

A Call To Rewrite America’s Child Pornography Test: The Dost Factor Test

*Kieran Dowling**

INTRODUCTION	152
I. DECIPHERING 18 U.S.C. § 2251, THE DOST FACTOR TEST AND <i>UNITED STATES V. JOHNSON</i>	155
A. § 18 U.S.C. 2251 and the Dost Factor Test	155
B. Applying the Dost Factor Test to <i>United States v.</i> <i>Johnson</i>	157
1. <i>Johnson the Coach or Johnson the Pedophile?</i> ...	157
2. The Videotapes.....	158
3. The Western District Court of Missouri’s Refusal to Look Beyond the Four Corners of the Image.....	160
4. The Eighth Circuit’s Focus on the Intent Over the Content of the Videotapes	162
II. THE DOST FACTOR TEST: A VAGUE, MISAPPLIED FACTUAL ANALYSIS THAT PROMOTES THE SEXUALIZATION OF CHILDREN	165
A. Vagueness and Discrepancy in the Dost Factor Test	166
B. The Dost Factor Test—A Sexualizer of Children	168
C. The Dost Factor Test: All Image and No Intent or All Intent and No Image?	170
D. Suggestions from Scholars to Reform the Current Child Pornography Laws:.....	172
III. BRINGING A TRUE BALANCE OF CONTENT AND CONTEXT TO THE DOST FACTOR TEST	176
A. The Misapplication of the Dost Factor Test in <i>United States v. Johnson</i>	176
B. In Determining Lasciviousness, the Reformed	

* J.D. Candidate, 2014, Seton Hall University School of Law; B.A., Political Science, 2011, Loyola University Maryland. I would like to thank Professor Charles Sullivan and Dean Erik Lillquist for their academic guidance. I would also like to thank my father Dr. Keith J. Dowling, a role model and an exemplar of humility, dedication, and perseverance.

Dost Factor Test Will Assess Both the Content of an Image and the Intent Behind Its Creation.....	176
IV. CONCLUSION.....	178

INTRODUCTION

Children are perhaps America's most precious, yet vulnerable members of society. Their innocence and naivety leave many susceptible to pedophiles, who wish to exploit children for their own perversions. As a result, Congress enacted strict laws to shield children from sexual exploitation and to prosecute those responsible for such atrocities. In *Miller v. California*, the Supreme Court held that pornography depicting children "may be proscribed regardless of whether the images 'taken as a whole' appeal to 'prurient interests' or 'have serious literary, artistic, political or scientific value.'"¹ Despite the Court's ruling in *Miller* in 1973, Congress failed to enact a federal statute prohibiting the use of children in the production of sexually explicit materials until 1977.² Recognizing that children were being exploited for pornography and suffering harm, Congress enacted the Protection of Children Against Sexual Exploitation Act, codified at 18 U.S.C. § 2251 et seq., in May of 1977.³ Despite this Act, child pornography remains pervasive throughout the United States. In fact, child pornography is currently a billion dollar industry.⁴

Congress's failure to eradicate child pornography can be attributed in part to the inconsistent applications of child pornography laws, including § 2251. Under § 2251, any person who employs or entices a minor to engage in sexually explicit conduct for the depiction of such conduct is in violation of the law.⁵ Under § 2256, the term sexually explicit is defined as the "lascivious exhibition of the genitals or pubic

1. James E. Bristol, *Free Expression in Motion Pictures: Childhood Sexuality and a Satisfied Society*, 25 CARDOZO ARTS & ENT L.J. 333, 352-53 (2007) (citing *Miller v. California*, 413 U.S. 15, 24 (1973)).

2. *Id.* at 342; see S. Rep. 95-438 at 1. Act became law under Pub. L. No. 95-225 (1978) (codified as amended at 18 U.S.C. §§2251-2252, 2256 (2006)).

3. See Bristol, *supra* note 1, at 342; 18 U.S.C. § 2251.

4. Allison L. Cochran, *Punishment for Virtual Child Pornography. . . It's Just A Fantasy*, 2 (Oct. 2009) (unpublished comment, on file with BePress), available at http://works.bepress.com/allison_cochran.

5. 18 U.S.C. § 2251(a) (2012).

area of any person.”⁶ Today, several circuits use a non-exhaustive, common law, totality of the circumstances test known as the “Dost Factor Test” to identify lasciviousness, and thus, sexual explicitness.⁷ However, *United States v. Johnson* exposes the problems that can result in applying Congress’s child pornography standards and the Dost Factor Test.⁸

In *Johnson*, a weightlifting coach filmed his minor weightlifters in the nude.⁹ Both the district court and circuit court applied the Dost Factor Test to determine the presence of lasciviousness in the videos.¹⁰ Focusing on the content of each video, Judge Richard E. Dorr of the United States District Court for the Western District of Missouri held that the videos of each minor depicted mere nudity, not lasciviousness or sexual explicitness.¹¹ Thus, the district court acquitted Scott A. Johnson of charges of sexual exploitation of children in violation of § 2251.¹² However, the United States appealed the district court’s decision, and a panel of the United States Court of Appeals for the Eighth Circuit reversed the district court’s decision, finding Mr. Johnson guilty of violating § 2251 by filming child pornography.¹³ The Eighth Circuit, in an opinion written by Judge David R. Hansen, held that the district court erred by focusing on whether the videotapes themselves were actually lascivious; Mr. Johnson’s intent and the context in which the images were created were sufficient to violate § 2251.¹⁴

Despite its implementation across a number of circuit courts, the Dost Factor Test applying § 2251 uses ambiguous language, forcing jurors to engage in the disturbing process of analyzing potentially pornographic material, and it results in inconsistent applications that focus on either the content or the intent behind such images. First, the term lascivious, which is used to define child pornography under § 2251,

6. 18 U.S.C. § 2256(2) (2012).

7. *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986).

8. *See generally* *United States v. Johnson*, 733 F. Supp. 2d 1089 (W.D. Mo. 2010), *rev’d*, 639 F.3d 433, 438 (8th Cir. 2011).

9. *See Johnson*, 733 F. Supp. 2d at 1091.

10. *See id.* at 1096; *Johnson*, 639 F.3d at 439.

11. *See Johnson*, 733 F. Supp. 2d at 1096.

12. *See id.* at 1089.

13. *See Johnson*, 639 F.3d at 438.

14. *See id.* at 438-39.

problematically varies in meaning among the different circuits.¹⁵ Factors that are regularly applied with the Dost Factor Test, such as “sexually suggestive” and “sexual coyness,” are vague and often reshaped based on the differing experiences of individual jury members.¹⁶ Second, society’s commercialization of a child’s sexuality renders it nearly impossible for jurors to properly apply the fact-sensitive Dost Factor Test and to discern lawful images of children from pornography.¹⁷ Professors Amy Adler and Robert J. Danay even assert that the Dost Factor Test’s requirement for courts and jurors to scrutinize images of naked children contributes to society’s sexual exploitation of children.¹⁸ Third, several federal court decisions have skewed the application of the Dost Factor Test by applying either only content-based or intent-based factors to their analysis. Robert J. Danay explains that Dost Factor Test decisions focusing solely upon the content of images fail to reach images that may seem fairly innocuous, yet were created by a pedophile with perverse intentions.¹⁹ On the other hand, a Dost Factor Test

15. One authority summarizes some of the problems:

[U]nder *Ferber* lascivious describes the child’s conduct, not necessarily the child. On the other hand, *Knox* held that lascivious describes depictions “presented by the photographer . . . to arouse or satisfy the sexual cravings of a voyeur.” Under this interpretation, lascivious describes the viewer. In *United States v. Wiegand*, the Ninth Circuit held that lascivious should be interpreted from the perspective of the “audience that consists of [the filmmaker] or likeminded pedophiles.” So lascivious describes not only the viewer (including pedophiles), but also the filmmaker. But how does one interpret lascivious from the perspective of the pedophile? Interpretation of what lascivious describes harkens back to Justice Stewart’s explanation of obscenity: I know it when I see it.

