO. REV. STAT. § 18-6-403(2)(d); IDAHO CODE ANN. § 18-1507(1)(d); MD. CODE ANN. CRIM. LAW § 11-101(e); NEB. REV. STAT. § 28-1463.02(3).

¹⁷³ COLO. REV. STAT. § 18-6-403(2)(d).

¹⁷⁴ *People v. Batchelor*, 800 P.2d 599, 602 (Colo. 1990).

¹⁷⁵ *Id.* at 603.

¹⁷⁶ *State v. Morton*, 140 Idaho 235, 238, 91 P.3d 1139, 1142 (Idaho 2004).

¹⁷⁷ MD. CODE ANN. CRIM. LAW § 11-101(e)(2). There is no additional description for what this term means.

¹⁷⁸ ARK. CODE ANN. § 5-27-601(15)(F); COLO. REV. STAT. § 18-6-403(2)(d); IDAHO CODE ANN. § 18-1507(1)(d); NEB. REV. STAT. § 28-1463.02(3).

¹⁷⁹ *See Cummings v. State*, 353 Ark. 618, 630, 110 S.W.3d 272, 279 (Ark. 2003) (conviction upheld for image depicting only the female breast).

¹⁸⁰ ARIZ. REV. STAT. § 13-3551(5) (rectal area); CAL. PENAL CODE § 311.4(d)(1) (rectal area), LA. REV. STAT. ANN. § 14:81.1(10) (anus); ME. REV. STAT. tit. 17-A, § 281(4)(E) (anus); MICH. COMP. LAWS § 750.145c(h) (rectal area); N.H. LAWS § 649-A:2(III)

depiction of the buttocks, anus, or rectal area by itself can satisfy the constitutional concept of child pornography, a number of these statutes have been explicitly upheld as constitutional.¹⁸¹

The most interesting jurisdiction out of this group is West Virginia. In addition to expanding the federal definition to include the rectal area, West Virginia also apparently prohibits the possession of child erotica.¹⁸² It defines child erotica as “visual portrayals of minors who are partially clothed, where the visual portrayals are: (1) unrelated to the sale of a commercially available legal product; and (2) used for purely prurient purposes.”¹⁸³ While there are no cases directly interpreting this language, it is possible that the inclusion of the term “prurient” might require an obscenity analysis. In addition, there is currently draft legislation in West Virginia that would redefine child erotica as:

Any material relating to minors that serves a sexual purpose for a given individual, to include nonnude or seminude photographs and videos of minors in sexually suggestive poses modeling a variety of clothing types such as dresses, bikinis, nightgowns or undergarments. Child erotica may also include, in addition to images, other materials that may cause sexual arousal, such as children’s diaries, drawings, underwear, letters and other similar items.¹⁸⁴

The law has not yet been enacted, and thus it is premature to analyze the effect that law may have on child pornography jurisprudence.

3. States that Include the Breast and Buttocks

Combining the requirements of the previous two sections, eleven states include images that depict either the female breast or the buttocks: Illinois, Kentucky, Massachusetts, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, Virginia, and Washington.¹⁸⁵

(buttocks); VT. STAT. ANN. tit. 13, § 2827(a) (anus); W. VA. CODE § 61-8C-1(c)(10) (rectal area).

¹⁸¹ See *State v. Limpus*, 128 Ariz. 371, 625 P.2d 960 (Ariz. 1981); *State v. Hazlett*, 205 Ariz. 523, 73 P.3d 1258 (Ariz. 2003); *People v. Riggs*, 237 Mich. App. 584, 604 N.W.2d 68 (Mich. Ct. App. 1999).

¹⁸² W. VA. CODE § 61-8C-3a (entitled Prohibiting child erotica; penalties).

¹⁸³ *Id.*

¹⁸⁴ H.B. 2195, 81ST LEG. 1ST SESS. (W. Va. 2013).

¹⁸⁵ 720 ILL. COMP. STAT. 5/11-20.1(a)(1)(vii); KY. REV. STAT. ANN. § 531.300(4)(d), MASS. GEN. LAWS ch. 272, § 29C(vii); N.D. CENT. CODE § 12.1-27.2-01(4); OKL. STAT. tit. 21, § 1024.1(A); S.D. CODIFIED LAWS § 22-24A-2(16); TENN. CODE ANN. § 39-17-1002(8)(G); TEX. PENAL CODE ANN. § 43.25(a)(2); UTAH CODE ANN. § 76-5b-103(10)(e); VA. CODE ANN. § 18.2-390(2); WASH. REV. CODE § 9.68A.011(4)(f).

Utah has chosen to define child pornography in two nearly identical manners. First, it defines it as a “lascivious exhibition of the genitals, pubic region, buttocks, or female breast of any person.”¹⁸⁶ Second, it defines it as “the visual depiction of nudity or partial nudity for the purpose of causing sexual arousal of any person.”¹⁸⁷ However, nudity is defined as “any state of undress in which the human genitals, pubic region, buttocks, or the female breast, at a point below the top of the areola, is less than completely and opaquely covered.”¹⁸⁸ The similarity between the definitions makes the practical difference unclear. Arguably, the former is an objective standard based solely on the image itself, while the latter is a subjective standard based on the intended effect on either the viewer, producer, or victim.

4. States That Include “Intimate Parts”

The following three states define child pornography even more broadly, utilizing the generic phrase ‘intimate parts’ to define what body parts must be depicted within the image: Montana, Oregon, and Wisconsin.¹⁸⁹ Wisconsin defines child pornography exclusively as a “[l]ewd exhibition of intimate parts,” while Oregon utilizes “[l]ewd exhibition of sexual or other intimate parts,” and Montana merely adds the term to a list including the “lewd exhibition of the genitals, breasts, pubic or rectal area, or other intimate parts of any person.”¹⁹⁰

In Wisconsin, the term “intimate parts” is statutorily defined as: “the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.”¹⁹¹ Oregon has similarly limited the reach of what it might encompass with the following language:

The phrase “sexual or other intimate parts” is not defined in statute, and this court has stated that the phrase includes genitals and breasts, as well as parts that are “subjectively intimate to the person touched, and either known by the accused to be so or to be an area of the anatomy that would be objectively known to be intimate by any reasonable person.”¹⁹²

¹⁸⁶ UTAH CODE ANN. § 76-5b-103(10)(e).

¹⁸⁷ UTAH CODE ANN. § 76-5b-103(10)(f).

¹⁸⁸ UTAH CODE ANN. § 76-5b-103(8).

¹⁸⁹ MONT. CODE ANN. § 45-5-625(5)(b)(i)(G); OR. REV. STAT. § 163.665(3)(f); WIS. STAT. § 948.01(7)(e).

¹⁹⁰ *Id.*

¹⁹¹ WIS. STAT. § 939.22(19).

¹⁹² *State v. Rodriguez*, 347 Ore. 46, 69 n. 12, 217 P.3d 659 (Or. 2009) (citing *State v. Woodley*, 306 Ore. 458, 463, 760 P.2d 884 (1998)).

While Montana does not provide as detailed a definition as Oregon, its supreme court noted that the term “intimate parts” can include “the buttocks, the hips, and the prepubescent chest of a seven year old girl.”¹⁹³

5. States That Define Child Pornography as Nudity

The final category includes the following six states that define child pornography using the broad term “nudity”: Delaware, Iowa, Kansas, New Jersey, Ohio, and Pennsylvania.¹⁹⁴ Nonetheless, all but one of these states statutorily require that the nudity be “for the purpose of sexual stimulation or gratification of any person,” or other similar language.¹⁹⁵

Ohio does not statutorily limit the definition of nudity; however, the interpretation and application of that term led to one of the most critical Supreme Court cases involving child pornography, *Osborne v. Ohio*.¹⁹⁶ In upholding the constitutionality of Ohio’s prohibition of “nude” images of minors, the Supreme Court adopted the Ohio Supreme Court’s interpretation and narrowing of that statutory term with the following definition:

[T]he possession or viewing of material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged.¹⁹⁷

The Supreme Court noted that “[b]y limiting the statute’s operation in this manner, the Ohio Supreme Court avoided penalizing persons for viewing or

¹⁹³ *State v. Weese*, 189 Mont. 464, 468, 616 P.2d 371 (Mont. 1980).

¹⁹⁴ DEL. CODE ANN. tit. 11, § 1100(7)(i); IOWA CODE § 728.1 (7)(g) (2013); KAN. STAT. ANN. § 21-5510 (2013); N.J. STAT. ANN. § 2C:24-4(b)(1); OHIO REV. CODE ANN. § 2907.323; 18 PA. CONS. STAT. § 6312(g).

