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## Metamorphosis: Changing Oklahoma Law to Protect Children from Morphed Child Pornography

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# **METAMORPHOSIS: CHANGING OKLAHOMA LAW TO PROTECT CHILDREN FROM MORPHED CHILD PORNOGRPAHY**

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## I. INTRODUCTION

Referring to pornography, Supreme Court Justice Potter Stewart famously wrote, “I know it when I see it.”<sup>1</sup> However, the current struggle to define child pornography in our technologically-advanced age demonstrates that Stewart’s ability in 1964 to identify pornography with a glance is not a viable option for defining child pornography today.<sup>2</sup> This comment tracks the development of child pornography law, specifically focusing on morphed child pornography and Oklahoma law. Morphed child pornography is distinct from images of children engaging in sexual acts, or depictions of virtual children engaging in sexual acts.<sup>3</sup> Rather, morphed child pornography consists of otherwise innocent images of real children edited to appear as though the child is engaged in a sexual act.<sup>4</sup> Ultimately, this comment argues that Oklahoma’s legal definition of child pornography should be updated to include morphed child pornography thereby protecting the children that are exploited in these types of images.<sup>5</sup>

Part II provides a brief overview of the history of child pornography. This section provides the context necessary to understand the interactions between the multifaceted definitions of child pornography and the law. Specifically, this part defines morphed child pornography by comparing and contrasting morphed child pornography with other categorical definitions, including virtual child pornography and lewd child pornography.

Part III explains the interaction of child pornography and the law in the United States, both at the federal and state level. The evolution of obscenity laws is tracked along with its relationship to child pornography law. The interaction of child pornography law and the First Amendment is discussed.

Part IV interprets Oklahoma’s statute defining child pornography, analyzing whether or not the morphed variety legally constitutes child pornography. It utilizes different tools of statutory construction to answer this question, looking at the legislative intent behind this section in the criminal code and the plain meaning of the words in the statute. This part also addresses the treatment of child pornography at the state level, noting the different statutory definitions of child pornography and whether morphed child pornography is included in those definitions.

Part V argues that morphed child pornography should fall within any definition of child pornography. After addressing the harms and exploitation caused by morphed images, this part concludes that morphed child pornography should be included in Oklahoma’s statutory definition of child pornography. Finally, it recommends the simple language needed to broaden Oklahoma’s statutory definition of child pornography.

## II. TYPES OF CHILD PORNOGRAPHY

While recent developments in technology have continued to create new conversation and controversy about child pornography, the existence of child pornography predates

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1. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

2. MONIQUE MATTEI FERRARO & EOGHAN CASEY, *INVESTIGATING CHILD EXPLOITATION AND PORNOGRAPHY: THE INTERNET, THE LAW AND FORENSIC SCIENCE* 237 (2005).

3. CARMEN M. CUSACK, *PORNOGRAPHY AND THE CRIMINAL JUSTICE SYSTEM* 188 (2015).

4. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 242 (2002).

5. *See generally* OKLA. STAT. tit. 21, § 1024.1(A).

even the invention of the printing press in the fifteenth century.<sup>6</sup> For example, paintings depicting sexual activity between men and young boys have been discovered in ancient Greek civilizations.<sup>7</sup> In addition, written pornography describing sexual acts with children has survived from seventeenth-century France and England.<sup>8</sup> Indeed, it has been said that “[a]lmost since man discovered the ability to write or draw he has recorded the sexual abuse of children.”<sup>9</sup>

Advancements in technology have greatly increased the production and distribution of child pornography. With the invention of the camera in the early nineteenth century, the pornography industry boomed, and with it, child pornography.<sup>10</sup> The relationship between technology and pornography continues today. Significant changes in technology can shift the creation and distribution of child pornography in a matter of years.<sup>11</sup> Rapid advancement in technology led to a proliferation of child pornography.<sup>12</sup> These developments created what has been described as a “child pornography revolution” and created a context in which defining child pornography is a challenging task.<sup>13</sup>

### *A. The Difficulty of Defining Child Pornography*

For a number of reasons, including advancements in technology, a succinct and clear definition of child pornography is elusive. Justice Stewart’s non-descript diagnosis is a poor default.<sup>14</sup> Attempting to define child pornography while considering all the resulting implications is a muddy task. Accordingly, the challenges of defining child pornography were highlighted at the First World Congress Against the Commercial Sexual Exploitation of Children:

The question of what constitutes child pornography is extraordinarily complex. Standards that are applied in each society or country are highly subjective and are contingent upon different moral, cultural, sexual, social and religious beliefs that do not readily translate into law. Even if we confine ourselves to a legal definition of child pornography, the concept is elusive. Legal definitions of . . . “child pornography” differ globally and may differ even among legal jurisdictions within the same country.<sup>15</sup>

As the above quote illustrates, questions remain regarding the type of image that constitutes child pornography.<sup>16</sup> Subtle differences among statutory definitions within the United States provide more evidence of this challenge.<sup>17</sup> Ultimately, advancements in

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6. IAN O’DONNELL & CLAIRE MILNER, *CHILD PORNOGRAPHY: CRIME, COMPUTERS AND SOCIETY* 3 (2007).

7. *Id.*

8. *Id.*

9. TIM TATE, *CHILD PORNOGRAPHY: AN INVESTIGATION* 33–34 (1990).

10. O’DONNELL & MILNER, *supra* note 6, at 4.

11. Carissa Byrne Hessick, *Introduction*, in *REFINING CHILD PORNOGRAPHY LAW: CRIME, LANGUAGE, AND SOCIAL CONSEQUENCES* 1, 1 (Carissa Byrne Hessick ed., 2016).

12. *Id.*

13. *Id.*

14. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

15. O’DONNELL & MILNER, *supra* note 6, at 65.

16. Hessick, *supra* note 11, at 1.

17. *Compare* OKLA. STAT. tit. 21, § 1024.1(A) (“[E]ngaged in any act . . . of sexual intercourse . . .”), CAL. PENAL CODE § 311.11(a) (“[D]epicts a person under 18 years of age personally engaging in or simulating sexual conduct . . .”), and FLA. STAT. § 827.071(5) (“[I]nclude any sexual conduct by a child.”), *with* 18 U.S.C. §

technology spur unique and creative ways to accomplish the seediest of tasks and, accordingly, require state legislatures to continually develop the law. Because each jurisdiction crafts its own definition of “child pornography,” each jurisdiction must also make sure its definition continues to encompass the types of child pornography that fall within the safety of legal loopholes created by technology, the internet, and computers.<sup>18</sup>

While there might be differences in the many legal definitions, there is a common understanding about some core principles. Perhaps Justice Stewart was expressing this commonality, and not the technical challenges, when offering his description. Pornography was first defined in 1857 in the *Oxford English Dictionary*.<sup>19</sup> The depiction of sex and sexual activities is at the center.<sup>20</sup> An overly simplistic definition of child pornography is “an image that depicts a clearly prepubescent human being in a sexually explicit manner.”<sup>21</sup> Pornography is generally thought to be a depiction of consensual sex.<sup>22</sup> This view provides the great dividing line between pornography and child pornography. All fifty states and the federal government have laws establishing an age of consent for sexual activity.<sup>23</sup> Therefore, because children lack the capacity to consent to sexual activities, an image showing sexual acts involving a child is by definition an image of child abuse.<sup>24</sup> This element of consent provides an explanation as to why “[m]ost definitions of child pornography are premised on the basis of the harm that is caused to the child in the production of child pornography.”<sup>25</sup>

As a result, an image of a child engaging in sexual acts falls within the definition of child pornography in all fifty state jurisdictions and the federal law.<sup>26</sup> The current debate regarding the definition of child pornography is not focused on these images of traditional child pornography. Not only is this type of child pornography clearly included in any possible definition, it is the type of child pornography possessed by most offenders.<sup>27</sup> A

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2256(8)(C) (“[S]uch visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.”).

18. FERRARO & CASEY, *supra* note 2, at 8.

19. *Id.*

20. MAX TAYLOR & ETHEL QUAYLE, CHILD PORNOGRAPHY: AN INTERNET CRIME 22 (2003).

21. FERRARO & CASEY, *supra* note 2, at 8.

22. ALISDAIR A. GILLESPIE, CHILD PORNOGRAPHY: LAW AND POLICY 2, 22 (2011).

23. MacKenzie Smith, Note, *You Can Touch, But You Can't Look: Examining the Inconsistencies of Our Age of Consent and Child Pornography Law*, 87 S. CAL. L. REV. 859, 863 (2014).

24. GILLESPIE, *supra* note 22, at 22. The North American Man/Boy Love Association (NAMBLA) is an example of an organization that rejects this basic premise, stating that its “goal is to end the extreme oppression of men and boys in mutually consensual relationships by . . . educating the general public on the benevolent nature of man/boy love.” NAMBLA, *Who We Are*, <https://www.nambla.org/welcome.html> (last visited Oct. 27, 2018).

25. GILLESPIE, *supra* note 22, at 22.

26. See OKLA. STAT. tit. 21, § 1024.1(A) (“[E]ngaged in any act . . . of sexual intercourse . . . .”); CAL. PENAL CODE § 311.11(a) (“[D]epicts a person under 18 years of age personally engaging in simulating sexual conduct . . . .”); FLA. STAT. § 827.071(5) (“[I]nclude any sexual conduct by a child.”); 18 U.S.C. § 2256(8)(C) (“[S]uch visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.”); see also Smith, *supra* note 23, at 864; Nat’l Ctr. for the Prevention of Child Abuse, *Child Pornography Statutes*, NAT’L DIST. ATT’Y’S ASS’N (June 2010), [https://ndaa.org/wp-content/uploads/Child-Pornography-Statutory-Compilation-6-2010.pdf?click=Child%20Pornography%20%E2%80%94%20Comprehensive%20\(updated%20June%202010\)](https://ndaa.org/wp-content/uploads/Child-Pornography-Statutory-Compilation-6-2010.pdf?click=Child%20Pornography%20%E2%80%94%20Comprehensive%20(updated%20June%202010)).

