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Changing Faces: Morphed Child Pornography Images and the First Amendment

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CHANGING FACES: MORPHED CHILD PORNOGRAPHY IMAGES AND THE FIRST AMENDMENT

Stacey Steinberg*

ABSTRACT

Technology has changed the face of child pornography. The Supreme Court has held that child pornography harms a child both in the creation of the image and the circulation of the image, and thus has ruled that the possession and distribution of child pornography falls outside the realm of First Amendment protections. However, today's images depicting child pornography do not always depict an actual child engaged in a pornographic act. Instead, some images depicting child pornography are "morphed images."

Morphed child pornography is created when the innocent image of a child is combined with a separate, sexually explicit image, usually of an adult. The children depicted in these images are not harmed in the creation of the image, as they were not photographed while engaging in a sexual or obscene act. Nevertheless, the circulation of these images harms children. The distribution, or potential distribution, is damaging to the depicted child's emotional well-being and reputation. Furthermore, these morphed images could cause additional harm to other children, as pedophiles use child pornography to groom future victims.

In response to the changing face of child pornography and the harms associated with it, Congress enacted the PROTECT Act, which bans morphed images like the ones described above. Despite this effort to protect children's images online, there remains much to be done. First, the Supreme Court must uphold the PROTECT Act, finding that morphed child pornography is outside the scope of the First Amendment. Second, to respond to the harms morphed child pornography causes, states must amend their statutory definitions of child pornography. Lastly, parents must be cognizant of the risk associated with oversharing pictures as these images can be stolen and then used for illicit purposes. This proposal balances a defendant's First Amendment right to free

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speech against the harms caused by the circulation of morphed images depicting child pornography.

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INTRODUCTION

As technology evolves, so too does the face of child pornography. Child pornography traditionally depicted actual child sexual abuse. These images fall outside the protection of the First Amendment and their possession and distribution constitutes a criminal offense under federal and state laws.¹ With the advent of computer morphing software, today's child pornography images sometimes do not depict actual abuse.² Some of these images are virtual and do not involve images of actual children at all.³ Despite Congress's attempt to criminalize all obscene images depicting children, the Supreme Court has held that possession and distribution of images that look like, but are not actually children is protected speech under the First Amendment.⁴

Morphed child pornography falls between traditional child pornography and virtual child pornography. These images involve actual children; however, the full image often combines an "innocent" image of a child with a sexual or nude image of an adult.⁵ Through morphing, pedophiles create and often share these pornographic images.⁶ To protect children from this computer technology, Congress enacted the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act).⁷ This Act prohibits all obscene images that depict children, regardless of whether a child was abused in the image's creation.⁸

The creation and distribution of morphed images is becoming increasingly common. Often, the innocent child image component of morphed images originates on social media and blogs.⁹ Parents often share their children's

¹ See generally *New York v. Ferber*, 458 U.S. 747, 764 (1982) (holding child pornography is not in the realm of First Amendment protection).

² See, e.g., *United States v. Hotaling*, 634 F.3d 725, 727 (2d Cir. 2011) (describing how one defendant created morphed images).

³ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 241 (2002).

⁴ *Id.* at 258.

⁵ *Hotaling*, 634 F.3d at 730.

⁶ *Id.*

⁷ Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18 U.S.C. and 34 U.S.C.).

⁸ 4 IAN C. BALLON, E-COMMERCE AND INTERNET LAW § 40.01[2] (2017) ("Unlike computer-created images or depictions of adults altered to appear to be child pornography, at least one court has held that a morphed depiction of actual children (in this case, an identifiable child's face superimposed on the body of a young naked boy in a suggestive pose) was not protected by the First Amendment and could serve as the basis for a child pornography possession conviction under the CPPA.") (citing *United States v. Bach*, 400 F.3d 622 (8th Cir.), cert. denied, 546 U.S. 901 (2005)).

⁹ Sharon Kirkey, *Do You Know Where Your Child's Image Is? Pedophiles Sharing Photos from Parents'*

pictures in a variety of ways, and images that may not appear prurient to the average viewer might elicit an unexpected and inappropriate response if viewed by a pedophile or someone with pedophilic interests.¹⁰ Unbeknownst to parents, viewers can save their children's images and later use them to create morphed child pornography.¹¹ While there is limited data reflecting how common this practice is, Canadian law enforcement officers report that this practice is worrisome to their department.¹² Moreover, the Australian Children's eSafety Commissioner reported that about 50% of all images on one pedophile image-sharing site with at least forty-five million images originated on social media and family blogs.¹³

While the children depicted in morphed images are usually not harmed in the image's creation,¹⁴ these children can potentially suffer significant harm once a morphed image is circulated. To protect children from the harm of circulation, courts should hold that shared morphed images depicting child pornography fall outside the protection of the First Amendment.

Part I of this Article will explore the historical underpinnings of First Amendment jurisprudence as it pertains to actual child pornography from its inception as a criminal offense, to the morphed images depicting child pornography of today. Part II of this Article will discuss the harms morphed images cause. It will also explore the harm that circulation of other private material that is sexual in nature causes and discuss how this harm has been balanced against a defendant's right to free speech. This nuanced approach allows us to better understand how courts might balance the harm that circulation of a morphed image causes with the First Amendment. Lastly, Part III of this Article lays out a cogent path forward. It proposes a workable solution that balances a defendant's First Amendment right to free speech against the harm that circulation of morphed images causes.

Social Media Accounts, NAT'L POST (Apr. 18, 2017, 6:16 PM), <http://nationalpost.com/news/canada/photos-shared-on-pedophile-sites-taken-from-parents-social-media-accounts>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Lucy Battersby, *Millions of Social Media Photos Found on Child Exploitation Sharing Sites*, SYDNEY MORNING HERALD (Sept. 30, 2015, 12:23 PM), <http://www.smh.com.au/national/millions-of-social-media-photos-found-on-child-exploitation-sharing-sites-20150929-gjxe55.html>.

¹⁴ Kirkey, *supra* note 9 ("Pictures of children doing perfectly normal things—a snapshot of a child at a gymnastics performance, a toddler playing with a Tonka truck—have been stolen and implanted on child sexual abuse imagery sites, pedophile photo-sharing galleries and highly sexualized 'child modeling' websites, says the head of Canada's national tip line for online child pornography.").

I. CHILD PORNOGRAPHY AND THE FIRST AMENDMENT

In most cases involving child pornography before the mid-1990s, the distinction between harm in pornography's creation and harm in pornography's circulation was of little to no consequence.¹⁵ This is because computer technology had not advanced enough for an image of child pornography to exist that did not originate with the actual occurrence of a criminal act.¹⁶ Indeed, child pornography before the 1990s captured the abuse of the child in the pornographic image.¹⁷ Without the advance of computer technology, there could be no child pornography created without harming and abusing an actual child.

A. *Child Pornography Jurisprudence from Inception to the Advent of Computer Morphing Technology*

The U.S. Supreme Court first recognized the child pornography exception to the First Amendment in the case of *New York v. Ferber*.¹⁸ In that case, a bookstore sold two videos of young boys masturbating to an undercover police officer.¹⁹ The state charged the defendant under its state statute criminalizing child pornography.²⁰ The statute reads, in relevant part, “[a] person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than seventeen years of age.”²¹ The defendant challenged the conviction on First Amendment grounds.²² However, the Court disagreed, holding that distribution of child pornography, as defined in the New York state statute, fell outside the protection of the First Amendment.²³ The Court explained that under a strict scrutiny test, the state had

¹⁵ See, e.g., *New York v. Ferber*, 458 U.S. 747, 760–61 (1982) (examining the issues surrounding the First Amendment and actual child pornography).

¹⁶ S. REP. NO. 104-358, at 2 (1996).

¹⁷ See DANIEL S. CAMPAGNA & DONALD L. POFFENBERGER, *THE SEXUAL TRAFFICKING IN CHILDREN* 118 (1988).

¹⁸ 458 U.S. 747.

¹⁹ *Id.* at 752.

²⁰ *Id.*

²¹ N.Y. PENAL LAW § 263.15 (McKinney 2017).

²² *Ferber*, 458 U.S. at 760–61 (“Respondent does not contend that the State is unjustified in pursuing those who distribute child pornography. Rather, he argues that it is enough for the State to prohibit the distribution of materials that are legally obscene under the *Miller* test. While some States may find that this approach properly accommodates its interests, it does not follow that the First Amendment prohibits a State from going further. The *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State’s particular and more compelling interest in prosecuting those who promote the sexual exploitation of children.”).