¹⁹⁵ DEL. CODE ANN. tit. 11, § 1100(7)(i) (“Nudity, if such nudity is to be depicted for the purpose of the sexual stimulation or the sexual gratification of any individual who may view such depiction.”); IOWA CODE § 728.1 (7)(g) (“Nudity of a minor for the purpose of arousing or satisfying the sexual desires of a person who may view a visual depiction of the nude minor.”); KAN. STAT. ANN. § 21-5510(a)(2) (requiring that the image depict “sexually explicit conduct” (which includes nudity) “with intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the offender or any other person.”); N.J. STAT. ANN. § 2C:24-4(b)(1) (“Nudity, if depicted for the purpose of sexual stimulation or gratification of any person who may view such depiction.”); 18 PA. CONS. STAT. § 6312(g) (“[N]udity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction.”).

¹⁹⁶ *Osborne v. Ohio*, 495 U.S. 103 (1990). The decision in *Osborne* is addressed in more depth in Section VII.

¹⁹⁷ *Osborne*, 495 U.S. at 112-13 (quoting *State v. Young*, 37 Ohio St. 3d 249, 252, 525 N.E.2d 1363 (Ohio 1988)).

possessing innocuous photographs of naked children.”¹⁹⁸ In essence, as interpreted, the Ohio definition effectively mirrored the federal definition.

One intriguing aspect of *Osborne* is the Supreme Court’s apparent misinterpretation of the Ohio Supreme Court’s elucidation that the “lewd exhibition” actually depicts the genitalia.¹⁹⁹ However, later case law interpreting the Ohio Supreme Court’s reading have held that the disjunctive “or” between a “lewd exhibition” and a “graphic focus on the genitals” was intentional, and therefore a “lewd exhibition” of nudity need not focus on or depict the genitalia.²⁰⁰ Even with this disjunctive reading, Ohio courts have continuously held that both terms are neither constitutionally vague nor overbroad.²⁰¹

Beyond Ohio, other states have consistently upheld statutes that define child pornography merely as nudity. The Supreme Court of Iowa rejected a vagueness challenge of its statute in *State v. Hunter*.²⁰² It noted that “[t]he common meaning of the word ‘nudity’ includes exposure of the breasts, buttocks or genitalia.”²⁰³ It also found that the limiting phrase “for the purpose of sexual stimulation of the viewer” would “allow[] for the general public and those enforcing the statute to distinguish between prohibited conduct and protected expression.”²⁰⁴

Kansas focuses on the means of taking an image, as opposed to what it depicts, to define nudity. The Kansas Supreme Court noted that “[i]t is clearly necessary that the child must have some understanding or at least be of an age where there could be some knowledge that they are exhibiting their nude bodies in a sexually explicit manner.”²⁰⁵ In upholding the constitutionality of the statute, the court provided this required interpretation:

We construe the language to apply only to those situations when a child has been employed, used, persuaded, induced, enticed, or coerced into the nude display of the statutorily defined areas while engaging in sexually explicit conduct, also as statutorily defined, for purposes of appealing to the sexual desires or the

¹⁹⁸ *Id.* at 113-14.

¹⁹⁹ *See id.* at 129 n.4 (Brennan, J., dissenting).

²⁰⁰ *See State v. McDonald*, No. CA2008-05-045, 2009 Ohio App. LEXIS 1019 at *17-19 (Ohio Ct. App., Clermont County Mar. 16, 2009) (including citations to cases where convictions for images which did not depict the genitalia were affirmed); *United States v. McGrattan*, 504 F.3d 608, 613-15 (6th Cir. 2007) (confirming interpretation that nudity must be either by a “lewd exhibition” or a “graphic focus on the genitals”).

²⁰¹ *State v. Gann*, 154 Ohio App. 3d 170, 176, 796 N.E.2d 942 (Ohio Ct. App. 2003).

²⁰² *State v. Hunter*, 550 N.W.2d 460, 467 (Iowa 1996), *overruled on other grounds by State v. Robinson*, 618 N.W.2d 306 (Iowa 2000).

²⁰³ *Hunter*, 550 N.W.2d at 465 (citing *Wright v. Town of Huxley*, 249 N.W.2d 672, 678 (Iowa 1977), *State v. Salata*, 859 S.W.2d 728, 733-36 (Mo. App. 1993)).

²⁰⁴ *Id.* at 465.

²⁰⁵ *State v. Zabrin*, 271 Kan. 422, 431, 24 P.3d 77 (Kan. 2001).

prurient interest of the offender, the child, or another. The statute prohibits anyone from possessing a visual depiction of a child engaged in this type of conduct. The phrase “exhibition in the nude” does not make the statute unconstitutionally overbroad.²⁰⁶

The Court’s finding in *State v. Liebau*²⁰⁷ emphasizes the strictness of the requirement. “Clearly, a sixteen-year-old girl, unaware that she is being videotaped in the nude while using the bathroom, cannot be said to be engaging in sexually explicit conduct or an exhibition of nudity.”²⁰⁸

C. Summary

Two-thirds of all states (thirty-three) utilize a definition of child pornography that is broader than the federal limitation on the “genitalia or pubic area.” These range from the inclusion of a single body part or multiple additional body parts (i.e., breast, buttocks, etc.), to the generic “intimate parts,” to merely requiring “nudity” so long as it meets a required limiting definition. Importantly, none of these state statutes has been declared unconstitutional for including parts of the body not within the federal definition.

VI. The Concern with Child Erotica

The issue posed at the beginning of this article concerned the inability to prosecute servicemembers who possessed images of minors that do not meet the federal definition of child pornography. Having established now what constitutes child pornography under military, federal, and state law, and why it is prohibited, two important questions remain: (1) how to define those images that do not meet the military’s definition of child pornography yet should still be prohibited; and (2) why should those images be prohibited?

A. Defining Child Erotica

The colloquial term for offensive images of minors that are not technically child pornography is “child erotica.” However, the term itself is not overly precise. To begin with, there is no legal definition of “child erotica.” For instance, the Third Circuit defined “child erotica” 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. §

²⁰⁶ *Zabrinas*, 271 Kan. at 432.

²⁰⁷ *State v. Liebau*, 31 Kan. App. 2d 501, 67 P.3d 156 (Kan. Ct. App. 2003).

²⁰⁸ *Id.* at 505.

2256.”²⁰⁹ The Ninth Circuit referred to a definition from an FBI affidavit that defined child erotica as “images that are not themselves child pornography but still fuel their sexual fantasies involving children.”²¹⁰

Mr. Kenneth Lanning, a retired FBI agent who “has been involved in the professional study of the criminal aspects of deviant sexual behavior since 1973,”²¹¹ originally defined “child erotica” as “any material, relating to children, that serves a sexual purpose for a given individual.”²¹² He included “things such as fantasy writings, letters, diaries, books, sexual aids, souvenirs, toys, costumes, drawings, and nonsexually explicit images.”²¹³ Mr. Lanning recognizes, however, that “[m]any investigators eventually began using the term child erotica to refer only to visual images of naked children that were not legally considered child pornography.”²¹⁴ Mr. Lanning disagrees with this limited use of the term because his “definition includes many materials that are not images at all.”²¹⁵ However, whether other items of a sexual nature involving children, such as fantasy writings or sexual aids, may appropriately be prohibited, is outside the scope of this article.

A useful tool for categorizing and defining child erotica images that should be prohibited similar to child pornography comes from the Combating Paedophile Information Networks in Europe (COPINE) Project.²¹⁶ This Project created a ten

²⁰⁹ United States v. Vosburgh, 602 F.3d 512, 520 n.7 (3rd Cir. 2010).

²¹⁰ United States v. Gourde, 440 F.3d 1065, 1068 (9th Cir. 2006).

²¹¹ Lanning, *supra* note 49, at v.

²¹² *Id.* at 85 (citing Kenneth V. Lanning, *Child Molesters: A Behavioral Analysis*, 84 (1st ed. 1986)).

²¹³ *Id.* at 85.

²¹⁴ *Id.* at 85; *see also* Mary G. Leary, *Death to Child Erotica: How Mislabeled Evidence can Risk Inaccuracy in the Courtroom*, 16 *Cardozo J.L. & Gender* 1, 1 (2009) (“Child Erotica is a term currently used to describe images and materials which can sexually exploit children, but do not fit the legal definition of ‘child pornography’ or ‘child abuse images.’”).

²¹⁵ Lanning, *supra*, note 49, at 85.