27. JANIS WOLAK, KIMBERLY MITCHELL & DAVID FINKELHOR, INTERNET SEX CRIMES AGAINST MINORS: THE RESPONSE OF LAW ENFORCEMENT 9–10 (2003).

2003 study determined that eighty percent of offenders had images of children being sexually penetrated.<sup>28</sup>

Certainly, any image of a child “engaging” in sex precisely fits within the definition, not only in official statutes, but also in the minds of those who agree with Justice Stewart. However, there are images of children that do not fit perfectly into this bright-line definition of children “engaging” in sex. Beyond the traditional understanding of child pornography, three other categories will help to clarify the complexity of this issue.

### *B. Lewd Exhibition*

Both the federal and state statutes have elements that include the “lewd exhibition” of children’s genitals.<sup>29</sup> In these instances, it is not required that there be a depiction of a sex act, but mere child nudity.<sup>30</sup> Therefore, lewd images, while not specifically images of children “engaging” in sexual conduct, do fit into common definitions of child pornography. For example, Oklahoma law states that child pornography includes the “lewd exhibition of uncovered genitals.”<sup>31</sup> The reason to include this type of image is obvious: the elements of consent are equally applied to an image of a child who cannot consent to engaging in sex or cannot consent to taking off their clothes and exposing their body in order to sexually stimulate the viewer.

However, apparently innocent family photos might include pictures of partially clothed or naked children in a bathtub or other family contexts. In fact, this definition has led to the prosecution of parents who have taken photos of their children in bathtubs.<sup>32</sup> Some even argue that this is the “most problematic aspect of defining child pornography.”<sup>33</sup> Determining the difference between a “lascivious exhibition of the genitals” and an innocent family photograph of a naked child in a bathtub is a potentially difficult task.<sup>34</sup> It is certainly more difficult than determining whether a photo displays a child being sexually assaulted.<sup>35</sup> The *Dost* test was developed to help answer these questions.<sup>36</sup> The *Dost* test lists several factors that assist a court in determining whether or not an image is a “lascivious exhibition” of child nudity.<sup>37</sup>

While some have argued that this test is overbroad and therefore unconstitutional, the breadth of this particular branch in most child pornography definitions remains flexible.<sup>38</sup> This particular type of child pornography interacts with technology because

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28. *Id.* at 10.

29. *See, e.g.*, OKLA. STAT. tit. 21, § 1024.1(A) (“[L]ewd exhibition of uncovered genitals . . . .”); 18 U.S.C. § 2256(2)(A)(v) (“[L]ascivious exhibition of the anus, genitals, or pubic area . . . .”).

30. OKLA. STAT. tit. 21, § 1024.1(A); 18 U.S.C. § 2256(2)(A)(v).

31. OKLA. STAT. tit. 21, § 1024.1(A).

32. *See, e.g.*, LYNN POWELL, FRAMING INNOCENCE: A MOTHER’S PHOTOGRAPHS, A PROSECUTOR’S ZEAL, AND A SMALL TOWN’S RESPONSE 20–21 (2010) (telling the story of a mother who was prosecuted for taking photos of her bathing daughter).

33. Amy Adler, *The “Dost Test” in Child Pornography Law*, in REFINING CHILD PORNOGRAPHY LAW: CRIME, LANGUAGE, AND SOCIAL CONSEQUENCES 81, 86 (Carissa Byrne Hessick ed., 2016).

34. *Id.*

35. *Id.*

36. *Id.* at 87.

37. *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 2011).

38. Adler, *supra* note 33, at 99.

photoshopping and cropping can be a factor in determining whether a particular photo qualifies as a lewd exhibition of nudity.<sup>39</sup> In other words, photo editing might be the difference between an innocent family photo and child pornography.<sup>40</sup>

### C. Virtual

Virtual child pornography is dissimilar to the other types because it is neither a photo of an actual child engaging in sex nor an actual child's naked genitals.<sup>41</sup> Rather than utilizing a real child, some pornographic images are completely computer generated or utilize adults depicted as minors.<sup>42</sup> Increasingly realistic images are more prolific because of advancing technology.<sup>43</sup> "These images are, in essence, fictitious child pornography because a genuine child [was] never involved."<sup>44</sup>

This type of imagery is common in Japan, where comic books (*manga*) are popular.<sup>45</sup> A specific variety of *manga* that includes the most graphic content is known as *hentai*.<sup>46</sup> These artistic drawings or computer-generated images show children engaging in sex and sexual activity. However, the content was not created with the use of a child, leading to the creation of a different category of child pornography.

### D. Morphed

Morphed<sup>47</sup> child pornography is created when an innocent photo of an actual child is edited to make it appear as though the child is engaging in a sexual act.<sup>48</sup> It is the cutting and pasting of body parts—bringing together innocent and explicit images—that constitutes this unique type of child pornography.<sup>49</sup> The method of morphing can be accomplished through a variety of means ranging from rudimentary scissors and glue to sophisticated computer editing programs.<sup>50</sup> The distinction between virtual and morphed child pornography, while both employ technology to create or edit images, is important to understand these categories. The use of an actual child is the paramount difference.<sup>51</sup>

Morphed child pornography is created by combining a variety of components.<sup>52</sup>

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39. See *State v. Bolles*, 541 S.W.3d 128, 144 (Tex. Crim. App. 2017).

40. See generally *id.*

41. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 239 (2002).

42. Chelsea McLean, Note, *The Uncertain Fate of Virtual Child Pornography Legislation*, 17 CORNELL J.L. & PUB. POL'Y 221, 224 (2007).

43. *Id.* at 223.

44. GILLESPIE, *supra* note 22, at 100.

45. O'DONNELL & MILNER, *supra* note 6, at 66.

46. *Id.*

47. The word "morphed" is not the only term used to describe the types of manipulated images described here. Other commentators use the labels "spliced" or "rendered." See GILLESPIE, *supra* note 22, at 100. "Pseudo-images" is another label. See SUZANNE OST, CHILD PORNOGRAPHY AND SEXUAL GROOMING: LEGAL AND SOCIETAL RESPONSES 124 (2009). However, "morphed" is the term commonly used and adopted by the Supreme Court and circuit courts. See, e.g., *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 242 (2002); *United States v. Hotaling*, 634 F.3d 725, 729–30 (2nd Cir. 2011); *United States v. Bach*, 400 F.3d 622, 630 (8th Cir. 2005).

48. FERRARO & CASEY, *supra* note 2, at 237; *Ashcroft*, 535 U.S. at 242.

49. *Ashcroft*, 535 U.S. at 242.

50. FERRARO & CASEY, *supra* note 2, at 237.

51. *Id.*

52. *Id.*

Images of real children can be taken from virtually any source; the internet, magazines, etc. These photos of real children can then be edited to depict children engaging in sexual acts or situations. Some of these images can be made with photoshop or practically any other editing software.<sup>53</sup> This is a different level of photo editing than the common social media filters on Instagram or Snapchat. Rather than changing the shade of colors or incorporating a fictional face, morphed child pornography slices and splices the photos until the images reveal actual children *appearing* to engage in sex. Morphed child pornography does not polish or tone photos of children, but rather edits photos together to create a single explicit photo.

The following are two common examples of morphed child pornography. First, consider a photo of a child innocently eating an ice cream cone. The child is not engaging in sex or showing their exposed genitals. However, a pornographer can take that photo and edit it significantly, replacing the ice cream cone by superimposing a photo of an actual penis in place of the ice cream cone. Now, post-production, the child appears to be engaging in a sex act.<sup>54</sup>

Second, consider a photo of an innocent child. That photo is cropped to consist of only the face of the child. Next, the pornographer places that cropped image on the body of a pornographic photo of a naked adult. Certainly, the child was not engaging in sexual acts at the time the innocent photo was taken, but now the image of the child shows a depiction of a sexual act committed upon a child.<sup>55</sup>

Morphed child pornography is dissimilar to both virtual and traditional child pornography. It is divergent from traditional child pornography because no child was engaged in sexual activity even though the photo is altered to depict such acts.<sup>56</sup> It is distinct from virtual child pornography because a *real* child is the subject of the pornographer's image—and presumably—pleasure.<sup>57</sup> However, advancements in the technology facilitating life-like photo edits will confuse this distinction.<sup>58</sup> With the blur between the different categories of child pornography, jurisdictions must define child pornography with precision.

### III. CHILD PORNOGRAPHY AND THE LAW

This Part addresses the interaction between child pornography and the law. Focusing first on the federal level, it explores the relationship between child pornography, obscenity, and the First Amendment, providing a necessary foundation for a discussion of the recent cases that tackled morphed child pornography. A discussion of the circuit courts' treatment of morphed child pornography follows.

#### A. Early Developments

While child pornography might have ancient origins, laws against child pornography

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53. *Id.*

54. *Id.*

55. FERRARO & CASEY, *supra* note 2, at 238.

56. *Id.* at 237.

57. *Id.*; TAYLOR & QUAYLE, *supra* note 20, at 37.