²³ *Id.* at 757–58.

an interest in protecting children from the harm these images cause and that this interest outweighed the defendant's right to free speech.²⁴

In its opinion, the Court discussed the specific harms child pornography causes.²⁵ First, the Court recognized that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child."²⁶ Second, the Court noted that the images created a "permanent record of the children's participation and the harm to the child is exacerbated by their circulation."²⁷ Third, the Court held that "[t]he advertising and selling of child pornography provide an economic motive for, and are thus an integral part of the production of such materials."²⁸ Fourth, the Court addressed the societal value of the images at issue, holding that any value, if there was any at all, was *de minimis*.²⁹ Lastly, the Court noted that its decision, holding child pornography outside the protections of the First Amendment, was consistent with the Court's earlier decisions.³⁰

The Court expanded the child pornography exception to the First Amendment in 1990.³¹ In *Osborne v. Ohio*,³² a defendant was convicted of possessing images of nude adolescent boys in "sexually explicit position[s]."³³ Unlike *Ferber*, where the defendant was convicted for distributing pornographic images,³⁴ the defendant in *Osborne* was viewing images in his own home.³⁵ The

²⁴ *Id.* at 757 ("Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights. In *Prince v. Massachusetts*, *supra*, the Court held that a statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the statute's effect on a First Amendment activity. In *Ginsberg v. New York*, *supra*, we sustained a New York law protecting children from exposure to nonobscene literature. Most recently, we held that the Government's interest in the 'well-being of its youth' justified special treatment of indecent broadcasting received by adults as well as children.") (citing *FCC v. Pacifica Found.*, 438 U.S. 726 (1978)).

²⁵ *Id.* at 758 & n.9.

²⁶ *Id.* at 758.

²⁷ *Id.* at 759.

²⁸ *Id.* at 761.

²⁹ *Id.* at 762.

³⁰ *Id.* at 763–64 ("Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions. 'The question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech.' . . . When a definable class of material, such as that covered by § 263.15, bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.").

³¹ See *Osborne v. Ohio*, 495 U.S. 103 (1990).

³² *Id.*

³³ *Id.* at 107.

³⁴ *Ferber*, 458 U.S. at 751–52.

³⁵ *Osborne*, 495 U.S. at 107.

case suggests that the defendant did not create the images, nor did he offer the images for sale to a third party.³⁶ The Court relied on the earlier *Ferber* decision, noting that the state has a strong interest in protecting “the physiological, emotional, and mental health” of children.³⁷ Along with this harm, the Court held that “[i]t is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand.”³⁸ The *Osborne* Court identified additional grounds for upholding the conviction, many rooted in the *Ferber* decision.³⁹ It rested part of its holding on the harm caused by the circulation of the image, noting that “[t]he pornography’s continued existence causes the child victims continuing harm by haunting the children in years to come.”⁴⁰ Lastly, the *Osborne* Court identified a new ground for excluding child pornography from the protection of the First Amendment, recognizing that pedophiles use pornographic images “to seduce other children into sexual activity.”⁴¹

B. Addressing the Changing Face of Child Pornography: Congress’s Failed Attempt to Ban Virtual Child Pornography

Shortly after the *Osborne* decision, those seeking to end the creation, distribution, and possession of child pornography faced a new challenge.⁴² Technology was advancing, and pedophiles were finding new ways to create images depicting the sexual abuse of children.⁴³ Considering these advancements, Congress set out to address the changing face of child pornography.⁴⁴ It did so through the enactment of the Child Pornography Prevention Act of 1996 (CPPA).⁴⁵

³⁶ *See id.* at 106–07.

³⁷ *Id.* at 109 (citing *Ferber*, 458 U.S. at 756–58).

³⁸ *Id.* at 109–10.

³⁹ *See id.* at 109–15 (noting, for example, that a permanent record is made of the child’s abuse).

⁴⁰ *Id.* at 111.

⁴¹ *Id.*

⁴² *See generally* Sarah Sternberg, Note, *The Child Pornography Prevention Act of 1996 and the First Amendment: Virtual Antitheses*, 69 *FORDHAM L. REV.* 2783 (2001) (discussing the new challenge courts are dealing with in deciding how to handle morphed images).

⁴³ *Id.* at 2783 (“Soon it will not be necessary to actually molest children to produce child pornography . . . All that will be necessary will be an inexpensive computer, readily available software, and a photograph of a neighbor’s child shot while the child walked to school or waited for the bus.”) (quoting *The Child Pornography Prevention Act of 1995: Hearing on S. 1237 Before the S. Comm. on the Judiciary*, 104th Cong. (1996) (prepared testimony of Kevin V. DiGregory, Deputy Assistant Att’y Gen., Criminal Div., Dep’t of Justice)).

⁴⁴ *See* 18 U.S.C. § 2256(8)(B) (2012).

⁴⁵ 18 U.S.C. § 2252A.

Through the enactment of the CPPA, Congress attempted to broaden the definition of child pornography.⁴⁶ While federal law previously designated only actual images of children engaged in pornographic acts as constituting the criminal offense of child pornography, the CPPA expanded on the definition of child pornography to include “any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture” that is, or appears to be, of “a minor engaging in sexually explicit conduct”⁴⁷ and any sexually explicit image that is “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression” it depicts “a minor engaging in sexually explicit conduct.”⁴⁸

Congress had good reason to be concerned about the new “virtual images” flooding the Internet. Child pornography does not only harm the children depicted in an image, but it also creates material for child abusers to use when grooming future victims of sexual abuse.⁴⁹

“Peer pressure” in the form of visual depictions plays a crucial role in “the ‘cycle’ of child pornography.” That cycle consists of seven stages, namely (1) showing child pornography to a child for “educational purposes,” (2) attempting to persuade the child that sexual activity is permitted and even pleasurable, (3) convincing the child that because his peers engage in sexual activity such activity is acceptable, (4) “desensitiz[ing] the child, [and] lowering the child’s inhibitions[,]” (5) engaging the child in sexual activity, (6) photographing such sexual activity, and (7) using the resulting child pornography to “attract and seduce yet more child victims.”⁵⁰

Congress also noted that pedophiles often use child pornography “to stimulate and whet their own sexual appetites.”⁵¹ These significant concerns, Congress noted, are not diminished simply because an image is virtual.⁵² While no child is harmed in the creation of such an image, Congress was concerned

⁴⁶ 18 U.S.C. § 2256(8); *see also* Sternberg, *supra* note 42, at 2796–98 (discussing the legislative history of the CPPA).

⁴⁷ 18 U.S.C. § 2256(8)(B).

⁴⁸ 18 U.S.C. § 2256(8)(D) (2000).

⁴⁹ Sternberg, *supra* note 42, at 2786 (“Child molesters may use child pornography as ‘instructional aids,’ teaching children about the behavior that is expected of them and demonstrating to them that engaging in such acts is normal.”).

⁵⁰ *Id.* (citing CAMPAGNA & POFFENBERGER, *supra* note 17) (citations omitted).

⁵¹ S. REP. NO. 104-358, at 2 (1996) (finding that “child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites, and as a model for sexual acting out with children; such use of child pornography can desensitize the viewer to the pathology of sexual abuse or exploitation of children, so that it can become acceptable to and even preferred by the viewer”).

⁵² *See id.*

that children might be harmed *in the future* as a result of the image's circulation.⁵³

In *Ashcroft v. Free Speech Coalition*,⁵⁴ the Free Speech Coalition challenged the CPPA arguing that this concern about future harm was an unconstitutional basis for outlawing child pornography.⁵⁵ This pivotal case highlighted the difficulty legislatures faced in enacting laws that both protect children from sexual abuse and at the same time protect defendants' rights to free speech.⁵⁶ Under the CPPA, images that did not depict *actual* children were still considered child pornography.⁵⁷ The CPPA outlawed images of youthful looking adults that were posed to look like children and even some cartoon images depicting children engaged in sexual acts.⁵⁸ The Free Speech Coalition contended that since many of the images banned under the CPPA did not depict actual children, the CPPA was not narrowly tailored enough to withstand First Amendment challenges.⁵⁹

Congress found that the images the CPPA criminalized harmed children in significant ways.⁶⁰ "In its legislative findings, Congress recognized that there are subcultures of persons who harbor illicit desires for children and commit criminal acts to gratify the impulses."⁶¹ Furthermore, the Court noted that Congress, when enacting the CPPA, "found that surrounding the serious offenders are those who flirt with these impulses and trade pictures and written accounts of sexual activity with young children."⁶² While the Court acknowledged that those who view child pornography might abuse children as a result of such activity, the Court concluded that this potential future action, while serious, was an insufficient ground to hold the images to be unprotected speech.⁶³

⁵³ *See id.*

⁵⁴ 535 U.S. 234 (2002).

⁵⁵ *Id.* at 236 ("In contrast to the speech in *Ferber*, speech that is itself the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production.").

⁵⁶ *See generally id.*

⁵⁷ *Id.* at 240; *id.* at 261 (O'Connor, J., concurring in part and dissenting in part) (citing 18 U.S.C. § 2256(8)(B) (2000)).

⁵⁸ *Id.* at 240 (majority opinion); *id.* at 261 (O'Connor, J., concurring in part and dissenting in part) (citing 18 U.S.C. § 2256(8)(B)).

⁵⁹ *Id.* at 264 (O'Connor, J., concurring in part and dissenting in part).

⁶⁰ *Id.* at 242 (majority opinion).

⁶¹ *Id.* at 244–45.