²¹⁶ “The Combating Paedophile Information Networks in Europe (COPINE) Project was founded in 1997, and is based in the Department of Applied Psychology, University College Cork, Ireland. The Project emerged out of the Child Studies Unit (CSU), which was created to explore and contribute to the development of facilities for street children and other disadvantaged children[.]” <http://web.archive.org/web/20071129133102/http://copine.ie/background.php> (accessed through wikipedia.org). “The COPINE Project is a unique academic initiative, applying Forensic and Clinical Psychology to the analysis of vulnerabilities for children related to the Internet. The initial focus of the Project related to sexual exploitation of children through the Internet, which finds expression in child pornography.” *Id.*

–level scale to classify images of children, with one being the most innocent and ten being the most extreme.²¹⁷

Reviewing the COPINE scale at Appendix C, we find that level six correlates to images that depict a “lascivious exhibition of the genitals or pubic area of any person” similar to the terms used under current military and federal law.²¹⁸ Levels seven through ten would each likely fit within the remaining definitions of child pornography under military and federal law as well.²¹⁹ Levels one through five describe images that under current military law would likely be considered child erotica, and would not likely be prohibited under military or federal law because they do not require the depiction of the genitalia or an actual sexual act. While the law does not currently criminalize all of the images described in levels one through five, a percentage would fit the concept of child erotica that should be banned.

Initially, it must be recalled that for images to survive constitutional challenge as child pornography they must be either lewd or lascivious, evaluated by utilizing the *Dost* factors under the totality of the circumstances. Levels one and two would clearly fail to meet the *Dost* standard, and are in fact generally used as examples of what types of images are protected by the Constitution.²²⁰ Level three images pose a particular problem, in that they likely do not meet the requirements for lewdness since they “may be indistinguishable from legitimate family photographs”; however, “they can be argued to represent a very serious example of sexual victimization through photography . . . because they sexualize situations that should be safe and secure environments in which children can play.”²²¹ These images would be lewd not based on the image itself, but based solely on the intent of the photographer, which is a contentious legal issue.²²²

The clearest example of images that should be prohibited are levels four and five. While they do not depict the genitalia or pubic region, the requirement that there be a sexual component to the posed image takes them out of the category of innocuous images or mere nudity. More than likely, the images catalogued in these levels would most closely conform to those described by Mr. Lanning and the limited case law interpreting child erotica.

By combining the various definitions and descriptors of child erotica that have been used, a single encompassing definition emerges: images of minors in

²¹⁷ Taylor, *supra* note 52, at 32; Wortley, *supra* note 14, at 8; Akdeniz, *supra* note 160, at 69. This scale has been adopted in most respects by courts throughout Europe. Akdeniz, *supra* note 160, at 71. The scale is reproduced *infra* at Appendix C.

²¹⁸ MCM, pt. IV, ¶ 68b.c.(7)(e).

²¹⁹ MCM, pt. IV, ¶ 68b.c.(7)(a)-(d).

²²⁰ *Massachusetts v. Oakes*, 491 U.S. 576, 588-90, 109 S. Ct. 2633, 105 L. Ed. 2d 493 (1989) (Scalia, J., concurring in the judgment in part and dissenting in part).

²²¹ Taylor, *supra* note 52, at 35.

²²² *See supra*, Section IV.B.

various stages of undress which depict them as sexual objects in sexualized or provocative poses, or which suggest a sexual interest, that serve a sexual purpose or fuel a sexual fantasy for a given individual, but do not meet the technical definition of child pornography.

B. The Purpose of Prohibiting Child Erotica

The military should expand its definition of child pornography to encompass images of child erotica for two reasons: (1) child erotica is prevalent throughout society and is commonly located within child pornography collections; and (2) the policies that underlie the prohibition of child pornography apply equally to child erotica.

It is undeniable that child erotica exists and is a problem. Recently, a teacher at a Florida church school was forced to retire after over forty years of teaching when it was discovered he used a school computer to view images of “young girls posing provocatively in underwear and bathing suits.”²²³ No charges were filed because police determined that he merely viewed “child erotica,” not child pornography.²²⁴

Studies directly cataloging the prevalence of child erotica in child pornography collections are lacking. This is likely because “[w]hen the significance of a photograph is determined by legal definitions, necessarily photographs that fall outside that definition tend either to be ignored or not evaluated because they may be seen as secondary or incidental to the main focus of prosecution.”²²⁵ However, there is information that tends to support the position that images of child erotica are more than a *de minimus* problem.

One study has shown that, in the years 2000 and 2006, 79% and 82%, respectively, of child pornography collections that had been seized and surveyed included images of “nudity or seminudity, but not graphic,” which arguably refer to child erotica.²²⁶ Another study had similar numbers, showing that 73% of people arrested for producing child pornography possessed “nude or seminude,

²²³ Adam Sacasa & Brett Clarkson, *Teacher Escapes Prosecution After Viewing Child Erotica*, Sun Sentinel (Mar. 19, 2013), http://articles.sun-sentinel.com/2013-03-19/news/fl-delray-child-erotica-20130319_1_school-computer-child-abuse-unit-riggs.

²²⁴ *Id.*

²²⁵ Max Taylor, Gemma Holland & Ethel Quayle, *Typology of Paedophile Picture Collections*, 74 *Police J.* 97, 99 (2001), http://www.popcenter.org/problems/child_pornography/pdfs/taylor_etal_2001.pdf.

²²⁶ Janis Wolak, David Finkelhor, & Kimberly Mitchell, *Child Pornography Possessors: Trends in Offender and Case Characteristics*, 23 *Sexual Abuse: A Journal of Research and Treatment* 22, 31 (2011).

not graphic images,” and 79% of people arrested for possession had “nude or seminude, not graphic images.”²²⁷

Surveys of the COPINE collection establish that while most images fall within level six (the analogous definition to a “lascivious exhibition of the genitals or pubic area”), a good portion of the images would fall within levels four and five.²²⁸ Further, the rationale of various U.S. Attorneys declining to prosecute referred child pornography cases between 1992 and 2000 was that in 280 cases, which represented 11.5% of the cases not prosecuted, there was “no federal offense evident.”²²⁹ This rationale suggests that the images in question in at least some of those cases did not meet the federal definition of child pornography.

Beyond statistics and studies, recent military case law highlights the likely prevalence of child erotica in the military. In several cases, the evidence made clear that accused servicemembers possessed a large number of images of child erotica, either alone or in conjunction with actual child pornography.²³⁰ It is therefore highly likely that any military justice practitioner dealing with an accused possessing a child pornography collection will be confronted with images of child erotica, or may even confront persons possessing only child erotica.

The policies supporting the prohibition of child pornography have already been discussed in depth. The key justification is the protection of children from sexual exploitation. To say that child erotica does not involve these same interests is to say that harm only flows from the depiction of the genitalia or pubic area. If the underlying concept behind the prohibition of child pornography is truly the protection of children, why would the genitalia or pubic area be the *sine quo non* of injury?

Imagine, for example, a pedophile forces a minor girl to pose naked for him while he takes pictures of her. He forces her to portray herself in various poses,

²²⁷ Wortley, *supra* note 14, at 32 (citing Janis Wolak, David Finkelhor, & Kimberley J. Mitchell, *The Varieties of Child Pornography Production*, in MAX TAYLOR & ETHEL QUAYLE, VIEWING CHILD PORNOGRAPHY ON THE INTERNET: UNDERSTANDING THE OFFENCE, MANAGING THE OFFENDER, HELPING THE VICTIMS 31-48 (2005); Janis Wolak, David Finkelhor, & Kimberley J. Mitchell, *Child Pornography Possessors Arrested in Internet-Related Crimes: Findings from the National Juvenile Online Victimization Study*, NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN (2005), http://www.missingkids.com/en_US/publications/NC144.pdf).

²²⁸ Taylor, *supra* note 52, at 36.

²²⁹ Akdeniz, *supra* note 160, at 135.

²³⁰ *United States v. Barberi*, 71 M.J. 127, 129 (C.A.A.F. 2012) (four of six images did not meet the federal definition); *United States v. Warner*, 73 M.J. 1 (C.A.A.F. 2013) (twenty images); *United States v. Moon*, 73 M.J. 382 (C.A.A.F. 2014); *United States v. Lang*, No. 20140083, 2014 CCA Lexis 844 (A. Ct. Crim. App. Oct. 31, 2014) (unpublished); *United States v. Rapp*, No. 201200303, 2013 CCA Lexis 355 (N.M. Ct. Crim. App. Apr. 30, 2013) (six of sixteen images did not depict child pornography).

for a number of hours. He takes a total of 100 images of her, and uploads them all to a peer-to-peer network utilized by scores of additional pedophiles, all of whom take those 100 images and spread them further throughout the Internet. However, none of the first ninety-nine photos taken depict or focus on the genitalia or pubic area—it is not until the final, 100th photo that the pedophile includes her genitalia in the image. Where the purpose behind criminalizing child pornography is based almost exclusively on the protection of the minor victim, can it truly be said that the first ninety-nine photos circulating throughout the internet do not harm the minor girl? Is it really only the single image that has harmed her?