58. O'DONNELL & MILNER, *supra* note 6, at 91.

are relatively recent.<sup>59</sup> California was the first state to pass a law prohibiting individuals from using a minor in connection with the preparation or distribution of obscene matter in 1961.<sup>60</sup> But it took nearly ten years to expand awareness of child pornography. The 1970s was a notable decade for the expansion not only of child pornography, awareness of child pornography, and child sexual abuse, but also of laws prohibiting child pornography.<sup>61</sup> Some believe that the first real awareness of child pornography came in September 1975 in New York City during the preparation for the 1976 Democratic Convention.<sup>62</sup> The administration started a clean-up campaign targeting sex shops; four shops in particular were known to sell child pornography.<sup>63</sup> Because of the media attention on the Convention, the issue of child pornography was spotlighted.<sup>64</sup>

The media focus on child pornography in the latter half of the 1970s snowballed. In 1977, the *Chicago Tribune* published a series of stories on “child predators.”<sup>65</sup> The *New York Times* printed twenty-seven articles focused on child exploitation in 1977.<sup>66</sup> On May 15, 1977, CBS news program *60 Minutes* aired an episode with a report titled “Kiddie Porn” that spurred a tidal wave of letters to politicians.<sup>67</sup> It is no surprise that one member of Congress in 1977 stated, “A year ago who had ever heard of child pornography[?] . . . All of a sudden there it was. In newspapers, in Time magazine, on television, and inevitably, on the House floor. The revelations were shocking and disgusting. Children, ages 3 to 16, being used, sold, traded, photographed for sexual purposes.”<sup>68</sup>

In 1978, Congress enacted a new federal statute, the Protection of Children Against Sexual Exploitation.<sup>69</sup> This new law banned the use of children in the production of child pornography connected to interstate or foreign commerce.<sup>70</sup> Before the statute was passed it was possible to purchase more than 250 different child pornography magazines in the United States.<sup>71</sup> While more than four decades of legal development have passed since that time, “the law surrounding child pornography is far from settled,” especially as it relates to morphed child pornography.<sup>72</sup>

### *B. Child Pornography, Obscenity, and the First Amendment*

Ordinarily, the First Amendment provides protection for speech.<sup>73</sup> However, the

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59. Hessick, *supra* note 11, at 2.

60. *Id.*

61. O'DONNELL & MILNER, *supra* note 6, at 15.

62. *Id.* at 16.

63. *Id.*

64. *Id.*

65. Hessick, *supra* note 11, at 3.

66. O'DONNELL & MILNER, *supra* note 6, at 17.

67. *Id.*

68. Hessick, *supra* note 11, at 3.

69. Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No 95-225, 92 Stat. 7 (1978) (codified at 18 U.S.C. § 2251).

70. *Id.*

71. JOHN CREWDSON, BY SILENCE BETRAYED: SEXUAL ABUSE OF CHILDREN IN AMERICA 243 (1988).

72. Hessick, *supra* note 11, at 1.

73. U.S. CONST. amend. I.

Supreme Court has created exceptions for obscenity and child pornography.<sup>74</sup> The obscenity exception predates that of child pornography.<sup>75</sup> Obscenity is not identical to pornography, and Justice Stewart’s statements indicate the distinction is not robust.<sup>76</sup> The Court even calls the divide between what is constitutionally protected and obscenity a “dim and uncertain line.”<sup>77</sup> The rudimentary test as applied by the *Jacobellis* Court is “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”<sup>78</sup> The Supreme Court refined its definition of unprotected obscenity in *Miller v. California*. The *Miller* Court concluded that the “basic guidelines” to determine obscenity included the following three factors:

- (a) [W]hether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest[;] . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>79</sup>

However, at the time of *Miller*, the Supreme Court had not yet addressed child pornography nor considered it an exception to the First Amendment. Moreover, “the industry devoted to production and distribution of child pornography was flourishing.”<sup>80</sup> Some commentators believe this resulted from the weighty protection applied to speech by the Supreme Court during this time.<sup>81</sup> This changed in 1982, ten years after *Miller*. Perhaps as a response to the substantial media attention to the issues of child exploitation and child pornography, there was a massive legislative response.<sup>82</sup> States began to ban child pornography within the current obscenity framework, not wanting to push past the established obscenity exception to the First Amendment.<sup>83</sup> However, it is important to note that mere possession of obscene materials *is* protected by the First Amendment.<sup>84</sup> In other words, states targeting child pornography as obscenity could not ban child pornography possession. That is, until states like New York made the legal distinction between child pornography and obscenity.

New York distinguished between child pornography and obscenity by adopting a statute that criminalized the production and distribution of child pornography, separate from a statute criminalizing the distribution of obscene material.<sup>85</sup> This differentiation was

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74. *Roth v. United States*, 354 U.S. 476, 492 (1957); *New York v. Ferber*, 458 U.S. 747, 756 (1982).

75. *Roth*, decided in 1957, preceded *Ferber*, decided in 1982, by twenty-five years.

76. *Roth*, 354 U.S. at 487.

77. *Jacobellis v. Ohio*, 378 U.S. 184, 187 (1964).

78. *Id.* at 191.

79. *Miller v. California*, 413 U.S. 15, 24 (1972) (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)).

80. James Weinstein, *The Context and Content of New York v. Ferber*, in *REFINING CHILD PORNOGRAPHY: CRIME, LANGUAGE, AND SOCIAL CONSEQUENCES* 19, 24 (Carissa Byrne Hessick ed., 2016).

81. *Id.*

82. *Id.* (stating that “(1) twelve states prohibited only the production of child pornography; (2) fifteen states and the federal government prohibited the distribution of material depicting children engaged in sexual conduct but only if the material also met the *Miller* standard for obscenity; and (3) twenty states, including New York, prohibited distribution of child pornography if it was not legally obscene”).

83. Hessick, *supra* note 11, at 3.

84. *Stanley v. Georgia*, 394 U.S. 557, 559 (1969).

85. Hessick, *supra* note 11, at 3–4; *see also New York v. Ferber*, 458 U.S. 747, 749–50 (1982).

the catalyst for the Supreme Court to consider whether or not child pornography, separate from the obscenity exception, is protected by the First Amendment.

In *New York v. Ferber*, the Supreme Court held that child pornography, depictions of actual children engaged in explicit sexual conduct, is “categorically devoid of First Amendment protection.”<sup>86</sup> *Ferber* was the first Supreme Court case to examine a “statute directed at and limited to depictions of sexual activity involving children.”<sup>87</sup> The Court cautiously stated its natural hesitancy to promote censorship.<sup>88</sup> However, the Court ultimately rejected the *Miller* test to evaluate the constitutionality of child pornography laws and noted that “States are entitled to greater leeway in the regulation of pornographic depictions of children.”<sup>89</sup> The *Ferber* Court essentially drew a line in the sand, carving a category for child pornography distinct from obscenity. This was clearly a defining moment in the relationship between child pornography and the law. Rather than use the traditional obscenity exception to the First Amendment, the Court created a new exception to the First Amendment for this type of material.

The *Ferber* Court listed several reasons for stripping First Amendment protections from child pornography. First, the Court reasoned that the use of children in pornography “is harmful to the physiological, emotional, and mental health” of children.<sup>90</sup> Second, the distribution of such images is related to the sexual abuse of children.<sup>91</sup> The images are a permanent record—and exacerbator—of the harm experienced.<sup>92</sup> Third, the distribution, advertising, and selling of child pornography are “an integral part of the production of [child pornography].”<sup>93</sup> Fourth, the value of child pornography is extremely low, “if not *de minimis*.”<sup>94</sup> The Court therefore justified the exclusion of child pornography from the protections of the First Amendment as a unique class of materials because of its express connection to the harming of children.<sup>95</sup>

The *Ferber* Court also provided specific guidelines for child pornography laws. States must adequately define the conduct to be prohibited. The words “sexual conduct” must be described and defined.<sup>96</sup> However, because the *Miller* test does not apply to child pornography, the sexual conduct need not meet the obscenity standard of “patently offensive.”<sup>97</sup> Even with these limited instructions, the Court did something remarkable in First Amendment jurisprudence by creating a category exempt from the First Amendment based on a harm-in-production theory. In other words, child pornography is unprotected by the Constitution because of the harm caused to children during the creation of child

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86. Weinstein, *supra* note 80, at 19 (citing *Ferber*, 458 U.S. at 756).

87. *Ferber*, 458 U.S. at 753.

88. *Id.* at 756 (“[L]aws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy.”).

89. *Id.*

90. *Id.* at 758.

91. *Id.* at 759.

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

93. *Id.* at 761.

94. *Id.* at 762.

95. *Id.* at 756, 759.

96. *Id.* at 764.

97. *Ferber*, 458 U.S. at 764.

pornography and subsequent distribution.<sup>98</sup> Notice that this harm is not explicitly linked to a lack of consent by minor children in sexual activities, but it is obviously central to its foundation.

*Ferber's* attack on the production and distribution of child pornography was further expanded in *Osborne v. Ohio*. In *Osborne*, the Supreme Court held that Ohio could prohibit the possession of child pornography.<sup>99</sup> Because possession of obscene material is not illegal,<sup>100</sup> this holding provides another distinction between obscene materials and child pornography. While it would be paternalistic to prohibit the viewing of obscene material, denying the right to view child pornography protects the “physical and psychological well-being of . . . minor[s].”<sup>101</sup> Therefore, the Court utilized the harm-in-production logic of *Ferber* to ban possession of child pornography.

### C. The CPPA: Congress' Attempt to Ban Virtual and Morphed Child Pornography

Before 1996, both virtual and morphed child pornography were left unaddressed by federal law.<sup>102</sup> During this time, “the actual participation and abuse of children in the production or dissemination of pornography involving minors was the *sine qua non* of the regulating scheme.”<sup>103</sup> That is, until Congress passed the Child Pornography Protection Act of 1996 (CPPA).<sup>104</sup> This new federal definition of child pornography stepped beyond the scope of *Ferber's* harm-in-production boundaries by including both virtual and morphed pornography in its definition.<sup>105</sup> Congress crafted the CPPA to include virtual child pornography in its definition, reacting to the computer technology that makes virtual child pornography possible.<sup>106</sup> Section 2256(8)(B) of the CPPA defined child pornography as “any visual depiction, including any photography, film, video, picture, or computer or computer-generated image or picture” that “is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct.”<sup>107</sup> The CPPA's language provided the opportunity for the United States Supreme Court to consider the definition of child pornography in light of the First Amendment, obscenity, and *Ferber*. Ultimately, the provisions proscribing virtual child pornography were held unconstitutional by *Ashcroft v. Free Speech Coalition*.<sup>108</sup>

The *Ashcroft* Court held that virtual pornography was not child pornography as defined by *Ferber* because no actual children were involved in the production of these

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98. *Id.* at 758–59.

99. *Osborne v. Ohio*, 495 U.S. 103, 111 (1990).

100. *See Stanley v. Georgia*, 394 U.S. 557, 559 (1969).

101. *Osborne*, 495 U.S. at 109.