See Bristol, *supra* note 1, at 353-54:

16. *Id.* at 355.

17. See *id.* at 364 (citing ANNE HIGONNET, PICTURES OF INNOCENCE: THE HISTORY AND CRISIS OF IDEAL CHILDHOOD 133, 153 (1998)).

18. Robert J. Danay, *The Danger of Fighting Monsters: Addressing the Hidden Harms of Child Pornography Law* 11 REVIEW OF CONSTITUTIONAL STUDIES 151, 156 (2005); Amy Adler, *The Perverse Law of Childhood Pornography*, 101 COLUM. L. REV. 209, 210 (2001) [hereinafter Adler, *The Perverse Law*].

19. As Danay states:

In an effort to condemn all materials that might hold some special inciting effect upon alleged pedophiles, the judicial pedophilic gaze is extending to materials that are increasingly mundane. This trend is all the more distressing given the evidence of certain professed pedophiles who claim to prefer more innocent representations of children. For these people, it may be the very ‘sexual naïvete’ of the depicted children that is arousing If this is so, the judicial search for pedophilic material threatens to publicly sexualize

analysis centering exclusively upon the creator's intent could qualify virtually any image of a child as pornography.²⁰

To resolve these issues, triers of fact should be required to balance both content-based and intent-based factors during a Dost Factor Test analysis. This requirement would guard against triers of fact applying only those factors that support their personal opinions toward the defendant in the case before them. Also, this heightened standard offers a greater level of assurance that an image was properly found lascivious. Moreover, this standard will remain organic, allowing the definition of the term lascivious to reshape as society's standards change. Finally, this new requirement will allow courts to refine concepts as to what images constitute lasciviousness and what images do not.

This comment will first explain the meaning and application of § 2251, the Dost Factor Test, and the different holdings of the district court and court of appeals in *United States v. Johnson*. The following section will explore the criticisms that plague the Dost Factor Test, including its vagueness, misapplication, and its unintended promotion of the sexualization of children. Finally, this comment offers a solution that will allow judges and juries to apply the Dost Factor Test effectively by requiring a balance of both content-based and intent-based factors during the test's implementation.

I. DECIPHERING 18 U.S.C. § 2251, THE DOST FACTOR TEST AND *UNITED STATES V. JOHNSON*

A. § 18 U.S.C. 2251 and the Dost Factor Test

Congress's concern with the growth of commercial child pornography led it to enact 18 U.S.C. § 2251 in 1977.²¹ Since that time, the Act has been amended several times to strengthen its protection over America's children.²² In 1984, 1986, and most recently in 1988, Congress expanded the statute's reach by raising the age of those defined as minors,

all images of children no matter how innocuous the context.

Danay, *supra* note 18, at 156-57.

20. See Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 956 (2001) [hereinafter Adler, *Inverting the First Amendment*].

21. See Bristol, *supra* note 1, at 342.

22. See Adler, *Inverting the First Amendment*, *supra* note 20, at 956.

extending provisions to reach offenders who print and publish child pornography, and increasing the penalties for conviction.²³ Under the current § 2251, “[a]ny person who employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct shall be punished as provided under subsection (e).”²⁴ Under § 2256, sexually explicit conduct is defined as: sexual intercourse; bestiality; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the genital or pubic area of a person.²⁵

Focusing on this final category, while neither § 2251 nor § 2256 explicitly define lascivious, the Third, Eighth, and Ninth Circuits have each adopted a holistic test to assess whether material involving a child is lascivious, and, thus, sexually explicit under § 2251.²⁶ The applicable test originated in the Southern District of California case *United States v. Dost*.²⁷ Under this test, “[c]ourts consider a non-exhaustive list of factors in determining whether a depiction meets the category of ‘lascivious exhibition of the genitals or pubic area.’”²⁸ Factors considered may include:

- (1) whether the focal point is on the minor’s genitals or pubic area;
- (2) whether the picture’s setting is sexually suggestive, i.e. in a place associated with sexual activity;
- (3) whether considering the minor’s age, the minor is depicted in an unnatural pose or in inappropriate attire;
- (4) whether the minor is partially clothed or nude;
- (5) whether the picture suggests sexual coyness or a willingness to engage in sexual activity and;
- (6) whether the picture is intended or designed to elicit a sexual response from the viewer.²⁹

23. *Id.*

24. *United States v. Johnson*, 639 F.3d 433, 438 (8th Cir. 2011) (quoting 18 U.S.C. § 2256 (2012)).

25. § 2256.

26. *See United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986). For applications of the Dost Factor Test *see United States v. Villard*, 885 F.2d 117 (3d Cir. 1989); *United States v. Wallenfang*, 568 F.3d 649 (8th Cir. 2009); *Shoemaker v. Taylor*, 730 F.3d 778 (9th Cir. 2013).

27. *See generally Dost*, 636 F. Supp. at 828.

28. *United States v. Johnson*, 733 F. Supp. 2d 1089, 1094 (W.D. Mo. 2010) (citing *Dost*, 636 F. Supp. at 828).

29. *Id.* (citing *Dost*, 636 F. Supp. at 828). Because the Dost Factor Test’s list of applicable criteria is non-exhaustive, the district court in *Johnson* added the additional factor of whether the picture depicts the minor as a sexual object.

The decision is based on a totality of the circumstances, and not all of these factors need be present to find a “lascivious exhibition of the genital or pubic area.”³⁰ Nonetheless, the Eighth Circuit has held that “[i]mages or exhibitions of female breasts and the buttocks of either gender are not within the purview of § 2251(a),” and therefore not lascivious.³¹

B. Applying the Dost Factor Test to United States v. Johnson

1. Johnson the Coach or Johnson the Pedophile?

While the Dost Factor Test serves to define lascivious under § 2251, its application in both the district and circuit court decisions in *United States v. Johnson* highlights its severe deficiencies and reveals its need for restructuring.

Mr. Johnson served as a weightlifting coach at a specialized facility for young athletes located in Springfield, Missouri.³² He had been involved in weightlifting competitions as both a participant and as a coach.³³ In fact, he served as a women’s weightlifting coach at the 2004 Olympic Games and refereed national weightlifting competitions.³⁴

In the sport of weightlifting, participants compete in classes based upon their body weight.³⁵ Weightlifting coaches record a lifter’s weight through frequent weigh-ins in preparation for competitive events.³⁶ Prior to a competition, each participant stands on a scale and “weighs in” in either the nude or underwear.³⁷ A referee of the same gender conducts the weigh-in.³⁸ On several occasions, Johnson

30. Steven L. Grasz, *Child Pornography and Child Nudity: Why and How States May Constitutionally Regulate the Production, Possession, and Distribution, of Nude Visual Depictions of Children*, 71 TEMP. L. REV. 609, 622 (1998) (quoting *Dost*, 636 F. Supp. at 832).