C. Summary

The term child erotica encompasses generally those sexualized images of minors that do not meet the technical definition of child pornography. These types of images are prevalent throughout society, and are routinely discovered in the child pornography collections seized in criminal investigations. These images harm children in the same manner that “technical” child pornography would. Just as it is imperative for the military to prohibit child pornography, it is equally imperative that it prohibit child erotica as defined herein.

VII. The Military Should Amend Its Definition of Child Pornography to Include Depictions of Child Erotica

As previously discussed,²³¹ the military defines child pornography under Article 134, Uniform Code of Military Justice,²³² in part, as “material that contains . . . a visual depiction of an actual minor engaging in sexually explicit conduct.”²³³ “Sexually explicit conduct” is further defined, in relevant part, to include a “lascivious exhibition of the genitals or pubic area of any person.”²³⁴ In order to ensure that servicemembers may appropriately be charged with possessing images of child erotica, this portion of the definition of child pornography should be amended to remove the requirement that the images depict the genitals or pubic area.

²³¹ See *supra*, Section III.

²³² UCMJ, art. 134.

²³³ MCM, pt. IV, ¶ 68b.c.(1) (2012).

²³⁴ MCM, pt. IV, ¶ 68b.c.(7)(e). “Sexually explicit conduct” also includes images which depict “actual or simulated . . . sexual intercourse or sodomy[,] . . . bestiality[,] . . . masturbation[,] . . . [or] sadistic or masochistic abuse” *Id.* at ¶¶ 68b.c(7)(a)–(d). Because these definitions encompass depictions of actual sexual acts, as opposed to posed pictures, they are not relevant to the subject of this paper.

Rather than listing specific body parts that must be depicted, subsection (e) of the definition of sexually explicit conduct should be amended to read “lewd visual depiction of a minor.”²³⁵ The term lewd should be further defined within the offense as follows:

“Lewd Depiction.” Whether a particular image constitutes a lewd visual depiction of a minor is based on a consideration of the totality of the circumstances. Non-dispositive factors to be considered include, but are not limited to:

- (a) whether the focal point of the visual depiction is on the child’s intimate parts;
- (b) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
- (c) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
- (d) whether the child is fully or partially clothed, or nude;
- (e) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; or
- (f) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

By defining sexually explicit conduct utilizing only the term lewd, as opposed to requiring an actual depiction of the genitalia or pubic region, child pornography will encompass a broader set of offensive images of minors. In actuality, the proposed definition would be interpreted no differently than the current definition; the only change is that the requirement for the genitalia or pubic area has been removed. The newly defined term, lewd, incorporates the six factors announced in *United States v. Dost* to define “lascivious exhibition of the genitals,”²³⁶ and further includes the military’s consideration of the “totality of the circumstances” to determine whether an image depicts a lascivious exhibition.²³⁷

²³⁵ See *Infra* Appendix A for the draft text.

²³⁶ *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff’d sub nom.* *United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987). Every federal court to consider the issue has universally adopted these factors. *United States v. Roderick*, 62 M.J. 425, 429 (C.A.A.F. 2006).

²³⁷ *Roderick*, 62 M.J. at 430. As the court in *Roderick* noted, “several of the federal circuit courts have recognized that ‘although *Dost* provides some specific, workable criteria, there may be other factors that are equally if not more important in determining whether a photograph contains a lascivious exhibition.’” *Id.* at 429-30 (quoting *United States v. Amirault*, 173 F.3d 28, 32 (1st Cir. 1999); see also *United States v. Campbell*, 81 F. App. 532, 536 (6th Cir. 2003); *United States v. Knox*, 32 F.3d 733, 747 (3d Cir. 1994)).

While these factors have been used to define the term lascivious, courts have routinely found that the term lascivious is a synonym for lewd.²³⁸ The term lewd, rather than lascivious, is used in the amended definition to avoid confusion regarding whether the genitalia or pubic region is a required component.²³⁹

Utilizing only the term lewd, as opposed to merely expanding the body parts listed beyond the genitalia or pubic area (as many states do),²⁴⁰ ensures that images which could potentially be considered lewd, but do not necessarily focus on any particular body part, could still be prohibited. Inevitably, if the military were to adopt a definition merely expanding the list of body parts, future cases will focus on what constitutes the “buttocks,” or “bare female breast.” Is a complete depiction of the buttocks or breast required? If a partial depiction is acceptable, what percentage must be depicted? Invariably, by defining child pornography utilizing too strict of a requirement, the military will inadvertently exclude images that rightfully should be prohibited. This is what it has already been done by limiting depictions to those displaying the genitalia or pubic area; it should not be repeated.

Additionally, the proposed definition amends the *Dost* factors by broadening the second factor to include intimate parts, as a number of states do. Because intimate parts would generally be associated with the sexual organs and private parts of an individual, the depiction of those areas would tend to have a sexual component and likely victimize the minor portrayed. By choosing not to limit the consideration to specifically listed body parts, courts will be free to evaluate images based on the totality of the circumstances, rather than with anatomical precision.

Furthermore, addressing the issues of *Blouin* and *Knox*, nudity is explicitly not required under the definition, but is merely one of the factors to consider in determining whether the image is lewd. Nudity is obviously an important factor, however, as it is less likely that an image would be lewd if it did not include nudity. In all likelihood, in cases that do not involve nudity, the type of clothing worn is going to be the key determinant. For example, an image of a seventeen year-old girl posed seductively in jeans and a tank top is far different from an image of a nine year-old girl in a G-string and bra.

²³⁸ *United States v. Gaskin*, 12 U.S.C.M.A. 419, 421, 31 C.M.R. 5 (C.M.A. 1961) (“The term ‘lascivious’ is synonymous with ‘lewd’”); *United States v. Johnson*, 4 M.J. 770, 771 (A.C.M.R. 1978) (“The terms ‘indecent,’ ‘lewd,’ and ‘lascivious’ are synonymous and signify a form of immorality which has relation to sexual impurity.”).

²³⁹ Because the term “lascivious exhibition” has for so long included the requirement of the genitalia or pubic area, it is conceivable that courts would read the former requirement in to the new definition by mistake, thus defeating the purpose of amending the definition.

²⁴⁰ See discussion, *supra* at Section V.

The exclusion of the term child erotica is intentional. As discussed, the term has varying meanings and has been interpreted in different ways by courts and commentators. One commentator has noted three concerns with utilizing the term: (1) it “incorrectly suggests an artistic reference”; (2) it “suggests an artistic or social *value* to the material which is not present”; and (3) it has been used too broadly by courts, referring to a “very diverse collection of materials and objects.”²⁴¹ While the proposed definition is intended to, and does, encompass images of child erotica, the terminology utilized is intended to more closely align with the former definition for ease of judicial interpretation. Arguably, all previous case law interpreting lascivious exhibition will remain good law, except insofar as such law requires a depiction of the genitalia or pubic area.

This broader definition of child pornography accomplishes a number of things. It eliminates the requirement that an image depict the actual genitalia or pubic region, ensuring that possession of images that depict the breast of a female minor or the buttocks of a male minor could rightfully be prosecuted, assuming that the image meets the standards articulated for lewdness. This definition provides the greatest flexibility to trial counsel in determining what charges to file, and leaves to the sound discretion of the courts and finders of fact the interpretation and application of the rule to specific images in question.

There are three primary constitutional arguments that could be made against the recommended definition: (1) The images at issue are constitutionally protected; thus, the definition violates the First Amendment; (2) The definition is overbroad; and (3) The definition is void-for-vagueness. Each of these arguments will be addressed in turn.

A. The Term “Lewd Visual Depiction of a Minor” Does Not Violate the First Amendment’s Protection of Freedom of Speech.

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”²⁴² This generally means that “the First Amendment bars the government from dictating what we see or read or speak or hear.”²⁴³ However, “[t]he freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.”²⁴⁴ The question, however, is what

²⁴¹ Leary, *supra* note 214, at 2.

²⁴² U.S. CONST. amend. I.

²⁴³ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245, 122 S. Ct. 1389, 1399, 152 L. Ed. 2d 403, 418 (2002).

²⁴⁴ *Ashcroft*, 535 U.S. at 245-46 (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127, 116 L. Ed. 2d 476, 112 S. Ct. 501 (1991) (Kennedy, J., concurring)).

encompasses “pornography produced with real children” for constitutional purposes?