102. YAMAN AKDENIZ, INTERNET CHILD PORNOGRAPHY AND THE LAW: NATIONAL AND INTERNATIONAL RESPONSES 97 (2008).

103. *Free Speech Coal. v. Reno*, 198 F.3d 1083, 1089 (9th Cir. 1999).

104. Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009 (codified as amended at 18 U.S.C. § 2256); Brian Yamada, Note, *Pornoshopped: Why California Should Adopt the Federal Standard for Child Pornography*, 32 L.A. ENT. L. REV. 229, 232 (2011).

105. 18 U.S.C. § 2256(8)(B) (including virtual child pornography); 18 U.S.C. § 2256(8)(C) (including morphed child pornography).

106. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 240 (2002).

107. 18 U.S.C. § 2256(8) (emphasis added).

108. *Ashcroft*, 535 U.S. at 256.

images.<sup>109</sup> *Ashcroft* stated that the statute banned a substantial amount of materials that were neither obscene nor “‘intrinsically related’ to the sexual abuse of children.”<sup>110</sup> This connection between child pornography and the sexual abuse of children was the bedrock of the *Ferber* Court’s constitutional reasoning.<sup>111</sup> Therefore, virtual child pornography fell short of the harm-in-production logic of *Ferber* and this specific provision of the CPPA was held to be unconstitutionally broad.<sup>112</sup>

Even though the Supreme Court disagreed, the government strongly contended that virtual child pornography was worthy of inclusion in federal law.<sup>113</sup> First, it could be used by pedophiles to “seduce children.”<sup>114</sup> Second, “virtual child pornography whets the appetite of pedophiles.”<sup>115</sup> Third, the objective of eliminating the market for child pornography “necessitates a prohibition on virtual images as well.”<sup>116</sup> Lastly, the government argued that allowing virtual child pornography “makes it very difficult” to prosecute cases involving non-virtual child pornography.<sup>117</sup> However, *Ashcroft* concluded that while “[t]he sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people[,] . . . [t]he prospect of crime . . . by itself does not justify laws suppressing protected speech.”<sup>118</sup> In other words, *Ashcroft* held that the link between virtual child pornography and the harm of child sexual abuse was too “contingent and indirect.”<sup>119</sup>

*Ashcroft* did, in dicta, mention morphed child pornography. The *Ashcroft* Court only ruled on section 2256(8)(D) of the CPPA, which defined virtual child pornography.<sup>120</sup> However, the Court did not touch section 2256(8)(C), which prohibits morphed child pornography by prohibiting any “visual depiction [that] has been created, adapted, or modified to *appear* that an identifiable minor is engaging in sexually explicit conduct.”<sup>121</sup> The Court discussed this distinction in dicta, stating that images of real children edited so that the children appear to be engaged in sexual acts “implicate the interests of real children and are in that sense closer to the images in *Ferber*.”<sup>122</sup> In recent years, circuit courts have mined the meaning of those words.<sup>123</sup>

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109. *Id.* at 250.

110. *Id.*

111. *New York v. Ferber*, 458 U.S. 747, 759 (1982).

112. *Ashcroft*, 535 U.S. at 250, 256.

113. *Id.* at 250.

114. *Id.* at 251.

115. *Id.* at 253.

116. *Id.* at 254.

117. *Ashcroft*, 535 U.S. at 254.

118. *Id.* at 244–45.

119. *Id.* at 250.

120. *Id.* at 242.

121. 18 U.S.C. § 2256(8)(C) (emphasis added).

122. *Ashcroft*, 535 U.S. at 242.

123. *See, e.g.*, *Shoemaker v. Taylor*, 730 F.3d 778, 787 (9th Cir. 2013); *Doe v. Boland*, 698 F.3d 877, 883 (6th Cir. 2012); *United States v. Hotaling*, 634 F.3d 725, 729 (2d Cir. 2011); *United States v. Bach*, 400 F.3d 622, 632 (8th Cir. 2005).

In *United States v. Bach*, the Eighth Circuit considered the constitutionality of section 2256(8)(C) of the CPPA.<sup>124</sup> In *Bach*, the defendant was charged with possession of child pornography.<sup>125</sup> The child pornography in question was an image where the “head of a well known juvenile . . . was skillfully inserted onto the body of the nude boy so that the resulting depiction appear[ed] to be a picture of [the well known juvenile] engaging in sexually explicit conduct with a knowing grin.”<sup>126</sup> The defendant, relying on *Ashcroft*, argued that the image did not involve the abuse of a real minor and therefore morphed images should not be included in the statute.<sup>127</sup> Disagreeing, the court applied the words of section 2256(8)(C)<sup>128</sup> and determined that this image “implicates the interests of a real child.”<sup>129</sup>

The image depicted the child in a sexual manner because his face was pasted onto “a young nude boy who is grinning and sitting in a tree in a lascivious pose with a full erection, his legs spread, and his pelvis tilted upward.”<sup>130</sup> However, even though this image was slightly different than the previously-mentioned examples of morphed child pornography (because the body used in the photo editing was not an adult body) the court determined that the interests implicated were of the child whose *face* was placed on the body.<sup>131</sup> Even though the well-known child was not actually involved in the production of the image, he was an identifiable—actual—child harmed and “victimized every time the picture is displayed.”<sup>132</sup> Therefore, the child was a “victim of sexual exploitation,” and section 2256(8)(C) of the CPPA incorporating morphed child pornography was affirmed as constitutional because it protected the child’s “physical and psychological well being.”<sup>133</sup>

The Second Circuit adopted the Eighth Circuit’s reasoning in *United States v. Hotaling*.<sup>134</sup> Here, the defendant created morphed child pornography by superimposing photos of the faces of six different young girls onto the bodies of nude adult females engaged in sexually explicit conduct.<sup>135</sup> One of the photos overlaid the face of a young girl onto a partially nude adult female who was handcuffed, shackled, wearing a collar and leash, and tied to a dresser.<sup>136</sup> Some of the victims were friends with the defendant’s daughter.<sup>137</sup> The defendant contended that no child was harmed in the production of the

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124. *Bach*, 400 F.3d at 630.

125. *Id.* at 625.

126. *Id.* at 632.

127. *Id.* at 630.

128. 18 U.S.C. § 2256(8)(C) (“[S]uch visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.”).

129. *Bach*, 400 F.3d at 632.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *United States v. Hotaling*, 634 F.3d 725, 729–30 (2d Cir. 2011).

135. *Id.* at 727.

136. *Id.*

137. *Id.*

photos, which were created only to record his mental fantasies.<sup>138</sup> However, the *Hotaling* court held that morphed child pornography was rightly included in federal law because the “six identifiable minor females . . . 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.”<sup>139</sup> Stretching the *Ferber* definition of harm, the *Hotaling* court noted that “minors are harmed not only during the creation of child pornography, but are also haunted for years by the knowledge of its continued circulation.”<sup>140</sup> Therefore, the primary inquiry regarding the definition of child pornography is whether or not the image “implicates the interests of an actual minor.”<sup>141</sup> The *Hotaling* court held that morphed child pornography *does* implicate such interests.<sup>142</sup>

*Hotaling* reasoned that while the nude bodies were adult, the “only recognizable persons [in the photos] were the minors.”<sup>143</sup> Furthermore, the real names of the young girls were included on many of the images “bolstering the connections between the actual minor and the sexually explicit conduct.”<sup>144</sup> The *Hotaling* court explicitly distinguished these morphed images from virtual child pornography because of the connection to actual children.<sup>145</sup> However, while relying on the precedent of *Ferber*, the harms discussed in *Hotaling* were tweaked slightly from the harm-in-production logic. *Hotaling* stated that the harms associated with morphed images—reputational, emotional, and psychological—are triggered the moment a child pornographer cuts and pastes the image of a child into a pornographic image.<sup>146</sup> As a result, both the Eighth and Second Circuits categorized morphed child pornography within the terms found in section 2256(8)(C) of the CPPA and outside the protections of the First Amendment. The Ninth Circuit would soon join.

In *Shoemaker v. Taylor*, the Ninth Circuit noted that the *Ashcroft* Court left the issue of morphed child pornography and the First Amendment unresolved.<sup>147</sup> *Shoemaker* stated that proscribing these types of images is necessary because they “directly implicate the interest of protecting children from harm,” which is a compelling interest.<sup>148</sup> *Shoemaker* explained as follows:

Morphed images of children engaged in sexual activity directly implicate the interest of protecting children from harm, an interest the Supreme Court deemed compelling in *Ferber*. There, the Court explained that states have a compelling interest in “safeguarding the physical and psychological well-being of a minor” and the “prevention of sexual exploitation and abuse of children.” . . . The Court further noted that actual child pornography is “intrinsically related to the sexual abuse of children” because it is “a permanent record of the

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138. *Id.*

139. *Hotaling*, 634 F.3d at 730.

140. *Id.* at 728.

141. *Id.* at 729.

142. *Id.* at 729–30 (stating, “[w]e agree with the Eighth Circuit 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”).

143. *Id.* at 730.

144. *Hotaling*, 634 F.3d at 730.

145. *Id.*

146. *Id.*

147. *Shoemaker v. Taylor*, 730 F.3d 778, 787 (9th Cir. 2013).