⁶² *Id.* at 245.

⁶³ *Id.* ("The prospect of crime, however, by itself does not justify laws suppressing protected speech.") (citing *Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 689 (1959)).

Thus, without actual children depicted in the images, the Free Speech Coalition successfully argued that *Ferber's* justification for excluding child pornography from the First Amendment's protection was inapplicable in virtual child pornography cases.⁶⁴ The Court agreed, holding that the language of the CPPA, making it unlawful to possess any images that seem to depict an actual child engaged in sexually explicit activity, was too broad.⁶⁵

Additionally, the Court held that the CPPA banned not only obscene images of children, but also any image depicting a child—real or otherwise—engaged in explicit activity.⁶⁶ Under the Court's test outlined in *Miller v. California*,⁶⁷ "the Government must prove that the work, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value."⁶⁸ The Court noted many instances of well-received literary works that include scenes depicting sexual activity of minors.⁶⁹ Outlawing such material, the Court held, would be inconsistent with First Amendment principles.⁷⁰

C. *A Grey Area in the Law: Congress's Attempt to Overcome the Free Speech Coalition Decision*

While the Court declared the CPPA unconstitutional, it declined to comment on the legality of morphed images.⁷¹ Morphed images, images created by combining an image of a child with a virtual image or adult image depicting

⁶⁴ See *id.* at 250–51.

⁶⁵ *Id.* at 258. The Court pointed out that in its earlier case of *New York v. Ferber*, its "judgment about child pornography was based upon how it was made, not on what it communicated." *Id.* at 250–51.

⁶⁶ *Id.* at 246.

⁶⁷ 413 U.S. 15 (1973).

⁶⁸ *Free Speech Coal.*, 535 U.S. at 246 (citing *Miller*, 413 U.S. at 24).

⁶⁹ *Id.* at 247–48 ("Both themes—teenage sexual activity and the sexual abuse of children—have inspired countless literary works. William Shakespeare created the most famous pair of teenage lovers, one of whom is just 13 years of age. . . . Contemporary movies pursue similar themes. Last year's Academy Awards featured the movie, *Traffic*, which was nominated for Best Picture. . . . The film also contains a scene where, although the movie audience understands the act is not taking place, one character believes he is watching a teenage boy performing a sexual act on an older man. Our society, like other cultures, has empathy and enduring fascination with the lives and destinies of the young. Art and literature express the vital interest we all have in the formative years we ourselves once knew, when wounds can be so grievous, disappointment so profound, and mistaken choices so tragic, but when moral acts and self-fulfillment are still in reach. Whether or not the films we mention violate the CPPA, they explore themes within the wide sweep of the statute's prohibitions. If these films, or hundreds of others of lesser note that explore those subjects, contain a single graphic depiction of sexual activity within the statutory definition, the possessor of the film would be subject to severe punishment without inquiry into the work's redeeming value." (citations omitted)).

⁷⁰ *Id.* at 248.

⁷¹ *Id.* at 242 (finding the "[r]espondents [did] not challenge" the provision that the images fell "within the definition of virtual child pornography" and thus the Court need not consider the issue).

sexual activity,⁷² do not necessarily harm a child in their creation.⁷³ Many of the actual children in these images were never photographed for pornographic purposes.⁷⁴ They were often not posed in a sexualized manner.⁷⁵ In fact, these images are often “innocent” and can be found all over the Internet.⁷⁶ While some pedophiles use photos of children they know from their own lives, others find images to morph on social media and other websites.⁷⁷

Despite the Court’s ruling in *Free Speech Coalition*,⁷⁸ Congress was determined to find a workable solution to address the changing face of child pornography. *Free Speech Coalition* made it clear that virtual images were protected under the First Amendment.⁷⁹ But morphed images, and the solicitation of child pornography images in general, were still potentially outside the protections of the First Amendment.⁸⁰ Congress sought a work-around solution that would both protect children from technological advances taking place in the underground world of child pornography and survive a constitutional challenge like the one that caused the demise of the CPPA.

In response to the *Free Speech Coalition*⁸¹ decision, Congress enacted the PROTECT Act.⁸² This Act criminalizes anyone who knowingly:

advertises, promotes, presents, distributes, or solicits . . . any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe [it is] . . . 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.⁸³

The PROTECT Act’s language was clear—morphed image pornography depicting a minor engaged in sexually explicit conduct constituted a criminal

⁷² Kirkey, *supra* note 9.

⁷³ See Carissa Byrne Hessick, *The Limits of Child Pornography*, 89 IND. L.J. 1437, 1477 (2014).

⁷⁴ See Kirkey, *supra* note 9.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* The images pedophiles find sometimes originate on a parent’s social media feed or on a family blog. *Id.*

⁷⁸ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

⁷⁹ *Id.* at 256.

⁸⁰ See *id.* at 242.

⁸¹ *Id.* at 234.

⁸² Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18 U.S.C. and 34 U.S.C.).

⁸³ 18 U.S.C. § 2252A (2012).

act.⁸⁴ Moreover, under the Act, a state no longer needed to prove that a defendant ever had an image depicting actual child pornography in his possession.⁸⁵ Instead, the Act criminalized the solicitation of such material, regardless of whether the material was ever in the possession of a charged defendant.⁸⁶ By enacting this legislation, Congress attempted to close the loopholes the Court's *Free Speech Coalition* decision left open.⁸⁷

II. MORPHED IMAGES OF CHILD PORNOGRAPHY: THE PROTECT ACT IN COURT

Unlike the guidance the Supreme Court offers on the First Amendment implications of traditional and virtual child pornography, lower courts lack guidance from the Court regarding the constitutionality of morphed child pornography convictions. The Supreme Court has not yet addressed the issue of morphed images. Additionally, while state courts, relying on outdated statutory definitions of child pornography, have overturned convictions for possession of morphed child pornography, federal courts generally have upheld such convictions.⁸⁸ The cases below outline how lower federal and state courts have addressed the issue of possession and distribution of morphed child pornography images.

A. Federal Court Cases Involving Morphed Child Pornography

The Second and Sixth Circuit Courts of Appeals have heard cases involving morphed child pornography.⁸⁹ In each case, the courts held that the PROTECT Act's categorical ban on morphed child pornography is constitutional.⁹⁰ In so holding, each circuit court decision discussed the defendant's First Amendment free speech argument, and each circuit court concluded that the state's interest

⁸⁴ *See id.*

⁸⁵ *See* United States v. Williams, 553 U.S. 285, 293 (2008) (“The statute does not require the actual existence of child pornography. In this respect, it differs from the statutes in *Ferber*, *Osborne*, and *Free Speech Coalition*, which prohibited the possession or distribution of child pornography. Rather than targeting the underlying material, this statute bans the collateral speech that introduces such material into the child-pornography distribution network.”).

⁸⁶ *Id.* at 288.

⁸⁷ *See id.* at 289–90.

⁸⁸ *Compare* Doe v. Boland, 698 F.3d 877 (6th Cir. 2012), and United States v. Hotaling, 634 F.3d 725 (2d Cir. 2011), with Parker v. State, 81 So. 3d 451 (Fla. Dist. Ct. App. 2011).

⁸⁹ *See* Boland, 698 F.3d 877; Hotaling, 634 F.3d 725; United States v. Bach, 400 F.3d 622 (8th Cir. 2005).

⁹⁰ *See* Boland, 698 F.3d at 884 (citing Hotaling, 634 F.3d at 729; Bach, 400 F.3d at 632).

in protecting children from harm was significant enough to overcome such a challenge.⁹¹

In 2011, the Second Circuit became the first federal circuit court to address the issue of morphed child pornography. In *United States v. Hotaling*,⁹² a defendant superimposed the heads of minor females onto the bodies of adult females, creating morphed child pornography.⁹³ He argued that these images were protected speech under the First Amendment.⁹⁴ The defendant “contend[ed] that the interests of actual children were not implicated because they were not engaged in sexual activity during the creation of the photographs.”⁹⁵ The court disagreed, finding that “the interests of actual minors are implicated when their faces are used in creating morphed images that make it appear that they are performing sexually explicit acts.”⁹⁶

The court discussed in depth the nature of the images at issue, finding that the defendant’s conduct clearly failed constitutional muster for protected speech.⁹⁷ The court noted that the only identifiable people in the morphed images were the children.⁹⁸ Moreover, the images contained the children’s real first names.⁹⁹ The court contrasted the facts in the instant case from the facts in the Supreme Court’s *Free Speech Coalition* decision, holding that, unlike in *Free Speech Coalition* where there were no identifiable images of children, minors implicated in the instant case “were at risk of reputational harm and suffered the psychological harm of knowing that their images were exploited and prepared for distribution by a trusted adult.”¹⁰⁰

The court was unpersuaded by the defendant’s argument that, because the images had not been shared with any third parties, no harm was done to the children.¹⁰¹ The images were stored in folders on his computer and “could [have] be[en] used to create a website.”¹⁰² Thus, from the court’s vantage point, it appeared that the defendant intended to share the images, as many of them had

⁹¹ *Id.*

⁹² 634 F.3d 725.