In *United States v. Barberi*,²⁴⁵ the CAAF addressed that particular question. In that case, the accused was charged, in part, with possession of child pornography in violation of Article 134, UCMJ.²⁴⁶ The charges stemmed from an investigation into allegations that the accused had abused his minor stepdaughter. Seized electronic media possessed by the accused contained images of his stepdaughter in “various stages of undress.”²⁴⁷ The accused had apparently taken the pictures himself.²⁴⁸ At trial, the government admitted six separate pictures of the stepdaughter as evidence of his possession of child pornography; however, four of the six images did not contain a depiction of her genitalia or pubic area.²⁴⁹ On appeal to the CAAF, the accused argued that the four images that did not depict the genitalia or pubic area were constitutionally protected speech.²⁵⁰

The CAAF began its analysis by agreeing with the ACCA that “[w]ithout an exhibition of the genitals or pubic area, the four images at issue do not fall within the definition of sexually explicit conduct and therefore do not constitute child pornography as defined by the CPPA and as instructed by the military judge in this case.”²⁵¹ It then began its constitutional analysis by quoting the general language from the Supreme Court concerning the categories of speech that fall outside of the protections of the First Amendment.²⁵² The court noted that “speech that falls outside of these categories retains First Amendment protection.”²⁵³

²⁴⁵ *United States v. Barberi*, 71 M.J. 127 (C.A.A.F. 2012).

²⁴⁶ *Barberi*, 71 M.J. at 128. While the accused was charged under Article 134, UCMJ, the definition for child pornography utilized by the military judge was derived from the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. §§ 2252A-2260 (1996). *Barberi*, 71 M.J. at 129-30. Relevant to the case, the definition was limited to a “lascivious exhibit of the genitals or pubic area.” *Barberi*, 71 M.J. at 130; *cf.* 18 U.S.C. §2256(2)(A).

²⁴⁷ *Barberi*, 71 M.J. at 129.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* The constitutionality of the four images was critical to the accused’s argument to the CAAF that the general verdict rule did not apply to his conviction because the court would be unable to determine whether he had been convicted based on constitutionally protected speech. *Barberi*, 71 M.J. at 129-32; *compare with* *Stromberg v. California*, 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931), *United States v. Rodriguez*, 66 M.J. 201 (C.A.A.F. 2008). Because the CAAF did find that the four images were constitutionally protected, the exception to the general verdict rule did apply, resulting in the dismissal of the findings as to the charge of possession of child pornography. *Barberi*, 71 M.J. at 132-33.

²⁵¹ *Barberi*, 71 M.J. at 130.

²⁵² *Id.*

²⁵³ *Id.* at 130 (citing *Ashcroft*, 535 U.S. at 245-46; *New York v. Ferber*, 458 U.S. 747, 765, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982)).

Based solely on this conclusory statement, the CAAF held that “[a]ccordingly, [the four images] constitute constitutionally protected speech, and [t]he Government may not suppress lawful speech as the means to suppress unlawful speech.”²⁵⁴ Based on this holding, any image of a minor, in various stages of undress, that does not meet the federal definition of child pornography (i.e., fails to depict the genitals or pubic area), is per se constitutionally protected speech.²⁵⁵

As previously discussed,²⁵⁶ despite *Piolumek* recently overruling *Barberi*, its holding concerning the constitutionality of images that do not meet the federal definition of child pornography survives. Therefore, the CAAF’s holding in *Barberi* would seem to render impossible any expansion of the definition of child pornography to eliminate the requirement that the genitalia or pubic area be a focal point. However, the CAAF’s conclusion in *Barberi* improperly conflates the federal definition of child pornography (which is identical to the military definition) with the constitutional definition of child pornography. This is its fundamental flaw, and is in direct contradiction to Supreme Court precedent.

The seminal case concerning the lack of constitutional protection for child pornography is *New York v. Ferber*.²⁵⁷ At issue in that case was the constitutionality under the First Amendment of Article 263 of New York’s Penal Law,²⁵⁸ which “prohibit[ed] the distribution of material depicting children engaged in sexual conduct without requiring that the material be legally obscene.”²⁵⁹ That statute, upheld as constitutional by the Supreme Court, defined child pornography as a “lewd exhibition of the genitals.”²⁶⁰

The Supreme Court began by analyzing the CAAF’s finding that the obscenity standard created in *Miller v. California*²⁶¹ was “the appropriate line

²⁵⁴ *Barberi*, 71 M.J. at 130-31 (quoting *Ashcroft*, 535 U.S. at 255).

²⁵⁵ At least two members of the CAAF agree that the decision in *Barberi* “presents us with a binary choice: either a given image depicts a ‘lascivious exhibition of the genitals or pubic area’ and is therefore child pornography, or that image is constitutionally protected under the First Amendment.” See *United States v. Moon*, 73 M.J. 382, 392 (C.A.A.F. 2014) (Ohlson, J. dissenting). As Chief Judge Baker noted in *Barberi* itself, the per se holding has eliminated any “middle ground.” *Barberi*, 71 M.J. at 135 (Baker, C.J., dissenting).

²⁵⁶ Tate, *Supra* note 13, at 34.

²⁵⁷ *New York v. Ferber*, 458 U.S. 747, 765, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982).

²⁵⁸ N.Y. PENAL LAW, § 263 (McKinney 1980).

²⁵⁹ *Ferber*, 458 U.S. at 749.

²⁶⁰ *Id.* at 751 (citing N.Y. PENAL LAW, §263.00(3)).

²⁶¹ *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). The *Miller* standard has set forth the following definitive definition of constitutionally proscribed obscenity, “works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.” *Miller*, 413 U.S. at 24.

dividing protected from unprotected expression by which to measure a regulation directed at child pornography.”²⁶² The Court noted that this case “constitutes our first examination of a statute directed at and limited to depictions of sexual activity involving children.”²⁶³

The *Miller* standard was intended to strike the appropriate balance between the state’s interest in protecting individuals from exposure to unwanted pornographic material, and “the dangers of censorship inherent in unabashedly content-based laws.”²⁶⁴ The Court recognized that child pornography laws could likewise “run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy.”²⁶⁵ However, the Court ultimately concluded that states should be afforded “greater leeway” in the proscription of child pornography in order to protect children.²⁶⁶

While the Court did not actually provide a definition of what constitutes child pornography for the loss of constitutional protections, it required that “the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed.”²⁶⁷ It did find that the New York statute was defined “with sufficient precision,” and in particular noted that “[t]he term ‘lewd exhibition of the genitals’ is not unknown in this area and, indeed, was given in *Miller* as an example of a permissible regulation.”²⁶⁸ The Court’s one limitation was reinforcing the principle that “nudity, without more, is protected expression.”²⁶⁹

Ferber therefore stands for the proposition that child pornography is a specific class of speech that does not receive First Amendment protection not because of the nature of what it depicts, but based on the harm that it has been shown to cause to children. While the Court did not present a comprehensive definition of child pornography, it concluded that a lewd or lascivious exhibition of the genitals or pubic area was sufficiently precise. But could a broader definition pass constitutional muster? That question was arguably answered eight years later.

In *Osborne v. Ohio*,²⁷⁰ the Supreme Court at least implicitly found that a definition broader than one limited to a depiction of the genitalia and pubic region

²⁶² *Ferber*, 458 U.S. at 753.

²⁶³ *Id.*

²⁶⁴ *Id.* at 756.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 764.

²⁶⁸ *Id.* at 765 (citing *Miller v. California*, 413 U.S. 15, 25, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973)).

²⁶⁹ *Ferber*, 458 U.S. at 765 n.18 (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975)).

²⁷⁰ *Osborne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1980).

is constitutionally permissible. In that case, the Court was confronted with an Ohio statute which, “on its face, purports to prohibit the possession of ‘nude’ photographs of minors.”²⁷¹ While noting that mere nudity is generally insufficient to survive constitutional challenge, the Court found there was no overbreadth concern due to the Ohio State Supreme Court’s interpretation of the statute to prohibit only “the possession or viewing of material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals”²⁷²

While this case again appears to turn on the presence of the genitalia in any depiction, the majority notes that “[they] do not agree that this distinction between body areas and specific body parts is constitutionally significant: The crucial question is whether the depiction is lewd, not whether the depiction happens to focus on the genitals or the buttocks.”²⁷³

While not the holding in the case, the majority dicta supports the proposition that for constitutional purposes, child pornography is not limited solely to images that depict the genitals or pubic areas of a minor. At least two current judges on the CAAF agree with this interpretation. In *United States v. Moon*,²⁷⁴ Judge Ohlson, joined by Chief Judge Baker in dissent, went through this same analysis of *Ferber* and *Osborne*, noting that “a plain reading of the Supreme Court’s decision in *Osborne* demonstrates that there are constitutionally acceptable definitions of child pornography that are broader than the definition used in the CPPA,”²⁷⁵ and that “the Supreme Court has not stated that the CPPA or the

²⁷¹ *Id.* at 112.

²⁷² *Id.* at 113-14 (quoting *State v. Young*, 37 Ohio St. 3d 249, 252, 525 N.E.2d 1363, 1368 (1988)).