148. *Id.* at 786.

children’s participation and the harm to the child is exacerbated by [its] circulation.”<sup>149</sup>

The *Shoemaker* court noted that the *Ferber* reasoning explains why the Second and Eighth Circuits also consider morphed child pornography not only within the statutory definition of section 2256(8)(C) of the CPPA but also outside First Amendment protections.<sup>150</sup>

The Sixth Circuit’s decision in *Doe v. Boland* is particularly insightful. The morphed child pornography discussed in this case is almost identical to the two different examples of morphed child pornography previously discussed.<sup>151</sup> In one, the defendant edited an innocent photo of a child eating a donut, replacing the donut with a picture of a penis.<sup>152</sup> In another photo, the defendant placed the face of another child onto a photo of a nude woman engaging in sex acts with two other men.<sup>153</sup> Initially the *Boland* court referenced the “straightforward” rationale behind the proscription of child pornography—to protect children from abuse that is “‘intrinsically related’ to the underlying abuse.”<sup>154</sup> Because the CPPA targets morphed images as an invasion of the “child’s privacy and reputational interests,”<sup>155</sup> *Boland* concluded that the children in morphed child pornography are rightly considered “real victims.”<sup>156</sup> The defendant argued that the psychological harm implicated by morphed child pornography only materializes if or when the child victim becomes aware of the photo and experiences that harm upon viewing the image.<sup>157</sup> However, the *Boland* court rejected this argument, stating that “[t]he creation and initial publication of the images itself harmed the [children].”<sup>158</sup>

#### IV. OKLAHOMA LAW DANGEROUSLY IGNORES MORPHED CHILD PORNOGRAPHY

In view of the federal holdings, it is clear that morphed child pornography falls outside First Amendment protection and is prohibited by federal law. Federal courts have consistently supplied ample justification to view such images as harmful, triggering the need to protect the interest of children. However, differences between federal law and state law require a separate analysis to determine if morphed child pornography is similarly addressed at the state level. In other words, while the federal government has exposed morphed child pornography, it is the responsibility of the states to incorporate morphed images in their chosen definitions of child pornography. This section utilizes the different tools of statutory interpretation to show that morphed child pornography is likely *not* prohibited by Oklahoma law.

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149. *Id.* (emphasis added) (quoting *New York v. Ferber*, 458 U.S. 747, 756–57, 759 (1982)).

150. *Id.* at 786–87.

151. *Doe v. Boland*, 698 F.3d 877, 879 (6th Cir. 2012).

152. *Id.*

153. *Id.*

154. *Id.* at 883 (quoting *Ferber*, 458 U.S. at 759).

155. *Id.* at 884 (quoting Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121(1)(7), 110 Stat. 3009 (codified as amended at 18 U.S.C. § 2256)).

156. *Boland*, 698 F.3d at 883.

157. *Id.* at 884.

158. *Id.*

## A. Oklahoma's Definition of Child Pornography

While the federal language defining child pornography specifically addresses morphed child pornography, it appears that the Oklahoma statute defining child pornography does not. Oklahoma's definition is as follows:

"[C]hild pornography" means and includes any visual depiction or individual image stored or contained in any format on any medium including, but not limited to, film, motion picture, videotape, photograph, negative, undeveloped film, slide, photographic product, reproduction of a photographic product, play or performance wherein a minor under the age of eighteen (18) years is engaged in any act with a person, other than his or her spouse, of sexual intercourse which is normal or perverted, in any act of anal sodomy, in any act of sexual activity with an animal, in any act of sadomasochistic abuse including, but not limited to, flagellation or torture, or the condition of being fettered, bound or otherwise physically restrained in the context of sexual conduct, in any act of fellatio or cunnilingus, in any act of excretion in the context of sexual conduct, in any lewd exhibition of the uncovered genitals in the context of masturbation or other sexual conduct, or 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, or wherein a person under the age of eighteen (18) years observes such acts or exhibitions.<sup>159</sup>

The pertinent question is whether this language includes morphed images. It should be noted that this statute does not include the language found in federal definition defining child pornography as any visual depiction that "has been created, adapted, or *modified to appear* that an identifiable minor is engaging in sexually explicit conduct."<sup>160</sup> These differences between the federal and Oklahoma statutes eliminate the possibility of leaning on the federal meaning to interpret Oklahoma's chosen language. Additionally, the Oklahoma Court of Criminal Appeals offers sparse help in interpretation because it has not yet decided a case involving these specific images. However, the court outlined a number of principles to facilitate the work of statutory interpretation, including: interpreting the plain and ordinary meaning of the language, looking toward the legislative intent, reconciling provisions for a consistent interpretation, and staying within the boundaries established by the legislature.<sup>161</sup> Therefore, a thorough explanation of the language, legislative intent, and other state interpretations will be helpful in construing Oklahoma's definition of child pornography.

### 1. The Plain Meaning

The Oklahoma Court of Criminal Appeals stated that statutes must "be construed according to the plain and ordinary meaning of their language."<sup>162</sup> The words "any visual depiction or individual image . . . wherein a minor . . . is engaged in any act . . . of sexual intercourse" are significant.<sup>163</sup> Do these words refer to actual engagement in sexual activity at the time the image is captured? Or, is the *appearance* of engaging in sexual

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159. OKLA. STAT. tit. 21, § 1024.1(A) (emphasis added).

160. 18 U.S.C. § 2256(8)(C) (emphasis added).

161. *State v. Young*, 989 P.2d 949, 955 (Okla. Crim. App. 1999).

162. *Id.*

163. OKLA. STAT. tit. 21, § 1024.1(A).

activity via manipulation also included? A plain interpretation leads to the former conclusion, excluding morphed child pornography from Oklahoma’s definition.

The word “engaged” is defined by Webster’s dictionary as “involved in activity.”<sup>164</sup> However, morphed images only make it *appear* as though the child is engaged in sexual activity. As a result, it is correct to say that the children in morphed child pornography are not involved in the activity of sexual intercourse. Therefore, the plain meaning of “engaged” describes actual involvement, unless other words supply additional meaning. The federal statute does this by inserting the phrase “modified to appear” in the federal definition.<sup>165</sup> Without this qualification, the plain meaning of Oklahoma’s statute would exclude morphed child pornography.

However, the words “any visual depiction” near the beginning of the statute could be understood to include morphed images.<sup>166</sup> Plainly speaking, morphed child pornography is a visual *depiction* of sexual activity. However, the syntax of the statute reveals that the word “depiction” describes the type of *image*, not the *content* of the image. Directly following the words “any visual depiction,” the statute lists several qualified depictions: “film, motion picture, videotape, photograph, negative, undeveloped film, slide, photographic product, reproduction of a photographic product, play or performance.”<sup>167</sup> Therefore, only the word “engaged” is provided to supply the relationship between the child and the image.<sup>168</sup> In other words, “depiction” is not used as an adjective to modify “sexual intercourse,” but rather it is used as a noun in the list of visual images that contain child pornography.

Leaning upon the plain words of the statute, Oklahoma law requires an actual child—not merely an apparent child—to be engaged in sexual activity at the time the image is taken to qualify as child pornography. As is common, Oklahoma also includes the “lewd exhibition of the uncovered genitals” later in its definition.<sup>169</sup> These two possible qualifications—engagement in sexual activity or lewd nudity—certainly do not include morphed child pornography. As a result, the plain reading of Oklahoma’s statute would not include images of actual and clothed children morphed to make it appear as though they are engaging in sexual activity.

## 2. The Legislative Intent and Boundaries

The legislative purpose undergirding chapter 39 of Oklahoma’s criminal code, where child pornography is defined, is to “prevent the sexual exploitation of minors.”<sup>170</sup> Unfortunately, this rationale is too broad to be helpful when interpreting the definition of child pornography in light of morphed images. Without a specific legislative statement, it is challenging to interpret the words of the statute differently than rendered by the plain meaning. A look into the changes of Oklahoma’s obscenity and child pornography laws

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164. *Engaged*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/engaged> (last visited Jan. 21, 2019).

165. 18 U.S.C. § 2256(8)(C).

166. OKLA. STAT. tit. 21, § 1024.1(A).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Arganbright v. State*, 328 P.3d 1212, 1217 (Okla. Crim. App. 2014).

provides some insight into the words of the current definition.

In 2000, the Oklahoma legislature added child pornography to the criminal code, separate and distinct from the obscenity provisions.<sup>171</sup> The current language mirrors the 2000 definition, although some minor alterations have been made.<sup>172</sup> Interestingly, at the time when this change was undertaken, Oklahoma's old obscenity statute defined obscene materials as those "wherein the minor is engaged in or *portrayed, depicted, or represented* as engaging in any act of sexual intercourse."<sup>173</sup> Remarkably, this older obscenity language appears to include morphed child pornography in Oklahoma's obscenity statute of the past. However, when adding child pornography to the criminal code in 2000, the Oklahoma legislature did *not* borrow this language. Furthermore, the Oklahoma legislature has removed this language from the current definition of obscene materials, only including "depictions or descriptions of sexual conduct which are patently offensive."<sup>174</sup> While morphed child pornography might fall within this current obscenity definition, the legislative history is not likely to support an inclusion of these images in the child pornography definition. The current definition, when crafted in 2000, did not use the most descriptive and clear language, which is only found in the old obscenity definition. As a result, the legislative history indicates either an intentional move away from incorporating morphed child pornography, or a choice that had the unintended and unrealized consequence of distancing morphed child pornography from Oklahoma law.

Furthermore, the Oklahoma Court of Criminal Appeals stated that it is not appropriate to "interpret a statute to address a matter the Legislature chose not to address, even if . . . the interpretation might produce a reasonable result. [The court] will not enlarge the meaning of words included in a statute to create a crime not defined by that statute."<sup>175</sup> Considering both the plain meaning of the word "engaged" and the legislative history of the statute, it is evident that interpreting Oklahoma's definition of child pornography to include morphed images would violate the principles of statutory interpretation, putting words into the mouth of Oklahoma's Legislature.

#### *D. Other States and Morphed Child Pornography*

Unlike Oklahoma, other state courts have interpreted their child pornography statutes in light of morphed child pornography.<sup>176</sup> In the three state cases discussed below, the courts found that morphed child pornography was *not* included in the respective state's statutory definition of child pornography.

##### *1. California: People v. Gerber*

In 2008 a California father, Gerber, exposed his thirteen-year-old daughter, J., to

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171. 2000 Okla. Sess. Laws 795 (codified as amended at OKLA. STAT. tit. 21, § 1024.1).

172. *Compare* OKLA. STAT. tit. 21, § 1024.1 (2000) (amended 2012), *with* OKLA. STAT. tit. 21, § 1024.1(A).

173. OKLA. STAT. tit. 21, § 1021.3 (2000) (emphasis added) (amended 2012).

174. OKLA. STAT. tit. 21, § 1024.1(B)(1)(a).

175. *State v. Young*, 989 P.2d 949, 955 (Okla. Crim. App. 1999).