⁹³ *Id.* at 727.

⁹⁴ *Id.* at 729.

⁹⁵ *Id.*

⁹⁶ *Id.* at 729–30.

⁹⁷ *Id.* at 730.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 727 (describing how the defendant indexed, labeled, and encoded the photos into files in HTML, a format commonly used to post items on the Internet).

URLs and were encoded in HTML¹⁰³: “[T]he HTML images were titled ‘[Jane Doe] Upstate NY’s Hottest Teen’ and bore the actual first name of the minor depicted” in the image.¹⁰⁴

The court concluded that the defendant’s possession of these morphed images lawfully subjected him to prosecution under the federal PROTECT Act.¹⁰⁵ Even though the court seemed to make specific findings of fact relevant to the defendant’s case, the court generalized its holding, finding that “[s]exually explicit images that use the faces of actual minors are not protected expressive speech under the First Amendment.”¹⁰⁶ This decision, and others like it from state and federal courts,¹⁰⁷ suggests that the PROTECT Act has found support in courts around the country.

In the Sixth Circuit, the court looked closely at the harms victims in morphed image cases might suffer as a result of their images being used to create child pornography.¹⁰⁸ In *Doe v. Boland*,¹⁰⁹ the court compared the harms morphed child pornography images cause with the harms traditional forms of child pornography cause.¹¹⁰ In doing so, the court noted that while morphed images offer a different degree of injury compared to traditional forms of child pornography, the type of injury is quite similar.¹¹¹

The victims and their guardians in *Boland* sought to recover damages against a convicted defendant who morphed their children’s heads onto pornographic images.¹¹² Boland, the defendant, morphed the images in preparation for a child

¹⁰³ *Id.* at 730.

¹⁰⁴ *Id.* at 727.

¹⁰⁵ *Id.* at 730.

¹⁰⁶ *Id.*

¹⁰⁷ *See* Shoemaker v. Taylor, 730 F.3d 778, 786 (9th Cir. 2013) (“Morphed images are different from traditional child pornography because the children depicted may not have been sexually abused or physically harmed during the images’ production. But, morphed images are like traditional child pornography in that they are records of the harmful sexual exploitation of children. The children, who are identifiable in the images, are violated by being falsely portrayed as engaging in sexual activity. As with traditional child pornography, the children are sexually exploited and psychologically harmed by the existence of the images, and subject to additional reputational harm as the images are circulated.”); *McFadden v. State*, 67 So. 3d 169, 184 (Ala. Crim. App. 2010) (“Both *Ferber* and *Ashcroft* emphasized that children are harmed not only through the actual production of pornography, but also by the knowledge of its continued circulation. We further note that the United States Supreme Court upheld a statute criminalizing the mere possession of child pornography.”).

¹⁰⁸ *Doe v. Boland*, 698 F.3d 877, 880–81 (6th Cir. 2012).

¹⁰⁹ 698 F.3d 877.

¹¹⁰ *See id.* at 880–81.

¹¹¹ *Id.*

¹¹² *Id.* at 880. The defendant was charged with the criminal offense of child pornography and entered into a pre-trial diversion agreement with the U.S. Attorney’s Office. *Id.* While Boland raised his challenges in the later restitution phase of the proceeding, the First Amendment issues are identical to those that defendants often

pornography trial in which he was expected to be called as an expert.¹¹³ His goal was to show the jury that it is impossible to differentiate real child pornography from fake imagery.¹¹⁴ In preparing for trial, the court explained, “Boland created lasting images of Doe and Roe, two identifiable children, purporting to engage in sexually explicit activity.”¹¹⁵

If the point of Boland’s exercise was to demonstrate that the naked eye cannot distinguish morphed images of child pornography from real child pornography, as he claims it was, that goes a long way toward confirming that morphed images may create many of the same reputational, emotional and privacy injuries as actual pornography.¹¹⁶

The court specifically explored whether morphed images, like the ones Boland created, fell under the same exception to the First Amendment as actual child pornography.¹¹⁷ The court highlighted that “[t]he relevant statute defines ‘child pornography’ to include morphed images, as it covers a ‘visual depiction [that] has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.’”¹¹⁸ Boland argued that the PROTECT Act was overbroad.¹¹⁹ Specifically, Boland argued that unless the victims learned of the images (while being minors) and suffered psychological harm from knowing of the images’ existence, his conduct should be protected under the First Amendment.¹²⁰ The court disagreed, holding that simply creating the morphed image was enough to cause harm to the victims, regardless of whether the victims ever actually saw the images.¹²¹ Once an image is shared, it becomes “‘primed for entry into the distribution chain’ of underground child pornographers.”¹²²

raise at earlier stages of the criminal prosecution process. *See id.*

¹¹³ *Id.* at 879.

¹¹⁴ *Id.* at 880.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 880–81.

¹¹⁷ *Id.* at 883 (noting a free speech challenge to actual child pornography can be easily rejected and asking, “what of *morphed* images like the ones Boland created?”).

¹¹⁸ *Id.*

¹¹⁹ *See id.* at 884.

¹²⁰ *Id.*

¹²¹ *Id.* (citing *Osborne v. Ohio*, 495 U.S. 103, 111 (1990)). Similarly, the Bankruptcy Appellate Panel of the Sixth Circuit recently held that Boland could not discharge his debt to his victims because he had an intent to injure the children depicted in the morphed child pornography he created. *In re Boland*, No 17-8019, 2019 WL 580720 (B.A.P. 6th Cir. Feb. 13, 2019). One cannot discharge damage awards for willful or malicious injuries in bankruptcy, so the question in the case was whether the creation of these images met the requisite scienter. *Id.* at *5. The court looked to the injury to the children and concluded that Boland’s intent to invade their “legally protected interests in their reputation, emotional well-being and right to privacy” established that Boland’s conduct was willful. *Id.* at *12–14.

¹²² *Boland*, 698 F.3d at 884 (citing *United States v. Hotaling*, 634 F.3d 725, 730 (2d Cir. 2011)).

B. State Court Cases Involving Morphed Child Pornography

While only three federal circuit courts have analyzed the application of the PROTECT Act to morphed child pornography images, many state courts have analyzed the application of their own state child pornography statutes to morphed child pornography images.¹²³ Some of these cases conclude in a manner consistent with the federal circuits mentioned above.¹²⁴ However, in some states, courts have held that morphed images do not constitute child pornography.¹²⁵ These states did not base their decisions on a harm analysis.¹²⁶ Instead, the courts overruled morphed child pornography convictions for other reasons, notably sometimes due to the state statute at issue being written more narrowly than the federal PROTECT Act.¹²⁷

For example, in Florida, the child pornography statute reads, in relevant part: “It is unlawful for any person to knowingly possess . . . a photograph, motion picture, exhibition, show, representation . . . or other presentation which, in whole or in part, he or she knows to include any sexual conduct by a child.”¹²⁸ It then proceeds to state that “[t]he possession . . . of each such photograph, motion picture, exhibition, show, image, data, computer depiction, representation, or presentation is a separate offense.”¹²⁹ Since morphed images do not depict a child engaged in sexual conduct, Florida courts have overturned convictions when the child pornography at issue was in fact a morphed image.¹³⁰ While the courts seem to understand the concerns the state legislatures raise, one Florida court made its position especially clear, directly telling the legislature what is needed in order for morphed child pornography to be an offense under state law:

Congress enacted child pornography legislation three times, in 1994, 1996, and 2003; each time it broadened the definition of child pornography. Section 827.071(5) requires that actual children engage in sexual conduct. As the federal experience reflects, *if our legislature*

¹²³ See, e.g., *McFadden v. State*, 67 So. 3d 169, 183 (Ala. Crim. App. 2010) (holding that collages depicting adult nudity alongside pictures of children constituted child pornography); *Parker v. State*, 81 So. 3d 451, 453 (Fla. Dist. Ct. App. 2011) (holding that Florida’s child pornography statute does not criminalize morphed child pornography because the sexual conduct depicted must be of children).

¹²⁴ See, e.g., *McFadden*, 67 So. 3d at 182–83 (holding that morphed images implicate the same concerns as actual pornographic images of children).

¹²⁵ See, e.g., *Parker*, 81 So. 3d at 452–53 (holding that although the defendant’s conduct was “loathsome,” morphed images do not fall within the statute’s grasp and are protected speech).

¹²⁶ See, e.g., *id.* at 457 (“[W]e confine our analysis to the statutory language.”).

¹²⁷ See, e.g., *id.* at 453.

¹²⁸ FLA. STAT. ANN. § 827.071(5)(a) (West 2016).

¹²⁹ *Id.*

¹³⁰ See, e.g., *Parker*, 81 So. 3d at 453.