31. *United States v. Johnson*, 639 F.3d 433, 438 (8th Cir. 2011); *see also* *United States v. Gleich*, 397 F.3d 608 (8th Cir. 2005) (“[T]aking pictures of a non-pubic area such as the buttocks does not meet the definition of “sexually explicit conduct.”).

32. *Johnson*, 639 F.3d at 435.

33. *Id.*

34. *Id.* at 435-36.

35. *Id.* at 436.

36. *Id.*

37. *Id.*

38. *Johnson*, 639 F.3d at 436.

instructed female athletes to enter an examination room, disrobe completely, and weigh themselves.³⁹ The females were unaware that Johnson had set up a hidden video camera to film their weigh-ins.⁴⁰ Johnson had placed the camera between two shelves, limiting its vertical view, yet preventing its discovery.⁴¹ At least two female athletes were minors at the time Johnson filmed them.⁴² When authorities found the videotapes in Johnson's home, he confessed to investigators that he filmed the girls without their knowledge, because he, "just wanted to film them . . . [and] see them naked."⁴³ A grand jury indicted Johnson on ten counts of sexual exploitation of a minor under § 2251.⁴⁴

2. The Videotapes

At trial, the jury assessed eight videos filmed by Mr. Johnson, each video representing an alleged violation of § 2251.⁴⁵ The first count stated, "[t]he scale faces the table, such that when a person stands on it, a side view is captured. The minor enters the room, undresses completely, weighs herself, and redresses."⁴⁶ While this view shielded the minor's pubic region, the video showed the minor from just below her shoulders to her calves.⁴⁷ Under the second count, "[t]he scale faces the table. The minor disrobes outside of the camera's view. The minor weighs herself naked, giving the camera a side view from just above her breasts to her calves."⁴⁸ However, the video did not clearly show the minor's pubic area and captured no frontal nudity.⁴⁹ Under the third count, "[t]he scale faces the wall opposite the camera, such that the camera captures a rear view of the person standing on the scale. The camera's zoom appears to be increased."⁵⁰ While the minor weighed herself naked and the frame showed from

39. *United States v. Johnson*, 733 F. Supp. 2d 1089, 1091 (W.D. Mo. 2010).

40. *Id.*

41. *Id.* at 1092.

42. *Id.* at 1091.

43. *Id.* at 1092.

44. *Id.*

45. *Johnson*, 733 F. Supp. 2d at 1092.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

her left buttocks to just below her knee, the image captured no frontal view.⁵¹ Under the fourth count, even though the victim was completely naked at the time, only a side view was visible.⁵² Under the fifth count, not only did Johnson face the scale toward the table, but he also enhanced the camera's zoom to a similar degree as the video in the fourth count.⁵³ The video showed a female wearing red workout shorts, and therefore no frontal nudity.⁵⁴ Under the sixth count, the frame showed the scale facing the table.⁵⁵ While the minor redressed mostly outside of the camera's view, the frame showed the nude minor from just above her breasts to her calves.⁵⁶ In addition, the far left side of the frame briefly showed the minor's pubic region.⁵⁷ Under the seventh count, the frame showed a side view of the minor from her upper back to her calves.⁵⁸ Under the eighth count, the scale directly faced the camera.⁵⁹ The minor weighed herself three separate times: once fully clothed, once only wearing underwear and a bra, and once only wearing underwear.⁶⁰ The video showed the minor from her shoulders to her calves.⁶¹

Two of the victims testified that they were between the ages of fifteen and seventeen at the time Johnson filmed counts one, three, four, five, and eight.⁶² However, there was no evidence that Johnson tried to enhance the videos by freeze framing any of the images.⁶³ On December 16, 2009, after analyzing the videos using the Dost Factor Test, the jury returned a guilty verdict on all eight counts of attempted sexual exploitation of a minor under § 2251(a) and (e).⁶⁴ Johnson's sentence would carry a minimum of fifteen years in

51. *Johnson*, 733 F. Supp. 2d at 1092.

52. *Id.* at 1093.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Johnson*, 733 F. Supp. 2d at 1093.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Johnson*, 733 F. Supp. 2d at 1096.

64. *Id.* at 1093.

prison.⁶⁵ However, Judge Dorr granted Mr. Johnson's motion for acquittal notwithstanding the verdict and found that he had not violated § 2251 under any of the counts.⁶⁶

3. The Western District Court of Missouri's Refusal to Look Beyond the Four Corners of the Image

In providing his analysis using the Dost Factor Test, Judge Dorr disregarded Mr. Johnson's sexual intentions and chose to focus solely on the content of each video. The Judge held that "[a]lthough this Court believes Mr. Johnson's conduct should not go unpunished, the Court finds § 2251(a) was not intended to apply to Mr. Johnson's conduct," which consisted only of mere nudity.⁶⁷ Judge Dorr emphasized that the crime charged against Mr. Johnson is limited specifically to a video depiction of a "lascivious exhibition of the genitals or pubic area. . ."⁶⁸ He also turned to the American Heritage Dictionary, which defines the term lascivious as "of or characterized by lust, lewd, [or] lecherous."⁶⁹ Relying upon this definition, Judge Dorr opined that mere nudity could in no way be considered a "lascivious exhibition of the genitals or pubic area."⁷⁰

To distinguish lasciviousness from mere nudity, the district court first looked to *United States v. Rivera*.⁷¹ There, the Second Circuit held that a reasonable jury could find images showing a minor female lying naked with her legs spread and the camera focusing on her pubic area are unquestionably lascivious, because they serve to elicit a sexual response in the viewer.⁷² The district court also cited *United States v. Horn*, where the court held that freeze-framing portions of videotape to expose the pubic areas of young girls indicates lascivious conduct under the Dost Factor Test.⁷³ Distinguishing these cases from the facts at hand, Judge Dorr opined that the content of the videos taken by

65. *Id.* at 1091.

66. *See generally id.*

67. *Id.* at 1091.

68. *Id.* at 1093 (quoting 18 U.S.C. § 2256 (2) (2012)).

69. *Johnson*, 733 F. Supp. 2d at 1094.

70. *Id.*

71. *See United States v. Rivera*, 546 F.3d 245 (2d Cir. 2008).

72. *Johnson*, 733 F. Supp. 2d at 1095 (citing *Rivera*, 546 F.3d at 250).

73. *Id.* at 1096 (citing *United States v. Horn*, 187 F.3d 781, 789 (8th Cir. 1999)).

Johnson constituted mere nudity.⁷⁴ In his reasoning, Judge Dorr stated, “[t]here was no evidence in this case of freeze framing nor was there evidence that zoom enhancement made the minors’ genitals or pubic area the focus of the depiction.”⁷⁵ Johnson did not alter the camera’s zoom, placement, or scale to make the minors’ pubic areas the focal point of the video.⁷⁶ In addition, Judge Dorr remained unconvinced that a video showing a nude female from her lower back to just below her knees was intended to target a minor’s pubic area.⁷⁷ Finally, Judge Dorr highlighted the fact that Johnson never told the two girls to pose in a certain way or to wear certain suggestive clothing during weigh-ins.⁷⁸

Secondly, the district court determined that the videos were not made with a sexual intent. These videos indisputably depicted two minors “taking off their clothes, stepping onto a scale, getting off the scale, dressing, and leaving the room.”⁷⁹ But, because these two minors were filmed engaging only in the non-sexual acts requested by Johnson, they were not portrayed with the intent of being sexual objects, as when pictures of children are uploaded onto a website devoted to sexual images.⁸⁰ Therefore, the videos were not intended to elicit a sexual response in viewers any more than mere nudity would elicit.⁸¹ Furthermore, Judge Dorr extended the scope of his opinion, asserting that “[r]egardless of all the Government argument about Mr. Johnson’s intent and what he attempted to gain, it is clear from the end product – the videos – that he failed to actually produce a visual depiction of a ‘lascivious exhibition of the [minors’] genitals or pubic area.’”⁸²

Finally, the district court explained that the actions of Mr. Johnson did not violate § 2251 because the minors did not suffer any damage. Judge Dorr held that “[t]he females were in an organized weightlifting program, Mr. Johnson was their

74. *See id.* at 1093.