176. *See, e.g., People v. Gerber*, 196 Cal. App. 4th 368, 386 (2011); *Parker v. State*, 81 So. 3d 451, 453–54 (Fla. Dist. Ct. App. 2011); *State v. Zidel*, 940 A.2d 255, 256–57 (N.H. 2008).

alcohol and drugs.<sup>177</sup> After introducing her to cocaine, he offered her more cocaine if she would pose for a few photos.<sup>178</sup> J. agreed.<sup>179</sup> She was uncomfortable, because he instructed her to lean over, which revealed her cleavage.<sup>180</sup> He reassured her that this was photographic “art.”<sup>181</sup>

After the father and daughter snorted cocaine, he stated that “she owed him pictures in [her] underwear.”<sup>182</sup> Realizing she was “caught in the middle of a situation,” she complied.<sup>183</sup> He took various photos of J. in her bra and underwear.<sup>184</sup> She was crying.<sup>185</sup> Later that night she told her mother about the alcohol, drugs, and photos.<sup>186</sup> The father was arrested.<sup>187</sup>

Police recovered seven pornographic photos from the father’s computer.<sup>188</sup> Gerber admitted to using Microsoft Paint to alter pornographic pictures of women he had collected by replacing the women’s faces with his daughter’s face.<sup>189</sup> This morphed child pornography, and not the photos of his daughter in her bra and underwear, were the focus of the case and criminal charge.<sup>190</sup> In *People v. Gerber*, the California Court of Appeals reversed the conviction for possession of child pornography.<sup>191</sup>

The *Gerber* court addressed whether the morphed child pornography violated California law.<sup>192</sup> The relevant California statute defined child pornography as an image that “depicts a person under the age of 18 years personally engaging in or simulating sexual conduct.”<sup>193</sup> The court held that the California statute “requires a real child to have actually engaged in or simulated the sexual conduct depicted,” thereby reversing the conviction for possession of child pornography.<sup>194</sup> The *Gerber* court disagreed with the prosecution’s argument that the word “depict” in the definition incorporates the morphed photos because the photos do depict J. as the child engaged in sexual conduct.<sup>195</sup> Instead, *Gerber* focused on plain interpretation of the word “personally,” the legislative history, and the constitutional implications to hold differently.<sup>196</sup> Because of the plain definition of “personally” and the legislative history, the court determined that morphed child

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177. *Gerber*, 196 Cal. App. 4th at 373, 374.

178. *Id.* at 375.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Gerber*, 196 Cal. App. 4th at 375.

183. *Id.*

184. *Id.* at 376.

185. *Id.*

186. *Id.*

187. *Gerber*, 196 Cal. App. 4th at 376.

188. *Id.*

189. *Id.* at 377.

190. *Id.* at 378.

191. *Id.* at 386.

192. *Gerber*, 196 Cal. App. 4th at 382.

193. CAL. PENAL CODE § 311.11(a).

194. *Gerber*, 196 Cal. App. 4th at 371–72.

195. *Id.* at 378.

196. *Id.*

pornography was not banned by California law.<sup>197</sup>

*Gerber* leaned not only on the plain meaning of the California statute, but also on constitutional principles.<sup>198</sup> Interestingly, the court extinguished “any lingering doubts” about this interpretation by relying on *Ashcroft*.<sup>199</sup> *Gerber*—unlike the federal circuit courts—distinguished the harm described in *Ferber* from the harm caused by morphed child pornography.<sup>200</sup> *Gerber* noted that *Ferber* “was based upon how [child pornography] was made, not on what it communicated” and that “speech [which] is neither obscene nor the product of sexual abuse . . . does not fall outside the protection of the First Amendment.”<sup>201</sup> Therefore, the California Court of Appeals stated:

[T]hat the articulated rationales underlying both the *Ferber* and [*Ashcroft*] decisions compel the conclusion that such altered materials are closer to virtual child pornography than to real child pornography since the use of photo editing software to replace an adult’s head with a child’s head on pornographic images of the adult does not necessarily involve sexual exploitation of an actual child.<sup>202</sup>

*Gerber* generated calls for the amendment of California child pornography law.<sup>203</sup> However, the current statute is unchanged since the *Gerber* decision.<sup>204</sup>

## 2. Florida: *Parker v. State*

In the same year as *Gerber*’s decision, the District Court of Appeals of Florida published a similar opinion. The defendant, *Parker*, a Sunday school teacher, photographed many children.<sup>205</sup> While the photos were normal photos, “the innocence turned perverse.”<sup>206</sup> *Parker* cut the heads off of the children in the photos and pasted them onto the bodies of nude, or partially nude, women engaged in sexual activity.<sup>207</sup> He was charged and convicted of possession of child pornography.<sup>208</sup> However, in *Parker v. State*, the District Court of Appeal reversed, reasoning that *Parker*’s possession of morphed child pornography “escapes the grasp of the statute on which the State proceeds.”<sup>209</sup>

*Parker* narrowed its focus to the applicable Florida statute that defined child pornography as “a photograph . . . representation . . . or other presentation which, in whole or in part, he or she knows to include any sexual conduct by a child.”<sup>210</sup> While this definition does not contain the word “personally,” like the California statute, *Parker* concluded that the morphed images “leave no doubt that no child engaged in the sexual

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197. *Id.* at 371.

198. *Id.* at 383.

199. *Gerber*, 196 Cal App. 4th at 383.

200. *Id.* at 386.

201. *Id.* at 385 (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250–51 (2002)).

202. *Id.* at 386.

203. See generally *Yamada*, *supra* note 104, at 229, 231.

204. See CAL. PENAL CODE § 311.11(a).

205. *Parker v. State*, 81 So. 3d 451, 452 (Fla. Dist. Ct. App. 2011).

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. See *Parker*, 81 So. 3d at 453 (quoting FLA. STAT. § 827.071(5)(a)).

conduct.”<sup>211</sup> Restrained by the words of the Florida legislature, the *Parker* court held that the Florida statute “requires that the depicted sexual conduct be that of a child.”<sup>212</sup>

Bolstering its decision, the *Parker* court also focused on the legislative intent behind the statute, which was concerned with the sexual exploitation of children.<sup>213</sup> The court quoted language from 1983 in which the legislature expressed its concern in stopping the “use of children in sexual performances.”<sup>214</sup> *Parker* pointed out that the title of the statute is “Abuse of Children.”<sup>215</sup>

Referencing the First Amendment’s legal relationship with child pornography, the *Parker* court plainly stated that the federal statutes, and their interpretation by the circuit courts, was of “little aid” in its decision.<sup>216</sup> However, *Parker* noted that if the Florida “legislature wants to follow Congress’s example and prohibit the possession of the types of photographs involved here, [the court is] confident that it can, and perhaps should, craft an appropriate statute.”<sup>217</sup> Therefore, *Parker* indicates that other state courts will handcuff their decision to the state statute, unable to rely on federal statute or precedent to reach the decision that it “perhaps should.”<sup>218</sup> Like California, the legislature of Florida has not adopted a broader definition of child pornography since this decision.<sup>219</sup>

### 3. New Hampshire: *State v. Zidel*

In *State v. Zidel* the Supreme Court of New Hampshire reversed a conviction for the possession of morphed child pornography.<sup>220</sup> However, unlike the previous cases from California and Florida, the *Zidel* court focused primarily on the constitutional issues already addressed at the federal level.<sup>221</sup> Disagreeing with the Eighth Circuit in *Bach*, *Zidel* held that criminalizing the possession of morphed child pornography was an unconstitutional overstep by New Hampshire state law.<sup>222</sup> In its emphasis on federal precedent, rather than on state statutory interpretation, *Zidel* stated that “no demonstrable harms results to the child [who] . . . is depicted” in morphed child pornography.<sup>223</sup> Therefore, because the court held morphed child pornography was not intrinsically related to the sexual abuse of children, the conviction could not stand.<sup>224</sup>

Therefore, whether states have focused on the interpretation of state statutes (like California and Florida) or leaned on constitutional arguments (like New Hampshire), the trend is for state courts to find that morphed child pornography is *not* included in the state

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211. *Id.* at 453.

212. *Id.*

213. *Id.* at 454.

214. *Id.*

215. *Parker*, 81 So. 3d at 455.

216. *Id.* at 455.

217. *Id.* at 457 (emphasis added).

218. *Id.*

219. FLA. STAT. § 827.071(5)(a).

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

221. *Id.* at 257.

222. *Id.* at 265.

223. *Id.* at 263.

224. *Id.* at 264.

definitions of child pornography.<sup>225</sup> This tendency, coupled with the plain meaning of Oklahoma’s statute and the legislative history, strongly favors the position that morphed images are *not* considered child pornography under Oklahoma law.

## V. THE NEED TO INCLUDE MORPHED CHILD PORNOGRAPHY IN OKLAHOMA LAW

It is incumbent on any decent society to value and protect children because of their intrinsic worth. This value, which flows from the inherent dignity of humanity, calls for a public policy that protects children from those who might cause them harm. Morphed child pornography causes harm, exploits children as sexual objects, and violates basic notions of human dignity. Therefore, morphed child pornography should be added to Oklahoma’s legal definition of child pornography.