²⁷³ *Osborne*, 495 U.S. at 114 n.11. The discussion was brought about by the dissent’s recognition that the Ohio State Supreme Court’s interpretation of the statute was written in the disjunctive, meaning that it could prohibit either a “graphic focus on the genitals” or a “lewd exhibition,” rather than a “lewd exhibition of the genitals.” *Osborne*, 495 U.S. at 129 (Brennan, J. dissenting). While noting that the genitalia is an irrelevant constitutional consideration, the majority nevertheless dismissed the dissent’s concern by interpreting the Ohio State Supreme Court’s decision as requiring a “lewd exhibition of the genitals.” *Osborne*, 495 U.S. at 114 n.11 (citing *State v. Young*, 37 Ohio St. 3d 249, 258, 525 N.E.2d 1363, 1373 (1988)). Interestingly, Ohio courts have actually interpreted the Ohio Supreme Court’s language in *State v. Young* to include either a “lewd exhibition” or a “graphic focus on the genitals,” not a “lewd exhibition of the genitals,” as the majority found. See *State v. McDonald*, No. CA2008-05-045, 2009 Ohio App. LEXIS 1019, at *17 (Ohio Ct. App. Mar. 16, 2009) (“[a] close reading of the decision in *Young* demonstrates that the nudity need only constitute a lewd exhibition *or* involve graphic focus on the genitals.”) (emphasis added); *State v. Graves*, 184 Ohio App. 3d 39, 42, 919 N.E. 2d 753, 755 (2009); *State v. Gann*, 154 Ohio App. 3d 170, 176, 796 N.E. 2d 942, 947 (2003).

²⁷⁴ *United States v. Moon*, 73 M.J. 382 (C.A.A.F. 2014).

²⁷⁵ *Id.* at 391 (Ohlson, dissenting).

CPPA's statutory definitions cover the entire field of images that may be criminalized as 'child pornography.'²⁷⁶

Consequently, the summary conclusion²⁷⁷ in *Barberi* that images that do not meet the federal definition of child pornography are constitutionally protected is itself constitutionally infirm and should be explicitly overturned. To be sure, that decision conflicts with the definition of child pornography in two-thirds of the states.²⁷⁸

B. The Proposed Definition is Not Unconstitutionally Overbroad

The purpose of the overbreadth doctrine is to ensure that statutes, particularly criminal ones, do not overly infringe upon or "chill" constitutionally protected speech.²⁷⁹ "[W]here a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only 'real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'²⁸⁰ "Even when a statute at its margins infringes on protected expression, facial invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct . . .'²⁸¹ In general, the overbreadth doctrine is considered "strong medicine" that is invoked by courts "sparingly and only as a last resort."²⁸²

Every overbreadth challenge brought against state statutes that apply a broader definition of child pornography than does the military have uniformly been rejected by the courts.²⁸³ The crux of an overbreadth challenge would be

²⁷⁶ *Id.* at 392.

²⁷⁷ The only legal source relied upon by the majority in *Barberi* to conclude that any image that does not meet the federal definition of child pornography is constitutionally protected is *Ashcroft*. *Barberi*, 71 M.J. at 130-31. However, the ruling in *Ashcroft* is based solely on the conclusion that because real children are not utilized in the creation of virtual child pornography, the constitutional exception under *Ferber* does not apply. Child erotica involves actual children. Consequently, *Ashcroft* is inapposite to the rule announced in *Barberi*.

²⁷⁸ The interesting dilemma that has been created by *Barberi* is what would happen if the government attempted to incorporate through Article 134, UCMJ, a charge based on a state definition of child pornography utilizing UCMJ, art. 134(3) (crimes and offenses not capital). Would the CAAF hold the state definition unconstitutional? It seems incongruous that an image would be constitutionally protected on a military base, but not outside its gates.

²⁷⁹ *Virginia v. Hicks*, 539 U.S. 113, 119, 123 S. Ct. 2191, 156 L.Ed. 2d 148 (2003).

²⁸⁰ *Osborne v. Ohio*, 495 U.S. 103, 112, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1980) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)).

²⁸¹ *Osborne*, 495 U.S. at 112 (citing *Ferber*, 458 U.S. at 770 n. 25).

²⁸² *Broadrick*, 413 U.S. at 613.

²⁸³ See *State v. Hazlett*, 205 Ariz. 523, 73 P.3d 1258 (Ariz. Ct. App. 2003); *People v. Batchelor*, 800 P.2d 599 (Colo. 1990); *State v. Morton*, 140 Idaho 235, 91 P.3d 1139

that the lack of genitals or pubic area in an image would impermissibly encompass benign images. However, by retaining the requirement analogous to federal law that the images be lewd, the definition would not extend to those innocent photographs of infants in the bath, or innocuous family photographs.²⁸⁴ Every case that has dealt with an overbreadth challenge focuses on the requirement that the image be lewd or lascivious, not that any particular body part was depicted. The only way an overbreadth challenge would succeed is for a court to arrive at the unreasonable conclusion that only the genitalia or pubic area can render an image lewd.

Finally, even assuming that the definition could be read in some way to encompass those traditionally cited innocent pictures of children, such a reading would not render the definition *substantially* overbroad, and judicial review would prevent overreaching by the government.²⁸⁵

C. The Proposed Definition Is Not Unconstitutionally Vague

“As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”²⁸⁶ The primary purpose is to ensure that “a legislature establish minimum guidelines to govern law enforcement.”²⁸⁷ As it applies to servicemembers who may be subject to prosecution for the violation of particular statutes, the constitutional requirement is that they have “‘fair notice’ that an act is forbidden and subject to criminal

(2004); *People v. Gezelman*, 202 Mich. App. 172, 507 N.W.2d 744 (Mich. Ct. App. 1993); *Commonwealth v. Davidson*, 595 Pa. 1, 938 A.2d 198 (2007).

²⁸⁴ Professor Amy Adler would argue that the terms “lewd” or “lascivious” themselves are so “capacious” that they “seem[] to threaten all pictures of unclothed children, whether lewd or not, and even pictures of clothed children, if they meet the hazy definition of ‘lascivious’ or ‘lewd.’” Amy Adler, *The Perverse Law of Child Pornography*, 101 Colum. L. Rev. 209, 240 (2001); Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 941 (2001). However, every court in the country that has addressed the constitutionality of the terms “lewd” and “lascivious” have found them to not be overly broad.

²⁸⁵ See *Massachusetts v. Oakes*, 491 U.S. 576, 589, 109 S. Ct. 2633, 105 L. Ed. 2d 493 (1989) (Scalia, J., concurring in part and dissenting in part) (“Assuming that it is unconstitutional (as opposed to merely foolish) to prohibit such photography, I do not think it so common as to make the statute *substantially* overbroad. We can deal with such a situation in the unlikely event some prosecutor brings an indictment.”); *New York v. Ferber*, 458 U.S. 747, 773-74, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982) (“[W]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.”) (citing *Broadrick*, 413 U.S. at 615-16).

²⁸⁶ *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983).

²⁸⁷ *Id.* at 358.

sanction.”²⁸⁸ “Potential sources of fair notice may include federal law, state law, military case law, military custom and usage, and military regulations.”²⁸⁹

By utilizing the term lewd to define the images that will be subject to prohibition, the proposed definition ensures that it is not void-for-vagueness and provides sufficient notice to an accused as to what images are proscribed. Courts routinely recognize that the term lewd “is a commonly used word that ‘has an unmistakable meaning which is very well and generally understood.’”²⁹⁰ Further, the near universally accepted *Dost* factors, which are included within the text of the definition, provide further definiteness as to what expressive conduct is actually prohibited.

VIII. Conclusion.

While the Supreme Court was worried about works of art and *Romeo and Juliet* . . . lower appellate courts have been grappling with cases seeking to distinguish between what some judges view as supposedly lawful child erotica—photographs depicting young children dressed as prostitutes in G-strings in coy and provocative positions—and criminal child pornography—photographs depicting young children dressed as prostitutes in G-strings in coy and provocative positions that also show some sliver of the pubic area. . . . I am skeptical, if a majority of my colleagues are not, that the Congress, the Supreme Court, or, most importantly, the Constitution, intended such a nuanced result when it comes to the difference between criminal and constitutionally protected images of real children depicted in a pornographic manner for the purpose of sexual gratification.²⁹¹

Whether a servicemember can be prosecuted for possessing or distributing offensive images of minors turns primarily on whether the image depicts the genitalia or pubic area. This arbitrary requirement, which flies in the face of the definition of child pornography in almost two-thirds of the States (many of which

²⁸⁸ United States v. Vaughan, 58 M.J. 29, 31 (C.A.A.F. 2003) (citing United States v. Bivins, 49 M.J. 328, 330 (C.A.A.F. 1998)).