75. *Id.* at 1097.

76. *Id.* at 1096-97.

77. *Id.* at 1096.

78. *Johnson*, F. Supp. 2d at 1097.

79. *Id.*

80. *Id.* (citing *United States v. Wallenfang*, 568 F.3d 649, 660 (8th Cir. 2009) (concluding that a minor was portrayed as a sexual object when the images were primarily sexual in subject and were uploaded to a website devoted to sexual images)).

81. *Id.* at 1097.

82. *Id.* (quoting 18 U.S.C. § 2256(2) (2012)).

coach, and it was undisputed that weighing in the nude was a common practice with weight lifters.”⁸³ Judge Dorr noted that from the viewpoint of the minor females, they were not asked to do anything unusual.⁸⁴ Until the girls realized they had been videotaped, they had no reason to be upset.⁸⁵ As a result, the district court granted Mr. Johnson’s motion for acquittal notwithstanding the jury’s verdict of guilty.⁸⁶

4. The Eighth Circuit’s Focus on the Intent Over the Content of the Videotapes

Upon review, a panel of the United States Court of Appeals for the Eighth Circuit found Johnson guilty of violating § 2251 in an opinion that deemphasized the videos’ contents and stressed the Defendant’s sexual intentions.⁸⁷ Judge Hansen found the district court’s analysis to be misplaced.⁸⁸ First, the Eighth Circuit distinguished between images constituting mere nudity and images rising to the level of lasciviousness.⁸⁹ Judge Hansen agreed that “[m]ore than mere nudity is required before an image can qualify as ‘lascivious’ within the meaning of the statute [§ 2256].”⁹⁰ However, he stressed that lascivious images provide more than just a clinical view of the portions of a child’s anatomy.⁹¹ Relying upon the Third Circuit’s decision in *United States v. Knox* to explain the concept of “mere nudity,” Judge Hansen opined that surely “no one seriously could think that a Renoir painting of a nude woman or an innocuous family snapshot of a naked child in the bathtub violates the child pornography laws.”⁹² However, lasciviousness may exist even when a child’s genitals are only partially exposed.⁹³

83. *Id.* at 1094.

84. *Johnson*, F. Supp. 2d at 1094.

85. *Id.* at 1094.

86. *Id.* at 1100.

87. *See generally Johnson*, 639 F.3d at 433.

88. *Id.* at 439.

89. *See id.* at 440.

90. *Id.* (quoting *United States v. Kemmerling*, 285 F.3d 644, 645-46 (8th Cir. 2002)).

91. *Id.* at 439 (citing *Kemmerling*, 285 F.3d at 646). In *Kemmerling*, the court distinguished images depicting the genitalia of young males, which were labeled as lascivious, from those that could be classified as depicting only mere nudity.

92. *Id.* (quoting *United States v. Knox*, 32 F.3d 733, 750 (3d Cir. 1994)).

93. *Knox*, 32 F.3d at 744.

Using this distinction between mere nudity and lasciviousness in his Dost Factor Test analysis of the videos, Judge Hansen opined that the minors were portrayed as sexual objects.⁹⁴ First, Judge Hansen emphasized the camera's focus and zoom, stating that a reasonable jury could find that Johnson had adjusted the zoom to tighten the focus of the camera on the area where the females' genitals would have been had they been facing the lens, thereby fulfilling the first Dost Factor (whether the focal point is on the minor's genitals or pubic area).⁹⁵ In at least one video, the camera's focus had been so "zoomed in" that the left half of the female's body from her left buttock down to her knee filled half of the screen.⁹⁶ Had the female been facing the camera instead of away from it, the camera would have filmed a close-up view of her naked pubic area.⁹⁷ Second, Judge Hansen opined that a reasonable jury could have concluded that, because the videos show the girls from their shoulders to their calves, including naked breasts, the facial features of the girls were of little or no importance to Johnson.⁹⁸ Finally, Judge Hansen indicated that "[s]ome of the clips [do] clearly reveal the pubic areas of the young women not only as they stand on the scale facing the camera, but also as they go through the motions required to remove all of their clothing and put it back on."⁹⁹ Thus, because of where the camera was focused, the images of the girls could not reasonably be compared to innocent family photos, clinical depictions or works of art.¹⁰⁰

Judge Hansen then stated that to find a violation of § 2251, the lascivious act need not be committed by the child, but by the alleged perpetrator.¹⁰¹ Demonstrating his point, he applied the Fifth Dost Factor that asks whether sexual coyness or a willingness to engage in sexual activity is present.¹⁰² According to Judge Hansen, the minors depicted in the videos were not acting in an obviously sexual manner, failing to demonstrate any coyness or willingness to engage in

94. *Johnson*, 639 F.3d at 440.

95. *Id.*; *United States v. Dost* 636 F. Supp. 828 (S.D. Cal. 1986).

96. *Johnson*, 639 F.3d at 436-37.

97. *Id.* at 437.

98. *Id.* at 440.

99. *Id.* at 437.

100. *Id.* at 439.

101. *Id.* at 440.

102. *Johnson*, 638 F.3d at 440.

sexual activity.¹⁰³ However, this does not necessarily indicate that the videos were not lascivious.¹⁰⁴ In *Horn*, the Eighth Circuit held that "lascivious exhibition need not necessarily be 'the work of the child, whose innocence is not in question, but of the producer or editor of the video.'"¹⁰⁵ Thus, even images of children acting innocently (such as the girls in this case) can be lascivious if they are intended to be sexual.¹⁰⁶

Judge Hansen also noted that all six Dost Factors do not need to be present for an image to be proscribed under § 2251.¹⁰⁷ Therefore, even though three Dost Factors (a sexually suggestive setting, inappropriate attire or unnatural poses, and a suggestion of sexual coyness) were not present in Mr. Johnson's videos, a reasonable jury could still find that Mr. Johnson acted lasciviously.¹⁰⁸ For example, the fact that the camera was specifically pointed at the scale, encompassing the minors' nude bodies from their shoulders to below their knees, still weighed in favor of lasciviousness.¹⁰⁹

Finally, the Eighth Circuit held that statements made by the producer of the images must be considered in determining whether the images were meant to elicit a sexual response in the viewer.¹¹⁰ Judge Hansen considered that "[o]n at least one occasion after a lifter had come out from the examination room, he [Johnson] pointedly asked the young woman (age 15-16) if she had stripped down completely."¹¹¹ Even more, when investigators asked Johnson why he had filmed the two minors he stated that "he thought they were 'cute' and that he was curious about what they looked like naked."¹¹² Johnson even admitted to police, "[M]y pervertedness got the best of me."¹¹³ Based on Johnson's statements and his other analysis, Judge Hansen held that a reasonable jury could find that Johnson intended the videos to be sexual in nature and to

103. *Id.*

104. *Id.*

105. *Id.* (quoting *United States v. Horn*, 187 F.3d 781, 790 (8th Cir. 1999)).