*wants to follow Congress's example and prohibit the possession of the types of photographs involved here, we are confident that it can, and perhaps should, craft an appropriate statute.*¹³¹

The Florida Legislature has been unable to pass a state law protecting victims of morphed child pornography. House Bill 7017 was introduced to make amendments to Chapter 847 “Obscenity.”¹³² These amendments would have made it illegal to possess, promote, view, or transmit morphed child pornography.¹³³ More specifically, the amendments would have expanded the definition of “[c]hild pornography” to include any “visual depiction” that is “adapted . . . or modified to appear that an identifiable minor is engaging in sexual conduct.”¹³⁴ However, despite passing in the house in February 2018, the bill died in the senate.¹³⁵

In New Hampshire, the state supreme court also held that the state child pornography statute did not cover morphed child pornography.¹³⁶ The defendant in *State v. Zidel* was charged with the possession of child pornography¹³⁷ after he morphed images of innocent children¹³⁸ with images of naked adults.¹³⁹ The defendant lawfully possessed the innocent images of the children, as he took them himself in his role as photographer of a camp.¹⁴⁰ Zidel did not intend to share the images.¹⁴¹ Instead, he accidentally included them on a disc presented to the camp director at the end of the summer.¹⁴²

The New Hampshire state statute, in relevant part, states that it is a felony to “knowingly . . . buy, procure, possess, or control any visual representation of a child engaging in sexually explicit conduct.”¹⁴³ Telling the court that the images were “only his ‘personal fantasy,’” Zidel argued that under the protections of the First Amendment, a conviction could not stand because the images “were not

¹³¹ *Id.* at 457 (emphasis added).

¹³² H.R. 7017, 2018 Leg., Reg. Sess. (Fla. 2018); *see* FLA. STAT. ANN. § 847.001–.202.

¹³³ H.R. 7017, 2018 Leg., Reg. Sess. (Fla. 2018).

¹³⁴ *Id.*

¹³⁵ *CS/HB 7017: Child Exploitation*, FLA. SENATE, <https://www.flsenate.gov/Session/Bill/2018/7017> (last visited Mar. 26, 2019).

¹³⁶ *State v. Zidel*, 940 A.2d 255, 265 (N.H. 2008).

¹³⁷ *Id.* at 256.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *See id.*

¹⁴¹ *See id.*

¹⁴² *Id.*; *see also* Brief for the Defendant at 3, *Zidel*, 940 A.2d 255 (No. 2006-0549).

¹⁴³ N.H. REV. STAT. ANN. § 649-A:3 (West 2018); *Zidel*, 940 A.2d at 256–57 (quoting N.H. REV. STAT. ANN. § 649-A:3).

real.”¹⁴⁴ The Supreme Court of New Hampshire agreed, holding that these morphed, or composite, images¹⁴⁵ did not constitute child pornography under the state statute.¹⁴⁶

The New Hampshire opinion differs from the Florida opinion in that New Hampshire’s Supreme Court went further than simply holding morphed images as outside the scope of the state statute.¹⁴⁷ In *Zidel*, the court also opined that the defendant’s possession of morphed images, in and of itself, was protected speech under the First Amendment.¹⁴⁸ The court noted that while previous cases involving child pornography recognized that states have “a compelling interest ‘in safeguarding the physical and psychological health of a minor,’” the central harm at issue in those cases was the sexual abuse itself.¹⁴⁹

The *Zidel* court looked at the state legislature’s reasoning behind the enactment of the New Hampshire statute, noting that the purpose of the statute was to prevent harm to children resulting from “their *use as subjects in sexual performances*.”¹⁵⁰ The court considered the Supreme Court’s decision in *Free Speech Coalition*, wherein the Court focused its attention on how the image was “made, not on what it communicated.”¹⁵¹ In doing so, the New Hampshire Supreme Court found that the state’s application of *Osborne* to the facts at issue in *Zidel* was misplaced.¹⁵²

¹⁴⁴ *Zidel*, 940 A.2d. at 256.

¹⁴⁵ For the purposes of this Article, morphed and composite images represent the same thing—images created by combining portions of a real child’s image with portions of an adult or virtual image.

¹⁴⁶ *Zidel*, 940 A.2d. at 263.

¹⁴⁷ Compare *id.* at 265 (determining that the application of the state statute to the defendant’s conduct violated the defendant’s First Amendment right to free speech), with *Parker v. State*, 81 So. 3d 451, 457 (Fla. Dist. Ct. App. 2011) (“Although the parties urge us to consider the First Amendment ramifications of section 827.071, we confine our analysis to the statutory language.”).

¹⁴⁸ *Zidel*, 940 A.2d at 265.

¹⁴⁹ *Id.* at 262–63 (citing *New York v. Ferber*, 458 U.S. 747, 756–57 (1982)); see also *Osborne v. Ohio*, 495 U.S. 103, 109, 111 (1990) (extending the holding in *Ferber* to allow states to prohibit even the mere possession of child pornography to protect the victims and destroy the market for such acts).

¹⁵⁰ *Zidel*, 940 A.2d at 262 (citing N.H. REV. STAT. ANN. § 649-A:1 (2007)) (“The legislature finds that there has been a proliferation of exploitation of children through their *use as subjects in sexual performances*. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children. The public policy of the statute demands the protection of children from exploitation through sexual performances In accordance with the United States Supreme Court’s decision in *New York v. Ferber*, this chapter makes the dissemination of visual representations of children under the age of 16 engaged in sexual activity illegal irrespective of whether the visual representations are legally obscene.”); see also *Parker*, 81 So. 3d at 457 (finding Florida’s child pornography statute does not allow prosecution for morphed images).

¹⁵¹ *Zidel*, 940 A.2d at 263; see also *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250–51 (2002).

¹⁵² *Zidel*, 940 A.2d at 263.

The state argued that morphed images like those at issue in the *Zidel* case constituted unprotected speech.¹⁵³ The court noted that in *Osborne*, the Court’s desire to protect children seemed broader than solely protecting children from sexual abuse.¹⁵⁴ The court considered *Osborne*’s finding that “‘penaliz[ing] those who possess and view’ child pornography will decrease its production, ‘thereby decreasing demand.’”¹⁵⁵ The court even discussed *Osborne*’s finding that many sexual predators use child pornography to convince other children to engage in illicit and illegal acts.¹⁵⁶ However, the New Hampshire Supreme Court held that *Zidel*’s conduct was protected under the First Amendment.¹⁵⁷

To reach its conclusion, the New Hampshire Supreme Court attempted to differentiate the facts before it with the facts of another morphed image case, *United States v. Bach*.¹⁵⁸ In *Bach*, the defendant morphed an illicit image of a known juvenile onto the body of a second nude child.¹⁵⁹ He was prosecuted under the PROTECT Act, requiring that the defendant “knowingly receive or distribute” child pornography, and his conviction was upheld.¹⁶⁰ In contrast to *Bach*, the defendant in *Zidel* never knowingly received nor knowingly distributed the image at issue—instead, he created the image at home for his own personal use.¹⁶¹ Moreover, unlike *Zidel*, *Bach* involved the sexual exploitation of a second nude child whose body was attached to the head of the other known juvenile.¹⁶² Indeed, sexual abuse had occurred at some point in the production chain.¹⁶³ The court found that the facts of the *Zidel* case, as applied to the statute at issue, did not warrant a conviction and overturned it accordingly.¹⁶⁴

Returning to *Boland*,¹⁶⁵ the Sixth Circuit distinguished the case from *Zidel*, finding that New Hampshire’s Supreme Court decision rested on the application of a different statute to a case involving morphed child pornography images.

¹⁵³ *Id.* at 262.

¹⁵⁴ *See id.* at 264.

¹⁵⁵ *Id.* at 259 (citing *Osborne v. Ohio*, 495 U.S. 103, 109–10 (1990)).

¹⁵⁶ *Id.* at 259–60 (citing *Osborne*, 495 U.S. at 111).

¹⁵⁷ *Id.* at 265.

¹⁵⁸ *Id.* (citing *United States v. Bach*, 400 F.3d 622 (8th Cir.), *cert. denied*, 546 U.S. 901 (2005)).

¹⁵⁹ *Bach*, 400 F.3d at 625.

¹⁶⁰ *Id.* at 632 (“Although there is no contention that the nude body actually is that of [the child] or that he was involved in the production of the image, a lasting record has been created of [the child], an identifiable minor child, seemingly engaged in sexually explicit activity. He is thus victimized every time the picture is displayed. Unlike the virtual child pornography or the pornography using youthful looking adults . . . this image created an identifiable child victim of sexual exploitation.”).

¹⁶¹ *Zidel*, 940 A.2d at 264–65.

¹⁶² *Id.* at 265.

¹⁶³ *Bach*, 400 F.3d at 632 (noting the photograph actually “record[ed] a crime”).

¹⁶⁴ *Zidel*, 940 A.2d at 265.

¹⁶⁵ *See* discussion *supra* Section II.A.