²⁸⁹ United States v. Warner, 73 M.J. 1, 3 (C.A.A.F. 2013) (citing *Vaughan*, 58 M.J. at 31).

²⁹⁰ State v. Meyer, 120 Ore. App. 319, 325, 852 O.2d 879 (Ct. App. Or. 1993) (citing 53 CJS, “Lewdness,” § 1; *Dictionary of Criminology* 127-28 (1965)); see also State v. Gates, 182 Ariz. 459, 462, 897 P.2d 1345 (Ariz. Ct. App. 1994) (“We believe a person of ordinary intelligence would understand the term ‘lewd’ to connote sexual suggestiveness.”) (citations omitted); State v. Limpus, 128 Ariz. 371, 375-76, 625 P.2d 960 (Ariz. Ct. App. 1981).

²⁹¹ *Blouin*, 2015 CAAF LEXIS 584 at *34-35 (Baker, C.J., dissenting).

house military posts), excludes countless images that run afoul of the primary purpose for prohibiting child pornography: the protection of children.

The fact that a child's genitalia are not depicted in a particular image does not render it any less harmful to that child. By expanding the definition of child pornography to remove the requirement that the genitalia or pubic area be depicted, and instead require only that the image be lewd under well-established legal principles, the military will be in a much better position to prevent the proliferation of these offensive and harmful images within its ranks. To continue to exclude a wide range of offensive images of children from the category of what constitutes child pornography serves only to condone their continued presence within the military.

Appendix

Recommended Changes to Current Definition

Manual for Courts-Martial United States (2012)
Part IV. Punitive Articles
68b. Article 134--(Child pornography) 2012

c. Explanation

(1) “Child Pornography” means material that contains either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct.

(2) An accused may not be convicted of possessing, receiving, viewing, distributing, or producing child pornography if he was not aware that the images were of minors, or what appeared to be minors, engaged in sexually explicit conduct. Awareness may be inferred from circumstantial evidence such as the name of a computer file or folder, the name of the host website from which a visual depiction was viewed or received, search terms used, and the number of images possessed.

(3) “Distributing” means delivering to the actual or constructive possession of another.

(4) “Minor” means any person under the age of 18 years.

(5) “Possessing” means exercising control of something. Possession may be direct physical custody like holding an item in one’s hand, or it may be constructive, as in the case of a person who hides something in a locker or a car to which that person may return to retrieve it. Possession must be knowing and conscious. Possession inherently includes the power or authority to preclude control by others. It is possible for more than one person to possess an item simultaneously, as when several people share control over an item.

(6) “Producing” means creating or manufacturing. As used in this paragraph, it refers to making child pornography that did not previously exist. It does not include reproducing or copying.

(7) “Sexually explicit conduct” means actual or simulated:

(a) sexual intercourse or sodomy, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or

opposite sex;

(b) bestiality;

(c) masturbation;

(d) sadistic or masochistic abuse; or

(e) ~~lascivious exhibition of the genitals or pubic area of any person~~ lewd visual depiction of a minor.

(8) “Visual depiction” includes any developed or undeveloped photograph, picture, film or video; any digital or computer image, picture, film, or video made by any means, including those transmitted by any means including streaming media, even if not stored in a permanent format; or any digital or electronic data capable of conversion into a visual image.

(9) “Wrongfulness.” Any facts or circumstances that show that a visual depiction of child pornography was unintentionally or inadvertently acquired are relevant to wrongfulness, including, but not limited to, the method by which the visual depiction was acquired, the length of time the visual depiction was maintained, and whether the visual depiction was promptly, and in good faith, destroyed or reported to law enforcement.

(10) “Lewd Visual Depiction.” Whether a particular image constitutes a lewd visual depiction of a minor is based on a consideration of the totality of the circumstances. Non-dispositive factors to be considered include, but are not limited to:

(a) whether the focal point of the visual depiction is on the child’s intimate parts;

(b) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;

(c) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;

(d) whether the child is fully or partially clothed, or nude;

(e) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; or

(f) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

(101) On motion of the government, in any prosecution under this paragraph, except for good cause shown, the name, address, social security number, or other nonphysical identifying information, other than the age or approximate age, of any minor who is depicted in any child pornography or visual depiction or copy thereof shall not be admissible and may be redacted from any otherwise admissible evidence, and the panel shall be instructed, upon request of the Government, that it can draw no inference from the absence of such evidence.

MCM, Pt IV, ¶ 68b.c

State Definitions of Child Pornography

1. Alabama

- a. Any person who shall knowingly disseminate or display publicly any obscene matter containing a visual depiction of a person under the age of 17 years engaged in any act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, breast nudity, genital nudity, or other sexual conduct shall be guilty of a Class B felony.” ALA. CODE. § 13A-12-191.
- b. “Breast nudity. The lewd showing of the post-pubertal human female breasts below a point immediately above the top of the areola.” ALA. CODE. § 13A-12-190.

2. Alaska

- a. “the lewd exhibition of the child's genitals.” ALASKA STAT. § 11.41.455.

3. Arizona

- a. “Exploitive exhibition” means the actual or simulated exhibition of the genitals or pubic or rectal areas of any person for the purpose of sexual stimulation of the viewer.” ARIZ. REV. STAT. § 13-3551.

4. Arkansas

- a. “Sexually explicit conduct” means actual or simulated . . . Lewd exhibition of the: (i) Genitals or pubic area of any person; or (ii) Breast of a female.” ARK. CODE ANN. § 5-27-601.

5. California

- a. “exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer.” CAL. PENAL CODE § 311.4.

6. Colorado

- a. “‘Erotic nudity’ means the display of the human male or female genitals or pubic area, the undeveloped or developing genitals or pubic area of the human male or female child, the human breasts, or the undeveloped or developing breast area of the human child, for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.” COLO. REV. STAT. § 18-6-403.

7. Connecticut

- a. "lascivious exhibition of the genitals or pubic area of any person." CONN. GEN. STAT. § 53a-193.

8. Delaware

- a. "Prohibited sexual act" shall include . . . (9) Nudity, if such nudity is to be depicted for the purpose of the sexual stimulation or the sexual gratification of any individual who may view such depiction . . . (11) Lascivious exhibition of the genitals or pubic area of any child." DEL. CODE ANN. tit. 11, § 1100.

9. Florida

- a. "actual lewd exhibition of the genitals." FLA. STAT. § 827.071.

10. Georgia

- a. "'Sexually explicit nudity' means a state of undress so as to expose the human male or female genitals, pubic area, or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state." GA. CODE ANN. § 16-12-102.

11. Hawaii

- a. "'Sexual conduct' means acts of masturbation, homosexuality, lesbianism, bestiality, sexual penetration, deviate sexual intercourse, sadomasochistic abuse, or lascivious exhibition of the genital or pubic area of a minor." HAWAII REV. STAT. § 707-750.

12. Idaho

- a. "'Erotic nudity' means the display of the human male or female genitals or pubic area, the undeveloped or developing genitals or pubic area of the human male or female child, the human female breasts, or the undeveloped or developing breast area of the human female child, for the purpose of real or simulated overt sexual gratification or stimulation of one (1) or more of the persons involved." IDAHO CODE ANN. § 18-1507.

13. Illinois

- a. "depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed or transparently clothed genitals, pubic area, buttocks, or, if such person is female, a fully or partially developed breast of the child or other person." 720 ILL. COMP. STAT. 5/11-20.1.

14. Indiana

- a. "'Sexual Conduct' means: . . . exhibition of the: . . . (i) uncovered genitals; or (ii) female breast with less than a fully opaque covering of any part of the nipple; intended to satisfy or arouse the sexual desires of any person." IND. CODE § 35-42-4-4.