106. *Id.* at 439.

107. *Id.* at 440 (citing *United States v. Wallenfang*, 568 F.3d 649, 657 (8th Cir. 2009)).

108. *Johnson*, 638 F.3d at 440.

109. *Id.* at 440-41.

110. *Id.* at 441.

111. *Id.* at 436.

112. *Id.*

113. *Id.*

2014] *A Call to Rewrite America's Child Pornography Test* 165

elicit a sexual response in the viewer.¹¹⁴ The Eighth Circuit Court of Appeals therefore reversed the district court's decision to grant Mr. Johnson's motion for acquittal notwithstanding the verdict.¹¹⁵

II. THE DOST FACTOR TEST: A VAGUE, MISAPPLIED FACTUAL ANALYSIS THAT PROMOTES THE SEXUALIZATION OF CHILDREN

While the Dost Factor Test is widely implemented by different circuits and supported by scholars, it has been subject to extensive criticism for its vague terms, its unintentional promotion of the sexualization of children, and its misapplication among the courts. A number of commentators have supported the application of this test. Former Chief Deputy Attorney General of the Nebraska Attorney General's Office Steven L. Grasz asserts that in order "[t]o fully protect children from psychological and emotional harm, states should enact legislation which restricts the production, distribution, and possession of nude visual depictions of children."¹¹⁶ The Dost Factor Test, according to Grasz, accomplishes this goal by providing one of the clearest guides for federal courts to determine what types of materials should be proscribed under the Protection of Children Against Sexual Exploitation Act.¹¹⁷ Likewise, James E. Bristol opines that child pornography laws, including the Dost Factor Test, rightfully proscribe the abhorrent exploitation of children that originates from the production of "kiddy-porn."¹¹⁸ To Bristol, this test helps to eradicate one of

114. *Johnson*, 638 F.3d at 441 (citing *United States v. Kemmerling*, 285 F.3d 644, 646 (8th Cir. 2002)). Images designed to elicit a sexual response from the viewer are distinguishable from those designed to provide a clinical view of sections of a child's anatomy.

115. *Id.*

116. Grasz, *supra* note 30, at 634.

117. *Id.* at 623. This notion is illustrated by the number of cases that have followed the court's holding in *Dost*. See e.g. *United States v. Wolf*, 890 F.2d 241, 244-46 (10th Cir. 1989) (affirming the trial court's use of Dost Factors in measuring the lasciviousness of a photo of a partially nude girl); *United States v. Villard*, 885 F.2d 117, 122 (3d Cir. 1989) (adopting Dost Factors to determine whether photos of a nude boy are lascivious genital exhibitions); *United States v. Mr. A*, 756 F. Supp. 326, 328-29 (E.D. Mich. 1991) (using Dost Factors to find that the genitalia of children were not lasciviously exhibited in photos taken by their parents).

118. Bristol, *supra* note 1, at 348 (explaining that "kiddy porn" consists of motion pictures depicting sex crimes perpetrated against real children).

society's worst crimes.¹¹⁹

However, several critics believe the Dost Factor Test uses vague and confusing language, promotes the sexualization of children, and focuses too heavily on either the content of or the intent behind the images. Even Bristol acknowledges the Dost Factor Test's problems of visual interpretation, law application and product accessibility, which allow motion pictures with illegal depictions of children to enter the marketplace unnoticed.¹²⁰ Triers of fact who must apply this test are often left wondering what exactly it is they are supposed to interpret.¹²¹ With such an immense amount of scrutiny, the Dost Factor Test must be reframed into a more coherent structure for judges and jurors across the United States.

A. Vagueness and Discrepancy in the Dost Factor Test

Scholars have criticized the United States' child pornography laws, including both 18 U.S.C. §§ 2251 and § 2256 (specifically the term lascivious) and the Dost Factor Test, due to their vagueness and resulting differences in interpretation. For instance, § 2256 defines child pornography as "any visual depiction . . . of sexually explicit conduct involving a minor."¹²² However, Allison Cochran explains that this language creates several gray areas for legal interpretation.¹²³ Because this definition requires the depicted minor to be engaged in sexual activity, Cochran asks whether a minor just standing in a picture in her underclothes or even naked can ever truly constitute sexual explicitness.¹²⁴ Unfortunately, § 2256 and Congress provide no guidance as to how the courts should interpret its language.

Critics also find § 2251 problematic, because the ambiguity in defining the term lascivious under § 2256 results in the inconsistent application of § 2251 against alleged offenders. As Bristol explains, photographs of a nude, partially nude, and even fully clothed child create quasi-legal scenarios,

119. *Id.*

120. *Id.* at 363.

121. *Id.* at 355.

122. 18 U.S.C. § 2256.

123. Cochran, *supra* note 4, at 4.

124. *Id.*

where the deciding factor turns on whether the child's body was portrayed with lascivious intent.¹²⁵ However, Bristol raises the question as to what exactly the term lascivious describes.¹²⁶ To Bristol, the word lascivious could describe a multitude of elements including the child, the child's act, the filmmaker's intent, or even the viewer's reaction.¹²⁷

Even worse, the circuit courts' inconsistent applications of § 2251 and the term lascivious provide little guidance for applying this statute's terms. For example, the Eighth Circuit in *United States v. Kemmerling* held that a picture is lascivious only when it is sexual in nature.¹²⁸ Thus, § 2251 is violated when a picture depicts a child nude, partially clothed, or when the focus of the image is the child's pubic area.¹²⁹ However, distinguishing this definition, Bristol notes that in *New York v. Ferber*, the Supreme Court held that § 2251 prohibits lascivious images that "visually depict sexual conduct by children[.]"¹³⁰ Likewise, Adler notes that in *United States v. Knox*, Solicitor General Drew Days made a similar argument, claiming lascivious must mean that the child is depicted as engaging in sexual conduct.¹³¹ However, the Third Circuit disagreed with Days, holding that lascivious has nothing to do with the actions of the child, but centers on whether the photographs serve to satisfy the sexual cravings of a voyeur.¹³² Bristol demonstrates that in applying § 2251 one is left to ponder whether lascivious should be limited to describing the child (as held in *Kemmerling*), the conduct of the child (as held in *Ferber* and argued by Days in *Knox*), or the filmmaker's intent.¹³³ Such variances in defining lasciviousness demonstrate the need for circuit courts to adopt a more cohesive and reliable standard for proscribing child pornography and prosecuting those who violate § 2251.

125. Bristol, *supra* note 1, at 351 (citing *Massachusetts v. Oakes*, 491 U.S. 576, 583 (1983)).

126. *Id.* at 353-54.

127. *Id.* at 354.

128. 285 F.3d 644, 646 (8th Cir. 2002).

129. *Id.*

130. Bristol, *supra* note 1, at 354 (quoting *New York v. Ferber*, U.S. 747, 764 (1982)).

131. Adler, *Inverting the First Amendment*, *supra* note 20, at 954 (2001) (citing Brief for the United States at 9, *Knox v. United States*, 510 U.S. 939 (1995) (No. 92-1183)).

132. *Id.* (citing *United States v. Knox*, 32 F.3d 733, 747 (3d Cir. 1994)).