The New Hampshire Supreme Court's decision in *State v. Zidel* says nothing to the contrary. That decision invalidated a statute barring possession of morphed images because the *state* child-pornography laws aimed only to "combat the harm resulting to children from the distribution of depictions of sexual conduct involving live performance[s] or visual reproduction of live performances by children." A morphed image, the state court reasoned, does not involve a live sexual performance. The federal child-pornography statutes, by contrast, target "computers and computer imaging technology" that can "invade the child's privacy and reputational interests" by "alter[ing] innocent pictures of children to create visual depictions of those children engaging in sexual conduct." The legitimate government interest in avoiding "injury to [a] child's reputation and emotional well-being," allows Congress to prohibit morphed images.¹⁶⁶

Taken together, these cases suggest that federal courts view the resulting harm caused by morphed child pornography significant enough to warrant the images' exclusion from First Amendment protections.¹⁶⁷

III. A THREE-PART PRESCRIPTION TO ADDRESS THE CHANGING FACE OF CHILD PORNOGRAPHY

A. *The Supreme Court Should Find the PROTECT Act to Be Constitutional with Respect to Morphed Child Pornography*

Scholars opine that child pornography falls outside the purview of the First Amendment, not because of the harm caused by an image's *circulation*, but instead because of the harm caused by the image's *creation*.¹⁶⁸ These scholars

¹⁶⁶ *Doe v. Boland*, 698 F.3d 877, 884 (6th Cir. 2012) (citations omitted).

¹⁶⁷ *See also* *United States v. Stewart*, 839 F. Supp. 2d 914, 925 (E.D. Mich. 2012) ("The Sixth Circuit has upheld the criminalization of graphic manipulation of a photograph by a defendant even where a child was not used to create the original images and where there is no explicit evidence of harm to the photographed child."); *United States v. Anderson*, No. 4:12CR3083, 2012 WL 6967610, at *6 (D. Neb. Dec. 26, 2012), *report and recommendation adopted*, No. 4:12-CR-3083, 2013 WL 396014 (D. Neb. Jan. 30, 2013), *aff'd*, 759 F.3d 891 (8th Cir. 2014) ("Following the reasoning in *Bach*, *Hotaling* and *Boland*, the undersigned magistrate judge finds the morphed image in this case . . . is not protected under the First Amendment. Unlike the allegations in *Zidel* and *Gerber*, [the defendant] has been charged with distributing child pornography, implicating associated and foreseeable psychological harm to an identifiable child . . . that may not arise from mere possession of the image."). *See generally* *Boland*, 698 F.3d 877; *United States v. Hotaling*, 634 F.3d 725 (2d Cir. 2011); *Bach*, 400 F.3d 622.

¹⁶⁸ *See, e.g.*, Carmen M. Cusack, *Busting Patriarchal Booby Traps: Why Feminists Fear Minor Distinctions in Child Porn Cases*, 39 SOUTHERN U. L. REV. 43, 59 (2011) ("The *Gerber* court concluded that the altered images were analogous to virtual child pornography, not actual child pornography, since the photo of the child's face did not evidence the exploitation of a real child who actually engaged in or simulated the sexual

argue that the child pornography exception to the First Amendment is grounded less in the reputational harm a child's image being shared publicly causes, than in the actual harm creation of the pornographic image itself causes.¹⁶⁹ This distinction is important because in today's digital world, some images do not cause any harm in their creation.¹⁷⁰ However, the circulation harm is significant.¹⁷¹

There is no doubt that survivors of morphed child pornography will experience harm differently than survivors of sexual abuse whose abuse was recorded and/or distributed. The Initiative to Support Child Sex Abuse Survivors illustrated this reality when it surveyed survivors who identified the significant cause of the harm of circulation.¹⁷² Survivors of sexual abuse have unique needs. One sexual abuse survivor detailed this point as she outlined how the trauma remains with her:

Memories and feelings of the past still affect me today like it was yesterday. The abuse broke up my family unit. I think about it when I see families together. I think about it when I see moms and daughters together that are the age of me and my mother and how our relationship could have been different if abuse had not happened. I think about it at school, because school is taking me so much longer to finish and how much harder it is for me to succeed because of the court I went through and the PTSD I suffer with everyday [sic]. I think about it when I see children and families because I still mourn for the loss of my family unit. I think about it when I have arguments . . . because I have such a heightened flight or fight instinct that it gets hard to communicate my feelings.¹⁷³

An individual whose image is morphed with an illicit image and shared as child pornography avoids much of the trauma sexual abuse survivors experience;¹⁷⁴ however, as the Second, Sixth, and Eighth Circuit Courts of

conduct depicted. The sexually explicit content depicting an adult was neither child pornography nor obscenity. The harm principle, required by the *Gerber* court and other courts, is the best way for the government to protect children while avoiding the expansion of *Williams* and treading into anti-woman territory.”)

¹⁶⁹ This is essentially the argument set forth by the Court in *Free Speech Coalition*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 241 (2002).

¹⁷⁰ *Kirkey*, *supra* note 9.

¹⁷¹ As a former Special Victims Unit prosecutor, this Author recognizes that the harm in the creation of a pornographic image of children is distinctive from the harm caused by the circulation of an image depicting child pornography. However, courts should find that this is a distinction without legal significance.

¹⁷² See CANADIAN CENTRE FOR CHILD PROTECTION, SURVIVORS' SURVEY 124 (2017), https://www.protectchildren.ca/app/en/csa_imagery#csa_imagery-survey_results (discussing the harm survivors experience as a result of circulation such as fearing discovery would cause further distribution of their images).

¹⁷³ CANADIAN CENTRE FOR CHILD PROTECTION, *supra* note 172, at 265.

¹⁷⁴ See *id.* at 267.

Appeals have explained, morphed child pornography implicates real children and has the potential to cause them reputational and psychological harm.¹⁷⁵

The Supreme Court made clear that a defendant's First Amendment free speech protection *cannot* evaporate simply because a virtual image might harm a potential child in the future.¹⁷⁶ In *Free Speech Coalition*, the state argued that pedophiles often use child pornography (virtual or otherwise) to seduce victims.¹⁷⁷ Specifically, the state highlighted that a high percentage of child pornography viewers have also admitted to sexually abusing children.¹⁷⁸ The Court did not find this argument persuasive.¹⁷⁹

[The Government] argues that the CPPA is necessary because pedophiles may use virtual child pornography to seduce children. There are many things innocent in themselves, however, such as cartoons, video games, and candy, that might be used for immoral purposes, yet we would not expect those to be prohibited because they can be misused. The Government, of course, may punish adults who provide unsuitable materials to children, and it may enforce criminal penalties for unlawful solicitation. The precedents establish, however, that speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it.¹⁸⁰

The Court should find that this future harm to a potential child, coupled with the circulation harm to an actual child, is significant enough to warrant morphed child pornography's exclusion from the protections of the First Amendment. Without this safeguard, individuals, including law enforcement, would be required to "turn the other cheek" when discovering real children imaged in pornographic pictures on search warrants.¹⁸¹ A continued grey area would exist in the law in instances where the images were inadvertently discovered.¹⁸² The

¹⁷⁵ See discussion *supra* Section II.A.

¹⁷⁶ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 252 (2002).

¹⁷⁷ *Id.* at 251.

¹⁷⁸ *Id.* at 241, 250, 253; see also Audrey Rogers, *Child Pornography's Forgotten Victims*, 28 PACE L. REV. 847, 854 (2008) ("Moreover, there is growing evidence linking the possession of child pornography with acts of sexual violence against children. A recent study by psychologists at the Federal Bureau of Prisons found that eighty-five percent of individuals charged with possessing child pornography admitted that they also sexually abused children.") (citing Benedict Carey & Julian Sher, *Debate on Child Pornography's Link to Molesting*, N.Y. TIMES (July 19, 2007), http://www.nytimes.com/2007/07/19/us/19sex.html?_r=2&oref=slogin&oref=slogin).

¹⁷⁹ *Free Speech Coal.*, 535 U.S. at 251–52.

¹⁸⁰ *Id.* (citations omitted).

¹⁸¹ For an example of law enforcement officers discovering such pornographic pictures on a search warrant, see *McFadden v. State*, 67 So. 3d 169, 174 (Ala. Crim. App. 2010).

¹⁸² See *State v. Zidel*, 940 A.2d 255, 256 (N.H. 2008) (finding the defendant accidentally gave the morphed images away).

risk of future circulation of these morphed images is too real and too harmful to ignore.