### *A. Morphed Child Pornography Harms and Exploits Children*

The harm connected to traditional images of child pornography is self-evident.<sup>226</sup> This relationship between traditional child pornography and child sexual abuse is so unadulterated that it “overwhelmingly justifies the criminalization” of child pornography production and possession.<sup>227</sup> Therefore, child pornography is detrimental to children *and* societies, because it attacks the very core of flourishing healthy communities—children.<sup>228</sup> This link makes clear that traditional images of child pornography are repulsive, and also “a record of a crime scene.”<sup>229</sup> In fact, the connection between child pornography and child sexual abuse is so well-defined that multiple organizations and authors reject the term “child pornography” and describe these types of images as “sexually abusive images of children” or “child sexual abuse images.”<sup>230</sup>

The harm of child sexual abuse is the bedrock of *Ferber’s* reasoning to remove child pornography from First Amendment protections.<sup>231</sup> But this direct harm-in-production was not the only harm discussed by *Ferber*. The *Ferber* Court also described the derivative harms of child pornography, stating that the harm of sexual abuse is “exacerbated by [child pornography’s] circulation.”<sup>232</sup> *Ferber* connected the harm-in-production to the harm-in-circulation through an economic argument, holding that the market which fuels child sexual abuse would dry if the circulation of images were banned.<sup>233</sup> It is this connection between the sexual abuse and the harm-in-circulation that poses a problem for the

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225. See, e.g., *People v. Gerber*, 196 Cal. App. 4th 368, 371–72 (2011); *Parker v. State*, 81 So. 3d 451, 453–54 (Fla. Dist. Ct. App. 2011); *Zidel*, 940 A.2d at 265.

226. OST, *supra* note 47, at 104.

227. *Id.*

228. *New York v. Ferber*, 458 U.S. 747, 758 n.9 (1982).

229. O’DONNELL & MILNER, *supra* note 6, at 69.

230. Mary Graw Leary, *The Language of Child Sexual Abuse and Exploitation*, in *REFINING CHILD PORNOGRAPHY LAW: CRIME, LANGUAGE, AND SOCIAL CONSEQUENCES* 109, 133 (Carissa Byrne Hessick ed., 2016); see also National Center for Missing & Exploited Children, *Sexual Abuse Imagery: Overview*, <http://www.missingkids.com/theissues/sexualabuseimagery> (last visited Mar. 16, 2019).

231. *Ferber*, 458 U.S. at 757 (stating that “[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance”).

232. *Id.* at 759.

233. *Id.* at 760.

criminalization of morphed child pornography. While *Ferber* recognized that the harm of child pornography goes beyond sexual abuse, those extended harms caused by circulation and possession are *still* connected to the sexual abuse of children.<sup>234</sup> Therefore, if the extended harms of child pornography are unconnected to actual sexual abuse of children, do the justifications also drop away?<sup>235</sup>

The *Osborne* Court was the first to describe a harm more attenuated than physical sexual abuse. *Osborne* reasoned that possession of child pornography caused harm because the evidence showed that pedophiles used it to seduce other children.<sup>236</sup> This new argument untethered the harm caused by child pornography from the foundational harm of sexual abuse and pointed toward a harm tied to the *potential* abuse of children through pornographic seduction.<sup>237</sup> In other words, the harm of child pornography was not connected only to the creation of child pornography but also to its mere existence.<sup>238</sup> However, *Ashcroft* attempted to retie the knot between child pornography and child sexual abuse. The *Ashcroft* Court rejected criminalizing virtual child pornography by quashing the government's contention that these images might be used to encourage children to engage in sexual activity, that they might whet the appetites of pedophiles, and that they might increase the market for actual child pornography.<sup>239</sup> While protecting children from sexual abuse is a valid use of the law, *Ashcroft* stated that "[t]he prospect of crime, however, by itself does not justify laws suppressing protected speech."<sup>240</sup>

Yet, *Ashcroft* did not totally dismiss the potential harm caused by morphed child pornography by stating that these images "implicate the interests of real children and are in that sense closer to the images in *Ferber*."<sup>241</sup> This announcement from the Supreme Court shows a strong federal belief that morphed images do in fact harm the interests of children. And here, caught between traditional images of child pornography (which are the product of sexual violence against children) and virtual child pornography (which involve no actual sexual violence against children), morphed child pornography poses a unique analytical problem.<sup>242</sup>

The federal circuit courts, leaning on *Ashcroft*'s dicta, embraced a view that morphed child pornography does cause harm and is worthy of inclusion in the law.<sup>243</sup> The Ninth Circuit held in *Bach* that morphed images harm the psychological well-being of children and thus implicate the "interests of real children."<sup>244</sup> *Hotaling* noted the

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234. *Id.* at 759.

235. Weinstein, *supra* note 80, at 45.

236. *Osborne v. Ohio*, 495 U.S. 103, 111 (1990).

237. Carissa Byrne Hessick, *Setting Definitional Limits for the Child Pornography Exception*, in *REFINING CHILD PORNOGRAPHY LAW: CRIME, LANGUAGE, AND SOCIAL CONSEQUENCES* 57, 61 (Carissa Byrne Hessick ed., 2016).

238. *Id.*

239. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 256 (2002).

240. *Id.* at 245; Hessick, *supra* note 237, at 61 (writing that "[t]he *Ashcroft* Court also left no doubt that the harm in creation is the touchstone of its child pornography doctrine").

241. *Ashcroft*, 535 U.S. at 242.

242. GILLESPIE, *supra* note 22, at 20.

243. *See, e.g.*, *Shoemaker v. Taylor*, 730 F.3d 778, 786 (9th Cir. 2013); *Doe v. Boland*, 698 F.3d 877, 884 (6th Cir. 2012); *United States v. Hotaling*, 634 F.3d 725, 730 (2d Cir. 2011); *United States v. Bach*, 400 F.3d 622, 632 (8th Cir. 2005).

244. *Bach*, 400 F.3d at 632.

exploitive nature and reputational harm triggered by morphed images.<sup>245</sup> *Shoemaker* highlighted the sexual exploitation, psychological harm, and reputational harm that morphed child pornography imposes on children.<sup>246</sup> *Boland* even comments on the “privacy injuries” stemming from morphed images.<sup>247</sup> However, no singular theory of the harm caused by morphed child pornography has been established. While the central harm of actual sexual abuse is not implicated by morphed images, the other harms noted by the federal courts are plentiful. And still, the circuit courts boldly utilize these harms, unconnected to actual sexual abuse, as a justification to include morphed images in the federal definition of child pornography.<sup>248</sup>

*Shoemaker* described the harm posed by morphed child pornography as “sexual exploitation.”<sup>249</sup> While it is certainly true that morphed images are those which only make it *appear* as though the child is engaging in sexual activity, it is “realistic to say that they have been exploited.”<sup>250</sup> This exploitation causes psychological harm to a child with the *knowledge* that their image was used as an instrument of sexual gratification.<sup>251</sup> It is impossible to quantify the consequences on a child’s mental health when they know that a pedophile is using their image as masturbatory material. Even if some victims of morphed child pornography are unaware that their photo is being manipulated for a pedophile’s sexual pleasure, the threat alone justifies criminalizing morphed images.<sup>252</sup> Furthermore, the harms produced by this sexual exploitation are not limited to the psychological. Whether or not a child becomes aware that their face and/or body is the subject of a pedophile’s sexual fantasies, morphed child pornography causes harm because the pornographer is taking unfair advantage of a child, using them as a “means to an end.”<sup>253</sup> This exploitative harm violates sexual autonomy and personhood.<sup>254</sup>

This distinction between the harms of sexual abuse and sexual exploitation was acknowledged on the international level. Article 34 of the UN Convention on the Right of the Child encourages nations to “protect the child from all forms of sexual exploitation and sexual abuse.”<sup>255</sup> Notice that the Article distinguishes between “exploitation” and “abuse.”<sup>256</sup> This distinction supports the argument that morphed child pornography is harmful, and worthy of inclusion in Oklahoma law, because of the exploitation of the children who are used to create these pornographic images. It is this exploitation and the harms which ensue that are consistently mentioned in the federal circuit courts.

However, some commentators have rejected the justification of these types of harm,

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245. *Hotaling*, 634 F.3d at 730.

246. *Shoemaker*, 730 F.3d at 786.

247. *Boland*, 698 F.3d at 881.

248. *See, e.g., Shoemaker*, 730 F.3d at 786; *Boland*, 698 F.3d at 884; *Hotaling*, 634 F.3d at 730; *Bach*, 400 F.3d at 632; *Leary*, *supra* note 230, at 133.

249. *Shoemaker*, 730 F.3d at 786.

250. GILLESPIE, *supra* note 22, at 3.

251. Suzanne Ost, *Criminalising Fabricated Images of Child Pornography: A Matter of Harm or Morality?*, 30 LEGAL STUD. 230, 241 (2010).

252. *Id.*

253. OST, *supra* note 47, at 119; *see also Boland*, 698 F.3d at 884.

254. GILLESPIE, *supra* note 22, at 100.

255. G.A. Res. 44/25, Convention on the Rights of the Child (Sept. 2, 1990).

256. *Id.*

stating that “[t]he idea that child pornography could be defined to include images that were created without harming children should give us pause.”<sup>257</sup> However, this commentator’s focus is primarily on sexting images and not morphed images.<sup>258</sup> Still, without a direct link between the morphed images and the sexual abuse of children, some have defended excluding morphed images from the category of child pornography.<sup>259</sup> Relying on harm of actual sexual abuse, it is possible to believe that the other harms implicated by morphed child pornography are not sufficient and are unconnected to sexual abuse at the time of production to render these images illegal.<sup>260</sup> Nevertheless, a disconnection between morphed images and sexual child abuse does not negate the harms of sexual exploitation, potential psychological harm, or the possible reputational harm used by the many federal courts previously mentioned. While these harms are certainly different than the one connected to other types of child pornography, simply saying that the link is weak does not effectively render the argument void.<sup>261</sup>

Furthermore, while the link between morphed child pornography and child sexual abuse is more attenuated than traditional child pornography, it is certainly more associated than the virtual child pornography discussed in *Ashcroft*. Morphed images, as the *Hotaling* defendant admitted, record the “mental fantasies” of pedophiles.<sup>262</sup> Often the young victims of these mental fantasies are children in direct contact with the pedophile. More than half of the cases previously discussed in this article expose direct connections between the victim and the pornographer, including a father and daughter’s friends, a camp photographer and camp students, a Sunday school teacher and Sunday school students, and a father and daughter.<sup>263</sup> The mental fantasies of pedophiles in morphed child pornography visually represent a lust for children known by the pornographer. Therefore, the sexual exploitation involved in morphed child pornography is eerily intimate in nature.