133. Bristol, *supra* note 1, at 354.

Furthermore, the Dost Factor Test's vague terms, coupled with each trier of fact's unique life experiences, make it nearly impossible to create a uniform, fact-intensive test for lascivious images. Bristol raises the question; can a depiction be lascivious based upon the factors outlined in *Dost*?¹³⁴ Considering the different Dost Factor Test elements applied by the courts, Bristol asks how elements such as "sexually suggestive," "sexual coyness," and "designed to elicit sexual response in the viewer" should be defined.¹³⁵ According to Anne Higonnet, this question cannot be answered, because legal interpretations of these ambiguous terms slip and slide in each direction during attempts to unravel their ultimate meaning.¹³⁶ Because such terms are open to multiple interpretations, it is no wonder the Western District of Missouri and the Eighth Circuit in *United States v. Johnson* drew such different conclusions regarding the lasciviousness of Johnson's videos.

Finally, the application of the Dost Factor Test's elements may differ based upon a juror's unique life experiences. Bristol explains that while some laws enjoy clarity and precision, interpreting images of children may never be ascribed these attributes.¹³⁷ Whether a filmmaker, the public or a trier-of-fact, each individual will interpret from a *sitz im leben*, or a situation in life.¹³⁸ Characteristics including cultural values, education, tolerance levels, politics, and even religious beliefs will only complicate a person's interpretation.¹³⁹ Thus, the vagueness of the Dost Factor Test's terms and each trier of fact's unique interpretation of such terms illustrate the need to adopt a more coherent test to identify lascivious images.

B. The Dost Factor Test—A Sexualizer of Children

Some scholars find the Dost Factor Test ineffective because it reinforces society's captivation with the sexualization of children. They argue that the sexualization of children in society makes it difficult to determine an objective

134. *Id.* at 354-55.

135. *Id.* at 355 (citing *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986)).

136. Higonnet, *supra* note 17, at 161.

137. Bristol, *supra* note 1, at 355.

138. *Id.*

139. *Id.*

test that can differentiate between lascivious and non-lascivious content involving children. Anne Higonnet opines that “eroticism in mainstream images of children . . . [and] sexualization of childhood is not a fringe phenomenon inflicted by perverts on a protesting society, but a fundamental change furthered by legitimate industries and millions of satisfied customers.”¹⁴⁰ Children’s bodies advertise a plethora of society’s products including swimsuits, fragrances, clothing, electronics, and other commodities.¹⁴¹ “Every industry based on the display of adult bodies spawns a juvenile counterpart.”¹⁴² In fact, Bristol notes that the clothing line Abercrombie began selling its catalogue because the provocative photos of its teenage models were so successful that the images became the commodity.¹⁴³

In another example of sexualizing children, Bristol describes how southern United States citizens are infatuated with child beauty pageants.¹⁴⁴ “Little girls—some as young as three and four-years-old—are judged based solely upon appearance of makeup, hairstyle, and outfit—either bathing suit or evening gown.”¹⁴⁵ This sexualization of children can make interpreting the Dost Factor Test difficult, allowing suspect depictions of children to go unnoticed and innocent and valuable depictions to be censored.¹⁴⁶

Furthermore, several critics claim the Dost Factor Test itself contributes to the sexualization of children. According to Adler, the Dost Factor Test requires one to “evaluate the lasciviousness of the photographer and an ‘audience that consists of himself or like-minded pedophiles.’”¹⁴⁷ Both Alder and Danay emphasize that the trier of fact must focus on the photographer’s peculiar lust and take on the gaze of the pedophile in order to flush out pictures of children that have pedophilic appeal.¹⁴⁸ To Adler, this requirement under the

140. Higonnet, *supra* note 17, at 153.

141. *Id.* at 144.

142. *Id.*

143. Bristol, *supra* note 1, at 364.

144. *Id.* at 365 (citing C. Calvert, *The Perplexing Problem of Child Modeling Web Sites: Quasi-Child Pornography and Calls for New Legislation*, 40 CAL. W. L. REV. 231 (2004)).

145. *Id.*

146. *Id.* at 356.

147. Adler, *Inverting the First Amendment*, *supra* note 20, at 954 (quoting *United States v. Wiegand*, 812 F.2d 1244 (9th Cir. 1987)).

148. *Id.* at 954; Danay, *supra* note 18, at 154.

Dost Factor Test creates the daunting task for a layperson to ascertain a pedophile's exact intent. The difficulty and grotesqueness in such instructions were most evident in *Foster v. Virginia*, in which the Virginia Court of Appeals urged the jury to ascertain the intent of a man accused of committing necrophilia against children.¹⁴⁹

Likewise, Danay illustrates how the Third Circuit Court of Appeals in *United States v. Knox* used its own pedophilic gaze to find that an image constituted the "lascivious exhibition of the genitals" despite the fact that the child was wearing attire.¹⁵⁰ The Dost Factor Test required the Third Circuit to "carefully, explicitly, and publicly scrutinize the genital and pubic regions of clothed minors" in an effort to detect a picture's sexually stimulating nature.¹⁵¹ To Danay, this test wrongfully places a "sexual child on public display while simultaneously condemning those who view children in such a manner."¹⁵² Through cases such as *Knox* and *Dost*, Danay asserts that the American courts have become "unwitting cultural conduits and amplifiers," to the portrayal of children as sexual objects.¹⁵³ Such a flawed process for extinguishing child pornography inadvertently contributes in part to society's inability to fully eliminate the problem.¹⁵⁴

C. The Dost Factor Test: All Image and No Intent or All Intent and No Image?

Critics also assert that courts applying the Dost Factor Test rely too heavily on either the content of an image or the intent behind an image in deciding whether § 2251 has been violated. On one hand, many critics claim judges and/or juries that rely too heavily upon content-based Dost Factor Test elements in their analysis fail to consider the pedophile who fulfills his perverse intentions with innocuous images of minors. For example, Adler explains how the Third Circuit

149. Adler, *Inverting the First Amendment*, *supra* note 20, at 955 (citing *Foster v. Virginia*, No. 0369-87-2, 1989 WL 641956, at 4 (Va. Ct. App. Nov. 21, 1989)).

150. Danay, *supra* note 18, at 155 (citing *United States v. Knox*, 32 F.3d 733, 744 (3d Cir. 1994)).

151. *Id.* at 155-56.

152. *Id.*

153. *Id.* at 156.

154. *Id.* at 168 (citing MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: VOLUME 1 AN INTRODUCTION* 264 (Robert Hurley trans., Vintage Books, 1990 ed.) (1978)).

Court of Appeals misapplied the Dost Factor Test in *United States v. Villard* by holding that child pornography inheres in a photograph.¹⁵⁵ Similarly, the First Circuit in *United States v. Amirault* ruled it is unacceptable for the court to analyze beyond the four corners of a photograph, otherwise “a deviant’s subjective response could turn innocuous images into pornography.”¹⁵⁶ However, this approach is problematic. As Danay explains, the sexual naïveté of a depicted child could be *the* arousing factor for pedophiles (emphasis added).¹⁵⁷ For example, Danay indicates that a recent survey regarding members of the North American Man Boy Love Association (NAMBLA), an organization for pedophiles, revealed that its members derived erotic stimulation through watching the Disney Channel, mainstream films, and other networks that televise children.¹⁵⁸ Hence, limiting a Dost Factor Test analysis to the four corners of an image restricts the prohibitive capabilities of § 2251 to an overly-narrow category of images.