15. Iowa
 - a. “Nudity of a minor for the purpose of arousing or satisfying the sexual desires of a person who may view a visual depiction of the nude minor.” IOWA CODE § 728.1.
16. Kansas
 - a. “engaging in sexually explicit conduct with intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the offender or any other person;” KAN. STAT. ANN. § 21-5510.
 - b. “Sexually explicit conduct” means actual or simulated: Exhibition in the nude; . . . or lewd exhibition of the genitals, female breasts or pubic area of any person;” KAN. STAT. ANN. § 21-5510.
17. Kentucky
 - a. “‘Obscene’ means the predominate appeal of the matter taken as a whole is to a prurient interest in sexual conduct involving minors.” KY. REV. STAT. ANN. § 531.300.
 - b. “The exposure, in an obscene manner, of the unclothed or apparently unclothed human male or female genitals, pubic area or buttocks, or the female breast, whether or not subsequently obscured by a mark placed thereon, or otherwise altered, in any resulting motion picture, photograph or other visual representation, exclusive of exposure portrayed in matter of a private, family nature not intended for distribution outside the family;” KY. REV. STAT. ANN. § 531.300.
18. Louisiana
 - a. “lewd exhibition of the genitals or anus.” LA. REV. STAT. ANN. § 14:81.1.
19. Maine
 - a. “‘Sexually explicit conduct’ means any of the following acts . . . [l]ewd exhibition of the genitals, anus or pubic area of a person. An exhibition is considered lewd if the exhibition is designed for the purpose of eliciting or attempting to elicit a sexual response in the intended viewer;” ME. REV. STAT. tit. 17-A, § 281.
20. Maryland
 - a. “‘Sexual conduct’ means whether alone or with another individual or animal, any touching of or contact with: (i) the genitals, buttocks, or pubic areas of an individual; or (ii) breasts of a female individual.” MD. CODE ANN. CRIM. LAW § 11-101.
 - b. “‘Sexual excitement’ means: (1) the condition of the human genitals when in a state of sexual stimulation; (2) the condition of the human female breasts when in a state of sexual stimulation.” MD. CODE ANN. CRIM. LAW § 11-101.
21. Massachusetts
 - a. “depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed genitals, pubic area, buttocks

or, if such person is female, a fully or partially developed breast of the child.” MASS. GEN. LAWS ch. 272, § 29C.

22. Michigan

- a. “‘Erotic nudity’ means the lascivious exhibition of the genital, pubic, or rectal area of any person. As used in this subdivision, ‘lascivious’ means wanton, lewd, and lustful and tending to produce voluptuous or lewd emotions.” MICH. COMP. LAWS § 750.145c.

23. Minnesota

- a. “lewd exhibitions of the genitals.” MINN. STAT. § 617.246.

24. Mississippi

- a. “Lascivious exhibition of the genitals or pubic area of any person.” MISS. CODE ANN. § 97-5-31.

25. Missouri

- a. “Lascivious exhibition of the genitals or pubic area of any person.” MO. REV. STAT. § 573.010.

26. Montana

- a. “lewd exhibition of the genitals, breasts, pubic or rectal area, or other intimate parts of any person.” MONT. CODE ANN. § 45-5-625.

27. Nebraska

- a. “Erotic nudity means the display of the human male or female genitals or pubic area, the human female breasts, or the developing breast area of the human female child, for the purpose of real or simulated overt sexual gratification or sexual stimulation of one or more of the persons involved.” NEB. REV. STAT. § 28-1463.02.

28. Nevada

- a. “lewd exhibition of the genitals.” NEV. REV. STAT. § 200.700.

29. New Hampshire

- a. “any lewd exhibitions of the buttocks, genitals, flagellation, bondage, or torture.” N.H. LAWS § 649-A:2.

30. New Jersey

- a. “Nudity, if depicted for the purpose of sexual stimulation or gratification of any person who may view such depiction.” N.J. STAT. ANN. § 2C:24-4.

31. New Mexico

- a. “lewd and sexually explicit exhibition with a focus on the genitals or pubic area of any person for the purpose of sexual stimulation.” N.M. STAT. ANN. § 30-6A-2.

32. New York

- a. “lewd exhibition of the genitals.” N.Y. PENAL LAW § 263.00.

33. North Carolina

- a. “The lascivious exhibition of the genitals or pubic area of any person.” N.C. GEN. STAT. § 14-190.13.

34. North Dakota
- a. “‘Sexual conduct’ means actual or simulated sexual intercourse, sodomy, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the buttocks, breasts, or genitals . . .” N.D. CENT. CODE § 12.1-27.2-01.
35. Ohio
- a. “state of nudity.” OHIO REV. CODE ANN. § 2907.323 (*but see* Osborne v. Ohio, 495 U.S. 103, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990))
36. Oklahoma
- a. “where the lewd exhibition of the uncovered genitals, buttocks or, if such minor is a female, the breast, has the purpose of sexual stimulation of the viewer.” OKL. STAT. tit. 21, § 1024.1.
37. Oregon
- a. “‘Sexually explicit conduct’ means actual or simulated . . . [l]ewd exhibition of sexual or other intimate parts.” OR. REV. STAT. § 163.665.
38. Pennsylvania
- a. “Prohibited sexual act: Sexual intercourse as defined in section 3101 (relating to definitions), masturbation, sadism, masochism, bestiality, fellatio, cunnilingus, lewd exhibition of the genitals or nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction.” 18 PA. CONS. STAT. § 6312.
39. Rhode Island
- a. “‘Sexually explicit conduct’ means actual . . . [g]raphic or lascivious exhibition of the genitals or pubic area of any person.” R.I. GEN. LAWS § 11-9-1.3.
40. South Carolina
- a. “‘Sexually explicit nudity’ means the showing of: (a) uncovered, or less than opaquely covered human genitals, pubic area, or buttocks, or the nipple or any portion of the areola of the human female breast; or (b) covered human male genitals in a discernibly turgid state.” S.C. CODE ANN. § 16-15-375.
41. South Dakota
- a. “‘Prohibited sexual act,’ actual or simulated sexual intercourse, sadism, masochism, sexual bestiality, incest, masturbation, or sadomasochistic abuse; actual or simulated exhibition of the genitals, the pubic or rectal area, or the bare feminine breasts, in a lewd or lascivious manner[.]” S.D. CODIFIED LAWS § 22-24A-2.
42. Tennessee
- a. “‘Sexual activity’ means any of the following acts[:] . . . [l]ascivious exhibition of the female breast or the genitals, buttocks, anus or pubic or rectal area of any person.” TENN. CODE ANN. § 39-17-1002.

43. Texas
- a. “‘Sexual conduct’ means sexual contact, actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola.” TEX. PENAL CODE ANN. § 43.25.
44. Utah
- a. “‘Sexually explicit conduct’ means actual or simulated . . . (e) lascivious exhibition of the genitals, pubic region, buttocks, or female breast of any person; (f) the visual depiction of nudity or partial nudity for the purpose of causing sexual arousal of any person.” UTAH CODE ANN. § 76-5b-103.
45. Vermont
- a. “sexual conduct by a child or of a clearly lewd exhibition of a child’s genitals or anus.” VT. STAT. ANN. tit. 13, § 2827.
46. Virginia
- a. “‘sexually explicit visual material’ means . . . [a] lewd exhibition of nudity.” VA. CODE ANN. § 18.2-374.1.
 - b. “‘Nudity’ means a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.” VA. CODE ANN. § 18.2-390.
47. Washington
- a. “Depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer.” WASH. REV. CODE § 9.68A.011.
48. West Virginia
- a. “‘Sexually explicit conduct’ includes any of the following, whether actually performed or simulated[:]. . . [e]xhibition of the genitals, pubic or rectal areas of any person in a sexual context.” W. VA. CODE § 61-8C-1.
49. Wisconsin
- a. “‘Sexually explicit conduct’ means actual or simulated: . . . (e) Lewd exhibition of intimate parts.” WIS. STAT. § 948.01.
50. Wyoming
- a. “‘Explicit sexual conduct’ means actual or simulated sexual intercourse, including genital–genital, oral–genital, anal–genital or oral–anal, between persons of the same or opposite sex, bestiality, masturbation, sadistic or masochistic abuse or lascivious exhibition of the genitals or pubic area of any person.” WYO. STAT. ANN. § 6-4-303

COPINE SCALE

1. Indicative	Non-erotic and non-sexualised pictures showing children in their underwear, swimming costumes, etc. from either commercial sources or family albums; pictures of children playing in normal settings, in which the context or organization of pictures by the collector indicates inappropriateness.
2. Nudist	Pictures of naked or semi-naked children in appropriate nudist settings, and from legitimate sources.
3. Erotica	Surreptitiously taken photographs of children in play areas or other safe environments showing either underwear or varying degrees of nakedness.
4. Posing	Deliberately posed pictures of children fully, partially clothed or naked (where the amount, context and organization suggests sexual interest).
5. Erotic Posing	Deliberately posed pictures of fully, partially clothed or naked children in sexualized or provocative poses.
6. Explicit Erotic Posing	Emphasizing genital areas where the child is either naked, partially or fully clothed.
7. Explicit sexual activity	Involves touching, mutual and self-masturbation, oral sex and intercourse by child, not involving an adult.
8. Assault	Pictures of children being subject to a sexual assault, involving digital touching, involving an adult.
9. Gross Assault	Grossly obscene pictures of sexual assault, involving penetrative sex, masturbation, or oral sex involving an adult.

10. Sadistic/Bestiality	a. Pictures showing a child being tied, bound, beaten, whipped or otherwise subject to something that implies pain. b. Pictures where an animal is involved in some form of sexual behavior with a child.
-------------------------	--