The significant harms caused by circulation of damaging images is not limited to child pornography, and it is helpful to think about the harm from a broader perspective. Cyber-harassment and the sharing of revenge pornography cause similar reputational and psychological harms.¹⁸³ In her article, *Law's Expressive Value in Combatting Cyber Gender Harassment*, Professor Citron explores cyber-harassment through a feminist lens.¹⁸⁴ She argues that, “[t]he online harassment of women exemplifies twenty-first century behavior that profoundly harms women yet too often remains overlooked and even trivialized.”¹⁸⁵ Citron highlights the misconceptions that often lead to society marginalizing the conduct of those who engage in cyber-harassment.¹⁸⁶ At the root of these misconceptions is the mistaken belief that the harm caused to victims of cyber-harassment are not significant enough to warrant its condemnation through legislation.¹⁸⁷ However, as Citron points out, the harm caused to victims of cyber-harassment is very real and often targets women, a traditionally vulnerable group in society.¹⁸⁸ This harm can take a “significant economic, emotional, and physical” toll on its victims.¹⁸⁹

The threat of morphed images coming to light in the future is significantly worrisome. The need to exclude morphed child pornography from First Amendment protection can be illustrated by its similarities to cyber-harassment, which by some state definitions, includes revenge porn.¹⁹⁰ Just as revenge porn harms victims through circulation, morphed child pornography also harms children through its circulation.¹⁹¹ Victims of both crimes experience “a privacy or reputational harm akin to the harms of defamation, invasion of privacy, or

¹⁸³ See Danielle Keats Citron, Essay, *Law's Expressive Value in Combatting Cyber Gender Harassment*, 108 MICH. L. REV. 373, 375 (2009) (discussing the harms caused by revenge pornography and cyber-harassment).

¹⁸⁴ See generally *id.* (discussing the gendered nature of online harassment and its effect on women).

¹⁸⁵ *Id.* at 373.

¹⁸⁶ *Id.* at 395 (“Commentators trivialize the harassment of women online by arguing that: (1) it constitutes innocuous teasing, (2) women can address the harassment on their own, and (3) cyber-harassment coheres with the internet’s unique norms.”).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 396–97.

¹⁸⁹ *Id.*

¹⁹⁰ E.g., FLA. STAT. ANN. § 784.049 (West 2017) (“‘Sexually cyberharass’ means to publish a sexually explicit image of a person that contains or conveys the personal identification information of the depicted person to an Internet website without the depicted person’s consent, for no legitimate purpose, with the intent of causing substantial emotional distress to the depicted person.”).

¹⁹¹ See Citron, *supra* note 183, at 396–97.

false light invasion of privacy.”¹⁹² Like revenge porn, a morphed image of a child in and of itself might not physically harm the individual pictured at its creation, but the harm of it being viewed or circulated is prevalent and worrisome.¹⁹³ However, unlike most adult revenge porn cases, where the adult might have consented to the image’s existence at its creation, young children are unable to give consent to any image taken—innocent or otherwise. A defendant (related or otherwise) should not be able to possess a child’s image if he has ill intent with regard to how that image will be treated.¹⁹⁴

Online privacy violations are not only harmful, but they are prevalent as well. Four percent of Internet users in the United States “have had intimate images posted online without their consent or” threatened to be shared without their consent.¹⁹⁵ For young women, the statistic is even more startling. A law review article authored by legal practitioners Carrie Goldberg and Adam Massey found that one in ten women under the age of thirty have had a sexualized image

¹⁹² Hessick, *supra* note 73, at 1478 (“The conceptual foundation of this harm relies on the distribution of an image to other individuals, just as reputation and privacy torts require publication.”).

¹⁹³ *Id.* at 1478–81.

¹⁹⁴ See Layla Goldnick, Note, *Coddling the Internet: How the CDA Exacerbates the Proliferation of Revenge Porn and Prevents a Meaningful Remedy for Its Victims*, 21 *CARDOZO J.L. & GENDER* 583 (2015). As seen in child pornography cases, courts must balance the harm caused by revenge porn with the defendant’s right to free speech. *Id.* at 595. In response to First Amendment concerns, states criminalizing revenge porn often require proof of more than simply sharing an intimate image of an adult without the adult’s consent to share such image. *Id.* at 616. The focus on these statutes centers on the intent of the defendant, perhaps even more so than in his actions in sharing the harmful material. *See id.* Some statutes require a showing that the defendant shared the image with the intent to harass the victim. *See id.* Other state statutes require a showing that the image was taken with the expectation that it would remain private. *See id.* Some states require a showing that either the victim suffered a financial loss as a result of the nonconsensual sharing or that the defendant shared it seeking a financial gain. *Id.* at 617. Taken as a whole, revenge porn statutes include requirements that focus on how the charged defendant used the image to take advantage of a victim or to take advantage of an opportunity to use another’s image for personal gain. *Id.* at 615–17. Any time a defendant possesses a child’s image and transforms it into morphed child pornography, he takes advantage of the child’s image—an image that he has no lawful right to possess or manipulate. This “taking advantage” parallels the statutes criminalizing revenge porn. Layla Goldnick lists the following states as having this (or a similar) requirement:

Alaska (ALASKA REV. STAT. ANN. § 11.61.120(a) (2014)); California (CAL. PENAL CODE § 647(j)(4)(A) (West 2013)); Colorado (COLO. REV. STAT. ANN. § 18-7-107(1)(a)(I) (West 2014)); Georgia (GA. CODE ANN. § 16-11-90(a)(1) (West 2014)); Hawaii (HAW. REV. STAT. ANN. § 711-1110.9(1)(b) (West 2014)); Maryland (MD. CODE ANN., CRIM. LAW § 3-809(c) (West 2014)); New York (N.Y. PENAL LAW § 250.45(5) (McKinney 2014)); Pennsylvania (PA. CONS. STAT. ANN. § 3131(a) (West 2014)); Utah (UTAH CODE ANN. § 76-5b-203(2) (West 2014)); and Virginia (VA. CODE ANN. § 18.2-386.2(A) (West 2014)).

Id. at 616 n.233.

¹⁹⁵ Carrie Goldberg & Adam Massey, *State-Sanctioned Humiliation: Why New York Needs a Nonconsensual Pornography Law*, MAY 2017 *NYSBA J.* 48, 49–50 (2017) (citing AMANDA LENHART ET AL., *NONCONSENSUAL IMAGE SHARING: ONE IN 25 AMERICANS HAS BEEN A VICTIM OF ‘REVENGE PORN’* 3, 4–5 (2016), https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf).

either threatened to be posted or actually posted online.¹⁹⁶ This privacy harm has caused many state legislatures to criminalize the nonconsensual sharing of intimate images.¹⁹⁷

Like criminalizing cyber-harassment and revenge porn, criminalizing morphed child pornography does not curtail a defendant's right to free speech. As Professor Citron notes, “[s]elf-expression should receive little protection if its sole purpose is to extinguish the self-expression of another.”¹⁹⁸ In many ways this mirrors the harms victims of morphed child pornography might face: cyber-harassment and revenge porn take away a victim's right to fully define herself online.¹⁹⁹ Indeed, “[y]ou are what Google says you are.”²⁰⁰ For a child, this harm is especially worrisome. If a child is depicted as a victim of child pornography or a willing participant in a sexual encounter, she might face reputational and psychological harm, including stigmatization and shame for years into the future.

B. State Legislatures Should Amend Their Child Pornography Statutes to Encompass Morphed Child Pornography

Many state statutes do not criminalize the possession of morphed child pornography. Florida law defines child pornography as “any image depicting a minor engaged in sexual conduct.”²⁰¹ Similarly, in New Hampshire, child pornography images are called “child sexual abuse images” and are defined as “any visual representation of a child engaging in sexually explicit conduct.”²⁰²

¹⁹⁶ *Id.* at 50. The authors represent victims of revenge porn. *See id.* at 49.

¹⁹⁷ *See id.* at 50 (“While these statutes differ substantially from state to state, all of them ban the intentional distribution of nude images and video when that distribution is without the consent of the party depicted. Taken as whole, these states and the proposed federal law are important steps in legislating a right to sexual privacy. And it makes sense: our health records (HIPAA) and our educational records (FERPA) are private under federal law; why shouldn't material that's more personal warrant protections?”). Additionally, in many states, victims of revenge porn can recover damages under tort law against individuals who nonconsensually share their image. *See* Paul J. Larkin, Jr., *Revenge Porn, State Law, and Free Speech*, 48 LOY. L.A. L. REV. 57, 84 (2014) (noting that a damages remedy for “offensive publication of private details of an individual's life” is provided by the *Restatement (Second) of Torts*, which is adopted by most jurisdictions and often cited by judges). While there are certainly similar causes of actions available under tort law for victims of morphed child pornography, an examination of those actions is outside the scope of this Article. Therefore, this section is limited to criminal liability for revenge porn.

¹⁹⁸ Citron, *supra* note 183, at 406.

¹⁹⁹ *See id.* at 397–98.

²⁰⁰ *See generally* Megan Angelo, *You Are What Google Says You Are*, WIRED (Feb. 11, 2009, 11:43 AM), <https://www.wired.com/2009/02/you-are-what-go/> (outlining how the Google search results for an individual define her professional identity).

²⁰¹ FLA. STAT. ANN. § 847.001 (West 2017).

²⁰² N.H. REV. STAT. ANN. § 649-A:3 (West 2018).