Another minority view espouses a beneficial purpose to morphed child pornography because these images could potentially help pedophiles facilitate an outlet for their disease, protecting real children from sexual abuse.<sup>264</sup> Here the notion of harm is flipped, and it is argued that these images might actually lead to less harm.<sup>265</sup> However, there is little evidence that this is correct.<sup>266</sup> Additionally, this argument is severely flawed. Because virtual child pornography is not illegal, the hypothetically positive effects could be realized with images of computer-generated children, not actual children with real interests to protect. As a result, none of these counter-arguments are convincing and the case for including morphed child pornography in Oklahoma’s statutory definition remains strong.

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257. Hessick, *supra* note 237, at 58.

258. *Id.* at 70–72.

259. *See id.* at 73.

260. *Id.*, at 67.

261. Mary Gray Leary, *Sexting or Self-Produced Child-Pornography? The Dialog Continues – Structured Prosecutorial Discretion Within a Multidisciplinary Response*, 17 VA. J. SOC. POL’Y & L. 486, 522 (2010).

262. *United States v. Hotaling*, 634 F.3d 725, 727 (2nd Cir. 2011).

263. *Id.*; *People v. Gerber*, 196 Cal. App. 4th 368, 373 (2011); *Parker v. State*, 81 So. 3d 451, 452 (Fla. Dist. Ct. App. 2011); *State v. Zidel*, 940 A.2d 255, 256 (N.H. 2008).

264. Katherine Williams, *Child Pornography Law: Does It Protect Children?*, 26 J. SOC. WELFARE & FAM. L. 245, 253 (2011).

265. *Id.*

266. GILLESPIE, *supra* note 22, at 41.

Morphed child pornography “violates the privacy and dignity of the depicted child.”<sup>267</sup> Therefore, to legalize morphed child pornography would be to legalize the violation of fundamental human rights and autonomy. Perhaps this is why *Ferber* noted that “pornography poses an even greater threat to the child victim than does sexual abuse or prostitution.”<sup>268</sup> Children in morphed child pornography suffer an injury beyond physical or psychological harm.<sup>269</sup> “Even if the child was unaware the image was made or circulated, those who create, trade, and view child pornography harm the child’s inherent right of human dignity”—the freedom to not be viewed in such a sexualized and vulnerable position.<sup>270</sup> This idea is related to *Ferber* logic, which acknowledged “the individual interest in avoiding disclosure of personal matters.”<sup>271</sup>

This argument is consistent with the logical division between adult pornography and child pornography. As previously mentioned, lack of consent plays a significant role in the understanding of child pornography. In traditional child pornography the child has not—and cannot—consent to sexual activity. In morphed child pornography, the child has not—and cannot—consent to their sexualization in order to gratify the sexual appetites of adults. This consumption of child pornography can callous a person to the harm “caused to a child and encourages a view of children as legitimate sexual objects.”<sup>272</sup> Objectifying children to satisfy the desires of adults can only encourage those who commit actual child sexual abuse.<sup>273</sup>

Furthermore, humans share an inherent interest in protecting their likeness from improper use, an interest which is also found in other areas of the law.<sup>274</sup> The Geneva Convention bans photographs of prisoners of war that subject them to humiliation or public curiosity.<sup>275</sup> The Supreme Court ruled that there is a right of privacy over death-scene images of a loved one.<sup>276</sup> Even tort law limits images of certain death and autopsy photos.<sup>277</sup> This interest in protecting private images applies to children, who have a right not to be “defamed,” further bolstering the inclusion of morphed images in Oklahoma’s definition of child pornography.<sup>278</sup>

These notions of human dignity and privacy are also implicated in the current discussion regarding “deepfake” pornography which, much like morphed child pornography, embeds the faces of innocent women onto adult actors in pornography

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267. Audrey Rogers, *The Dignitary Harm of Child Pornography—From Producers to Possessors*, in *REFINING CHILD PORNOGRAPHY LAW: CRIME, LANGUAGE, AND SOCIAL CONSEQUENCES* 165, 166 (Carissa Byrne Hessick ed., 2016).

268. *New York v. Ferber*, 458 U.S. 747, 759 n.10 (1982).

269. Rogers, *supra* note 267, at 177.

270. *Id.*; Ost, *supra* note 251, at 241.

271. *Ferber*, 458 U.S. at 759 n.10.

272. O’DONNELL & MILNER, *supra* note 6, at 74.

273. OST, *supra* note 47, at 105.

274. Rogers, *supra* note 267, at 177.

275. *Id.*; Geneva Convention Relative to the Treatment of Prisoners of War art. 13, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

276. *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 170 (2004); Rogers, *supra* note 267, at 178.

277. *Favish*, 541 U.S. at 169; Rogers, *supra* note 267, at 178.

278. OST, *supra* note 47, at 128.

videos.<sup>279</sup> As one victim of a “deepfake” porn video disclosed, “I feel violated—this icky kind of violation.”<sup>280</sup> A Washington Post article states that these pornographic materials are “weaponized” against women, causing “humiliation, harassment and abuse.”<sup>281</sup> Scarlett Johansson, a prominent actress and victim of “deepfake” pornographic videos speaks to the depth of the “deepfake” problem by stating that “nothing can stop someone from cutting and pasting my image or anyone else’s onto a different body and making it look as eerily realistic as desired . . . . [T]rying to protect yourself from the Internet and its depravity is basically a lost cause.”<sup>282</sup> But Ms. Johansson is wrong. At the federal level, children *are* protected from this type of violation of human dignity because legal definitions of child pornography include morphed images. However, without including morphed child pornography in the definition of child pornography, attempting to protect children from this type of abuse, as Ms. Johansson laments, is a lost cause.

### *C. Morphed Child Pornography Is Repugnant to Public Policy*

Perhaps the reason the federal circuit courts have so diligently affirmed the federal definition of child pornography is the desire to protect children from something blatantly repugnant. Whether it is this unspoken rationale, or a stand-alone justification, the moral and ethical connections to morphed child pornography impact public policy. In fact, England and Wales have a strong moral rationale behind their child pornography legislation.<sup>283</sup> Some scholars have noted the direct link between morality and the law,<sup>284</sup> even stating that the American Revolution was fueled by many things including the belief “that the king of Britain was not legislating morally.”<sup>285</sup> The belief was that the king acted unfairly, violating human rights.<sup>286</sup> As a practical example, the Thirteenth Amendment is an instance when the government took a moral stand by banning slavery.<sup>287</sup>

The idea that children should be protected from sexualization is consistent with deeply-rooted public policy. Certainly, the moral fabric of American society demands the protection of children from people who would abuse them. The prevention of sexual exploitation of children constitutes an objective of surpassing importance.<sup>288</sup> Child pornography laws themselves reveal this strongly held desire to guard the most precious and vulnerable persons in society.

However, some assert that “[p]rosecuting individuals for images that are created without abusing or exploiting a child transforms child pornography law into a system for

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279. Drew Harwell, *Fake-Porn Videos Are Being Weaponized to Harass and Humiliate Women: “Everybody is Potentially a Target”*, WASH. POST (Dec. 30, 2018), [https://www.washingtonpost.com/technology/2018/12/30/fake-porn-videos-are-being-weaponized-harass-humiliate-women-everybody-is-potential-target/?utm\\_term=.0f96de6b8c91](https://www.washingtonpost.com/technology/2018/12/30/fake-porn-videos-are-being-weaponized-harass-humiliate-women-everybody-is-potential-target/?utm_term=.0f96de6b8c91).

280. *Id.*

281. *Id.*

282. *Id.*

283. GILLESPIE, *supra* note 22, at 9; Williams, *supra* note 264, at 255.

284. NORMAN GEISLER & FRANK TUREK, *LEGISLATING MORALITY: IS IT WISE? IS IT LEGAL? IS IT POSSIBLE?* 18 (1998).

285. *Id.*

286. *Id.*

287. *Id.* at 23.

288. *New York v. Ferber*, 458 U.S. 747, 757 (1982).

enforcing popular morality.”<sup>289</sup> Others disagree completely.<sup>290</sup> One commentator even stated that morality is an appropriate foundation for banning these images.<sup>291</sup> Therefore, immoral behavior, “even that which occurs in private, poses a threat to the moral fiber of society and, consequently, society itself.”<sup>292</sup>

But public policy and strong convictions without meaningful representation in the law is of little value. It is one thing to believe that children should not be exploited by pedophiles, but it is another for the law to add meaningful weight behind this conviction. The harms caused by morphed child pornography accentuate the need to protect children. Sexual exploitation, psychological harm, and violations of human dignity and privacy cannot be tolerated in a society that holds highly the “sacred trust” of protecting the most vulnerable and defenseless in society.<sup>293</sup> Public policy, undergirded by strong moral convictions, properly calls for the inclusion of morphed child pornography in Oklahoma law.

## VI. CONCLUSION

With the constitutional issues previously handled at the federal level, the good people of Oklahoma have the right to protect their children from pornographers who exploit children by including in their statute a definition of child pornography that incorporates morphed child pornography. Because morphed child pornography is not included in Oklahoma’s definition of child pornography and because its harmful effects are worthy of prosecution, the Oklahoma legislature should update state law to protect children. The legislature can adopt language from either the current federal statute or reach back into Oklahoma legislative history and use the language that previously defined obscenity before it was changed.

With the intent to protect children from the harms of morphed child pornography, and in light of our deeply-rooted value in protecting children, the new statute should define child pornography as “any visual depiction . . . wherein a minor under the age of eighteen (18) years is engaged, or appears to be engaged, in any sexual activity.”

—Caleb Beacham \*

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289. Hessick, *supra* note 237, at 73.

290. Williams, *supra* note 264, at 254.

291. *Id.* (“[T]he reasoning for the law must fall back on the protection of sexual morality; the desire to prevent people obtaining sexual gratification, even if it does not interfere with the rights of children (especially in the case of pseudo-images, where children are not used in the creation of the image), merely because most people consider that viewing such images is abhorrent.”).

292. OST, *supra* note 47, at 120.

293. *Ferber*, 458 U.S. at 757.

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