On the other hand, there are scholars who claim that triers of fact who focus too heavily on the intent-based elements of the Dost Factor Test wrongfully disregard the content of an image. Bristol and Adler raise concerns that an intent-based application of the Dost Factor fails to consider society’s numbness to childhood sexuality and problematically encourages jurors to only consider the perspective of the alleged pedophile. For example, Bristol notes that “as society continues to recognize expressive value in depictions of childhood sexuality, the more acceptable such expression becomes.”¹⁵⁹ In fact, nude portrayals of children date back to the classics age, where children were depicted in Greek statues and Renaissance paintings.¹⁶⁰ According to Bristol, “[p]eople may not be bothered [by the content of such images] because they have been fascinated by similar content for centuries.”¹⁶¹

Even more, as Adler explains, several courts enforcing

155. Adler, *Inverting the First Amendment*, *supra* note 20, at 957-58 (citing *United States v. Villard*, 885 F.2d 117 (3d Cir. 1989)).

156. *Id.* at 958 (citing *United States v. Amirault*, 173 F.3d 28, 34 (1st Cir. 1999)).

157. Danay, *supra* note 18, at 157.

158. *Id.*

159. Bristol, *supra* note 1, at 358.

160. *Id.*

161. *Id.*

child pornography laws have tended to approach the issue through the perspective of the pedophile. This can be problematic, as pedophiles may be stimulated by images of nude children that have absolutely no sexual connotation.¹⁶² For example, Bristol notes that in *United States v. Moore*, the Seventh Circuit Court of Appeals analyzed photographs of two young boys naked in the Australian wilderness.¹⁶³ One photograph depicted a boy walking across a stream, while the other showed a boy climbing a tree.¹⁶⁴ Although the court found that neither photo “appear[ed] to depict sexual activity or sexuality,” the court still concluded that the pictures seemed “designed to provoke a sexual response.”¹⁶⁵ Likewise, Adler notes the Tennessee Court of Criminal Appeal’s decision in *State v. Dixon*, in which the defendant secretly filmed two young girls bathing.¹⁶⁶ While the court recognized that the contents of the tape consisted of innocent and everyday activity, the defendant watched the tape before engaging in sexual relations with his adult girlfriend.¹⁶⁷ Therefore, in spite of the harmlessness of the images on the videotape, the defendant’s repugnant intent led the court to classify the contents of the videotape as child pornography.¹⁶⁸ As Adler asserts, when viewed from the perspective of pedophiles, all photos of children could be erotic in one way or another.¹⁶⁹ Because the Dost Factor Test permits focusing exclusively on the intent behind the images in question, this application may proscribe images that would not be considered lascivious had their content also been examined.

D. Suggestions from Scholars to Reform the Current Child Pornography Laws:

While scholars have proposed a harm analysis test and an incitement test to reform America’s child pornography laws, each proposed remedy is an unrealistic “fix” for the law’s

162. Adler, *Inverting the First Amendment*, *supra* note 20, at 959.

163. Bristol, *supra* note 1, at 360 (citing *United States v. Moore*, 215 F.3d 681, 687 (7th Cir. 2000)).

164. *Id.*

165. *Id.*

166. Adler, *Inverting the First Amendment*, *supra* note 20, at 959 (citing *State v. Dixon*, 01C01-9802-CC-00085, 1998 WL 712344 (Tenn. Crim. App. Oct. 13, 1998)).

167. *Id.*

168. *Id.*

169. *Id.*

deficiencies. Under the first suggested reform, the harm analysis test, Bruce Ryder recommends prohibiting the possession of materials containing images of children if the images caused “harm” to children in their production.¹⁷⁰ Commenting on Ryder’s recommended reform, Danay notes that under this approach, child pornography should be limited to materials where children engage in “explicit sex acts.”¹⁷¹ To Danay, Ryder’s proposed harm analysis test would refocus judicial attention on the express advocacy of harm, sexual or otherwise, to children, and not on the hidden prurient qualities inherent in particular impugned materials.¹⁷² Proponents of this reform also assert that it would remind courts that child pornography laws are designed to prevent actual harm to children, not to conduct an analysis that may hazily send the message that sex with children may be pursued.¹⁷³

However, critics of the harm analysis test, such as James Marsh, former executive director of the Children’s Law Center in Washington, D.C., stress that this reform disregards the concept that child pornography, in and of itself, causes personal injury to the child involved.¹⁷⁴ For example, the Supreme Court in *New York v. Ferber* noted that “a child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.”¹⁷⁵ According to the Supreme Court, the fear of exposure and the tension of keeping the images secret have profound emotional repercussions upon children.¹⁷⁶ Moreover, Professor Debra Burke states that there is substantial social evidence that persons who molest minors use such images as a tool, not only to arouse predatory lust, but also to seduce children.¹⁷⁷ Under Ryder’s proposed test, pedophiles would be allowed to keep for their own

170. Bruce Ryder, *The Harms of Child Pornography Law*, 36 U. OF B.C. L. REV. 101, 114 (2003).

171. Danay, *supra* note 18, at 186 (commenting on Ryder’s proposed harm analysis test).

172. *Id.* at 187 (commenting on Ryder’s proposed harm analysis test).

173. *Id.* at 187-88.

174. James R. Marsh, *Masha’s Law: A Federal Civil Remedy for Child Pornography Victims*, 61 SYRACUSE L. REV. 459, 495 (2011).

175. *New York v. Ferber*, 458 U.S. 747, 764 (1982).

176. *Id.*

177. Debra D. Burke, *Thinking Outside The Box: Child Pornography, Obscenity, and the Constitution*, VA. J. L. & TECH. ¶ 58 (2003).

perversions images that fall short of causing what Ryder defines as “harm” to the child being exploited.

In *United States v. Johnson*, the concerns expressed by Marsh and Burke would have come to fruition had a harm analysis test been applied. Several times, Johnson told female athletes to go into an examination room, completely disrobe and weigh themselves.¹⁷⁸ However, the females remained completely unaware that Johnson had set up a hidden video camera to film their weigh-ins.¹⁷⁹ In fact, Johnson hid the camera between two shelves, ensuring adequate cover.¹⁸⁰ Under the proposed harm analysis test suggested by Ryder, the videos Johnson filmed would not meet the harm analysis test. This is because no actual harm was caused to the minors and they were not forced to engage in explicit sexual acts. Still, such a test ignores the principle that child pornography is inherently harmful to the child that it portrays. This test does not consider the potential psychological harm to children, such as those in *Johnson*, which may result once the children have learned of the exploitive act committed against them. As a result, Johnson would be free to retain, and even disseminate, the videos he created of the minors, despite the fact that he confessed to creating them with perverse intentions.¹⁸¹

Under the second suggested reform, the incitement test, Burke calls for courts to evaluate the context of an image in order to determine if an incitement to imminent lawless activity exists (as was employed by the Supreme Court in *Brandenburg v. Ohio*¹⁸² in the First Amendment context).¹⁸³ Explaining the proposed incitement test, Burke states that, “while it is unlikely that a mother who shows a picture taken of her child in the bathtub to a sister would be held accountable, a commercial provider of sexually explicit speech to a foreseeable pedophilic audience likely would be held accountable,” due to its prospect of inciting imminent lawlessness.¹⁸⁴ However, even Burke is quick to explain that

178. *United States v. Johnson*, 733 F. Supp. 2d 1089, 1091 (W.D. Mo. 2010).

179. *Id.*

180. *Id.* at 1092.