Under Mississippi law, child pornography is defined as “an actual child engaging in sexually explicit conduct.”²⁰³ These are just three examples of state statutes that do not include language in their child pornography definitions that would permit a conviction to stand based on the possession of *morphed* child pornography.²⁰⁴

To protect children in their respective states, states should update their child pornography statutes to include a broader definition of child pornography. States could model their revised child pornography statutes after the PROTECT Act, as it criminalizes the possession of morphed child pornography and has withstood First Amendment scrutiny in federal courts.²⁰⁵ One Florida appellate court indicated that a revision to the state statute is needed to even begin to discuss the First Amendment issues raised (and often overcome) in federal morphed child pornography cases:

As this overview demonstrates, Congress enacted child pornography legislation three times, in 1994, 1996, and 2003; each time it broadened the definition of child pornography. Section 827.071(5) requires that actual children engage in sexual conduct. As the federal experience reflects, if our legislature wants to follow Congress’s example and prohibit the possession of the types of photographs involved here, we are confident that it can, and perhaps should, craft an appropriate statute.

Although the parties urge us to consider the First Amendment ramifications of Section 827.071, we confine our analysis to the statutory language. Because our construction of it concludes that it does not apply to [the defendant’s] conduct, we have no occasion to decide whether its application to him is unconstitutional. Such an analysis is unnecessary for our decision.²⁰⁶

A model statute might mirror the PROTECT Act’s relevant language, finding guilty:

- (a) Any person who— . . .
- (3) knowingly—
 - (A) reproduces any child pornography for distribution through the mails, or using any means or facility of interstate or foreign commerce

²⁰³ MISS. CODE ANN. § 97-5-33 (West Supp. 2018).

²⁰⁴ Other state child pornography laws that do not allow for the prosecution of morphed images include ARIZ. REV. STAT. ANN. § 13-3553 (2018) and KY. REV. STAT. ANN. § 531.335 (West 2016).

²⁰⁵ See discussion *supra* Section II.A.

²⁰⁶ Parker v. State, 81 So. 3d 451, 457 (Fla. Dist. Ct. App. 2011).

or in or affecting interstate or foreign commerce by any means, including by computer; or

(B) advertises, promotes, presents, distributes, or solicits through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that *reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—*

(i) *an obscene visual depiction of a minor engaging in sexually explicit conduct; or*

(ii) *a visual depiction of an actual minor engaging in sexually explicit conduct.*²⁰⁷

Under such a statute, the state would not be required to prove that a child is engaged in a sexual act in a pornographic image of a child. Instead, the statute would require the state to prove that the image “reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains” obscene images depicting an actual child engaged in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct.²⁰⁸ State statutes such as this broadly construe child pornography to include “innocent” images of actual children that are morphed with adult or virtual sexualized images. This language excludes both virtual child pornography and non-obscene images that depict minors engaged in sexually explicit acts (such as the movies and films discussed in Part I).²⁰⁹ This would mirror the PROTECT Act in many ways. State courts should hold that the circulation harm (or potential for circulation harm) caused to the actual children morphed into the child pornography images is significant. When coupled with the potential harm that may be caused to additional children because of a pedophile viewing such images or showing such images to prospective sexual abuse victims, these images warrant morphed child pornography’s exclusion from First Amendment protections.

C. Law Enforcement Should Oversee a Public Health Campaign Aimed at Educating Parents of the Risks Posed by Sharing a Child’s Image Online

Parents must be made aware that pedophiles take an interest in creating morphed images. These individuals may lurk within a parent’s newsfeed and might download a child’s image without the permission or knowledge of the

²⁰⁷ 18 U.S.C. § 2252A (2012) (emphasis added).

²⁰⁸ *Id.*

²⁰⁹ See discussion *supra* Part I; see also *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 256–58 (2002) (discussing what the language of the CPPA prohibits).

parent.²¹⁰ Such an image can become child pornography if it is morphed with a computerized image or with an image of an adult.²¹¹ Unlike more traditional forms of child pornography, the child depicted in the morphed image was not harmed in the creation of the image.²¹² But most, if not all parents, would find such an image to be harmful to the child. Just as if traditional child pornography²¹³ is shared online, when morphed child pornography is shared, the child's digital identity is forever tarnished. With today's facial recognition software, the possibilities for this image to show up over the course of the child's lifetime are endless.²¹⁴ Writing for the National Post, one of Canada's leading news publications, Sharon Kirkey discussed this phenomenon: "Pedophiles are re-posting innocuous photos of children lifted from their parents' Facebook accounts, a perverse phenomenon highlighting the darker side of 'sharenting,' those hunting online predators warn."²¹⁵

According to the head of Canada's online child photography tip line, images are often reshared on pedophile websites, where photos of children doing "normal" things are categorized and shared amongst pedophiles.²¹⁶ Safety officials in Australia are also concerned.²¹⁷ One official, eSafety Commissioner Toby Dadd, told an Australian journalist that one of the pedophile image-sharing sites he visited had over forty-five million images.²¹⁸ He found that "about half the material appeared to be sourced directly from social media" and clearly labeled in folders as images from Facebook, or other social sites like Kik, with one folder called 'Kik girls'. Another was labelled 'My daughter's Instagram friends.'²¹⁹

Indeed, legislatures, police officers, attorneys, and courts are not the only ones who need to be familiarized with the dangers of morphed child

²¹⁰ Kirkey, *supra* note 9.

²¹¹ *Id.* (quoting the director of a Canadian tip line website for child pornography who says pedophiles morph photos when they like the way a child looks).

²¹² See Hessick, *supra* note 73 ("While the morphed image makes it appear as though the child is being sexually exploited or abused, the child never actually suffers such abuse. Put simply, morphed computer images involve no sexual exploitation or abuse of children in the production process, and thus they do not fall within the proposed definition of child pornography." (citation omitted)).

²¹³ By traditional child pornography, this means child pornography that depicts an actual child being sexually abused.

²¹⁴ See Ben Woods, *Facial Recognition Can Identify You Even if Your Face Is Blurred*, WIRED (Aug. 8, 2016), <http://www.wired.co.uk/article/facial-recognition-systems-can-identify-you-even-if-your-face-is-blurred>.

²¹⁵ Kirkey, *supra* note 9.

²¹⁶ *Id.*

²¹⁷ See Battersby, *supra* note 13.

²¹⁸ *Id.*

²¹⁹ *Id.*

pornography. Parents must become apprised about the dangers as well. It is not only the downloading and sharing of images from social media that parents need to be concerned with: “In some cases, the images grabbed from Facebook, Instagram and other social media accounts are being manipulated and photo-shopped, so that the head of the child is pasted onto another child’s naked body.”²²⁰ One study reported that 92% of two-year-olds have an online presence.²²¹ Another study, conducted by the Pew Research Center, found that 75% of parents turn to social media for parenting advice and support.²²² Few of these parents are concerned when others share information about their children.²²³

While parents are concerned with what their teens are doing online that could harm them now or in the future, this Pew report shows that few parents are concerned with their own online actions with respect to their children.²²⁴ As this Article explains, parents can inadvertently expose their children to danger online. By becoming aware of this potential risk, parents can make well-informed choices regarding their online sharing. While this will not ameliorate the risk of morphed child pornography, it will encourage families and society to take a hard look at the changing face of child pornography.

CONCLUSION

The Internet has changed how child pornography is created and shared.²²⁵ While in the past only children who were sexually abused were depicted in pornographic images, today’s technology makes it possible for a child to be depicted in pornographic images without ever once engaging in a sexual or obscene act. To protect children, the U.S. Supreme Court should uphold the PROTECT Act’s ban on morphed child pornography. Moreover, state

²²⁰ Kirkey, *supra* note 9 (“(A pedophile) might like the way a particular child looks, so they take that face and morph it onto another shot they’ve come across online of a child sexual abuse image,” said Signy Arnason, director of Winnipeg-based Cypertip.ca, [sic] operated by the Canadian Centre for Child Protection.”).

²²¹ Larry Magid, *Study: 92% of U.S. 2-Year-Olds Have Online Record*, CNET (Oct. 6, 2010, 4:05 PM), <https://www.cnet.com/news/study-92-of-u-s-2-year-olds-have-online-record/>.

²²² Maeve Duggan et al., *Parents and Social Media*, PEW RES. CTR. (July 16, 2015), <http://www.pewinternet.org/2015/07/16/parents-and-social-media/#fn-13802-1>.

²²³ *Id.* (“Few parents say they have felt uncomfortable when information about their children is shared by other family members or caregivers on social media. Most parents have not felt uneasy about the content posted about their children by other family members or caregivers on social media. 12% of all parents of children under 18 say they have ever felt uncomfortable about something posted about their child on social media by a spouse, family member or friend. Fully 88% say they have not felt this way. 11% of all parents have ever asked for content about their child posted by a family member, caregiver or friend to be removed from social media.”).

²²⁴ *See generally id.*

²²⁵ *See Kirkey, supra* note 9.

legislatures should amend their child pornography statutes, potentially by following the PROTECT Act as outlined in this Article. Lastly, law enforcement in the United States should commence a public health campaign addressing the realities of morphed child pornography, encouraging parents to make well-informed decisions before sharing pictures of their children online. These cogent paths forward can offer meaningful legal and social benefits to victims and potential victims of child sexual abuse and pornography while protecting the First Amendment rights of the accused.