181. *See United States v. Johnson*, 639 F.3d 433, 436 (8th Cir. 2011).

182. 395 U.S. 444 (1969) (holding that the United States Constitution does not protect speech that serves to incite imminent lawless action).

183. Burke, *supra* note 177, at ¶ 56.

184. *Id.*

this approach does not fix all of the child pornography law issues.¹⁸⁵ According to Burke, under the incitement test, “there is still no controlling for pedophiles who are aroused by the photos of children clad in underwear in clothing catalogues.”¹⁸⁶

Illustrating Burke’s concern for the proposed incitement test’s inability to proscribe innocuous images of children, the images in *Johnson* would not have been prohibited under such a test. Much like an inoffensive catalogue portraying children in their underwear, the sport of weightlifting requires that coaches document a lifter’s weight through frequent weigh-ins for competitive events.¹⁸⁷ Prior to a competition, each participant stands on a scale and “weighs in” in either the nude or in underwear.¹⁸⁸ In addition, a referee of the same gender conducts the weigh-in.¹⁸⁹ Under an incitement test, the fact that Johnson was drawn to images of such inoffensive and routine procedures in the sport of weightlifting would most likely render his conduct and the images he created legal. Likewise, the images of each minor in *Johnson* could hardly be found to incite imminent lawless activity. The first count described that the video did not show the minor’s pubic region, but instead only portrayed the minor from just below her shoulders to her calves.¹⁹⁰ Under the second count, no frontal nudity was evident.¹⁹¹ Likewise, the third count only showed the minor from her left buttock to just below her knee.¹⁹² Finally, even under the fifth count, the video failed to show any nudity, depicting only a female in red workout shorts.¹⁹³ Based upon these facts, the proposed incitement test would provide no protection for minors who were subjected to Johnson’s abuse of recording routine weightlifting procedures.

185. *Id.*

186. *Id.* at ¶ 62.

187. *Johnson*, 639 F. 3d. at 436.

188. *Id.*

189. *Id.*

190. *Johnson*, 733 F. Supp. 2d at 1092.

191. *Id.*

192. *Id.*

193. *Id.* at 1093.

III. BRINGING A TRUE BALANCE OF CONTEXT AND CONTEXT TO THE DOST FACTOR TEST

A. *The Misapplication of the Dost Factor Test in United States v. Johnson*

The conflicting decisions by the Western District Court of Missouri and the Eighth Circuit Court of Appeals in *United States v. Johnson* demonstrate that the Dost Factor Test is ineffective in proscribing lascivious images of children. Judge Dorr of the district court chose to focus his entire analysis on the content of the images in question, thus overturning the jury's conviction of Johnson on all eight violations of 18 U.S.C. § 2251.¹⁹⁴ However, Judge Hansen of the Eighth Circuit Court of Appeals explained that, while hardly any of the videos of the victims filmed a child's pubic region, such images would have been captured had each child merely turned to face the camera.¹⁹⁵ Based on the camera's angle and admissions of Johnson, Judge Hansen opined that the Defendant's sexual intent made the images lascivious, even if the images were unable to meet certain content-based factors.¹⁹⁶ To prevent such discrepancies from arising in the future, the elements of the Dost Factor Test should be applied on an equal basis, where triers of fact are mandated to apply a balance of content-based and intent-based factors in their analysis as to whether an image constitutes lasciviousness.

B. *In Determining Lasciviousness, the Reformed Dost Factor Test Will Assess Both the Content of an Image and the Intent Behind Its Creation*

A novel suggestion to create a sense of uniformity in implementing the Dost Factor Test is to require that a mandatory balance of both content-based and intent-based Dost Factors be present in order to proscribe an image under §2251. This new reading of the current Dost Factor Test will tend to insulate the Dost Factor Test analysis from the emotions of jurors and judges, who wish to apply only those factors that suit their predispositions. In addition, the new

194. See generally *id.* at 1089.

195. *Johnson*, 639 F.3d at 436-37.

196. *Id.* at 439-40.

Dost Factor Test will remain organic as technology and child pornography change over time. Finally, it will allow courts to form distinct categories of images that are lascivious under society's standards, and therefore proscribe them under § 2251.

First, the new Dost Factor Test will insulate the application of the law from the high emotions that often accompany child pornography cases. By requiring that a balance of both content-based and intent-based factors be present in a Dost Factor Test analysis for an image to be lascivious, triers of fact will be restricted from applying only those factors that suit their predispositions toward the defendant. Had this approach been used in *United States v. Johnson*, the Eighth Circuit would have been required to show not only that Mr. Johnson had a sexual intent (based upon the camera's angle and testimony), but also that the image contained proscribed content (based on the images depicted in the videos). Even though these new requirements create a higher standard for prosecutors to meet, the newly proposed rule offers an extra level of assurance that the images were properly proscribed or accepted.

Second, these new requirements for both content-based and intent-based factors can fluctuate in meaning based upon society's standards of decency toward children. Today, children are openly accepted as models in clothing lines and even arguably as sex symbols in the music and entertainment industry. These are common occurrences that only a few decades ago were considered inappropriate. For such reasons, it would be nearly impossible to reform the Dost Factor Test to contain completely objective factors with timeless interpretations. Instead, implementing this new requirement will still allow the application of different Dost Factors to mold to society's norms as time progresses. For example, if the Dost Factor Test is applied to analyze the potential lasciviousness of an image, the content-based factors of "sexual coyness" or "sexually suggestiveness" may be selected by the judge to create a balance with the intent-based factors he or she also selects. Critically though, the definition of what constitutes "sexual coyness" or "sexual suggestiveness" would be allowed to change as America's culture evolves. The new Dost Factor Test will never be outdated to assess potentially lascivious images. In addition, the new Dost Factor Test's adaptability will allow it to be applicable to new

technology, such as virtual child pornography. Furthermore, the current Dost Factor Test is non-exhaustive, allowing judges to add and eliminate factors in their analysis as they deem necessary.¹⁹⁷ This principle would remain intact under the new Dost Factor Test. Nevertheless, under the new rule, there must always remain a balance between factors analyzing the content and factors analyzing the intent behind an image.

Finally, these new requirements for the Dost Factor Test will gradually establish defined categories of lascivious images. The freedom that courts are given in selecting which Dost Factor to apply have led to inconsistent rulings, as seen in *United States v. Johnson*. Such decisions keep the public from understanding the meaning of lasciviousness and thus, understanding what types of images constitute sexually explicit conduct under § 2251. However, with the court's consistent implementation of a set of both content-based and intent-based factors, patterns of lascivious images will develop over time. These patterns allow the public to understand what sorts of images cross the threshold into the territory of child pornography, even before the images are created. Now, photographers and videographers will have a better understanding as to whether their proposed images will likely be considered a violation of § 2251. Even more, such knowledge will turn the Dost Factor Test into a preventative measure against the sexual exploitation of children, rather than simply a retroactive test to assess the harm that has already damaged a child.

IV. CONCLUSION

This new standard for the Dost Test, while perhaps more rigid than its current standard, will still allow for great flexibility as societal and cultural norms change over time. In addition, a more rigid test will help to establish a uniform definition of the term lascivious during the time period in which the Dost Factor Test is applied. Finally, these reforms will serve, to not only enhance the protection of children, but also to prevent the convictions of those who are, in fact, innocent of any violation under § 2251.

197. *Johnson*, 733 F. Supp. 2d at 1095 (citing *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986)).