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Child Sexualization in the Media: A Need for Reform

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Child Sexualization in the Media: A Need for Reform

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CHILD SEXUALIZATION IN THE MEDIA: A NEED FOR REFORM

BY: PUNAM PANCHAL

I. INTRODUCTION

She had already been featured on the covers of Russian and Japanese Vogue magazine, modeled for a Forever 21 catalogue, and walked the runway in Paris, France, and New York.¹ The model was being managed by Ford Models, one of the most prestigious modeling agencies.² In March 2010 she was on what was supposed to be a “normal” photo shoot.³ The photographer, Jason Lee Parry, took numerous pictures of the model.⁴ Among the photographs was an image showing the model sitting on the back of a motorcycle posing in “a blatantly salacious manner with her legs spread, without a bra, [and] revealing portions of her breasts...”⁵ The model, Hailey Clauson, was fifteen at the time.⁶ The images were distributed on a grand scale with the same image plastered on t-shirts sold at boutiques in Los Angeles and New York City.⁷

For years, children such as Hailey have been sexualized and featured on magazine covers, films, television shows, and prominent advertisement campaigns.⁸ For example, the television show *Toddlers and Tiaras* has come under fire for featuring girls as young as four wearing prosthetic breasts.⁹ A final example in this note, but certainly not in the media, is *Jours Après Lunes* – a French lingerie company that designs “lounge” for girls four-to-six-years

¹ *Hailey Clauson*, NEW YORK MAGAZINE (Jan. 30, 2012), <http://nymag.com/fashion/models/hclauson/haileyclauson>.

² Complaint and Demand for Jury Trial, *Teen Model v. Parry*, No. 11-CIV 5766 (S.D.N.Y. Aug. 8, 2011); *Hailey Clauson*, NEW YORK MAGAZINE (Jan. 30, 2012), <http://nymag.com/fashion/models/hclauson/haileyclauson>.

³ Complaint, *supra* note 2, at 2.

⁴ *Id.*

⁵ *Id.*

⁶ See Marianne Garvey, *Teen Model Sues Urban Outfitters for \$28 Million over “Salacious” T-shirt*, E ONLINE (Aug. 19, 2011), http://www.eonline.com/news/teen_model_sues_urban_outfitters_28/259110.

⁷ *Id.*

⁸ See James E. Bristol, III, *Free Expression In Motion Pictures: Childhood Sexuality And A Satisfied Society*, 25 CARDOZO ARTS & ENT. L.J. 333 (2007) (evaluating consistent sexual exploitation of children in film and assessing the difficulty of preventing such sexualization).

⁹ See Luchina Fisher, *Fake Boobs at Age 4? ‘Toddlers and Tiaras’ Channels Idol Dolly Parton*, ABC NEWS (Sept. 1, 2011), <http://abcnews.go.com/blogs/entertainment/2011/09/fake-boobs-at-age-four-toddlers-and-tiaras-tot-channels-idol-dolly-parton>.

old.¹⁰ Such examples demand that we take a closer look at child pornography laws, particularly in New York, to evaluate whether they are effective in protecting children who are sexualized in the media. This comment will focus on New York law because New York is a known media hub. Though the laws of other states may be similar or different, this comment will argue that current New York law is insufficient and needs to be tailored to prevent child sexualization.

Toddlers and Tiaras, *Teen Model v. Parry*, as well as the Jours Après Lunes advertisement campaign will serve as supporting examples to help analyze New York's child pornography laws and whether they fail prevent child sexualization.¹¹ The Merriam-Webster dictionary defines sexualization as "to endow with a sexual character or cast."¹² The American Psychological Association ("APA"), in comparison, has a much more comprehensive definition. The APA states that "sexualization occurs when a person's value comes only from his or her sexual appeal or behavior, to the exclusion of other characteristics...a person is sexually objectified – that is, made into a thing for others' sexual use, rather than seen as a person with the capacity for independent action and decision making; and/or sexuality is inappropriately imposed upon a person."¹³ The APA explains that sexualization may include dressing "in revealing clothing, with bodily postures or facial expressions that imply sexual readiness."¹⁴ Furthermore,

¹⁰ See JOURS APRÈS LUNES, <http://www.jours-apres-lunes.com/fille.html> (last visited Jan. 30, 2012); Mikaela Conley, *Creepy or Cute? French Company Sells Lingerie for girls 4 to 12 years old*, ABC NEWS (Aug. 17, 2011), <http://abcnews.go.com/Health/french-company-sells-lingerie-year-olds/story?id=14324742>.

¹¹ The mentioned media examples serve as general examples of the type of child sexualization that exists in the media. The examples are used to show the ineffectiveness of the current law and its inability to exclude certain images of children that are sexual in nature. The range of examples demonstrates that the images of the children should be excluded. The *Parry* case is not a criminal action. The complaint demonstrates backgrounds facts about the image in question. This comment focuses on the images and not on the specific allegations of the complaint.

¹² MERRIAM-WEBSTER DICTIONARY, available at <http://www.merriam-webster.com/dictionary/sexualize> (last visited Jan. 30, 2012).

¹³ AMERICAN PSYCHOLOGICAL ASSOCIATION, <http://www.apa.org/pi/women/programs/girls/report.aspx> (last visited Jan. 30, 2010).

¹⁴ *Id.*

sexualized clothing may include “miniskirts, fishnet stockings and feather boas” in addition to lingerie for girls.¹⁵

This comment argues that current New York law fails to prevent sexualization of children and that the law should prevent the dissemination of such images in the media because of, as explained in Part IV, the adverse effect sexualization can have on children.¹⁶ Part I of this comment provides background information on *Teen Model v. Parry*, *Toddlers and Tiara’s*, and *Jours Après Lunes*. Part II discusses the three examples as applied to New York Penal Law and makes the argument that all of the images should be considered child pornography under current New York law. Part III proposes a new standard for evaluating sexualized images of children and argues that the new proposal would not violate the First Amendment of the Constitution. Part IV emphasizes the policy reasons for adopting the proposed amendment including the social implications of sexualizing children in the media. Part V concludes that the new proposal would help prevent as well as punish those that produce, disseminate, and distribute the images described in this comment along with other similar images in the media.

II. MEDIA EXAMPLES OF CHILD SEXUALIZATION

Several media examples demonstrate the need to prevent child sexualization. The first example is *Teen Model v. Parry*. In this case a salacious image of a fifteen-year-old model was widely distributed.¹⁷ The second example is a French company that advertises lingerie for young

¹⁵ *Id.*

¹⁶ This comment’s focus is media portrayal of children and does not address personal pictures taken apart of family photos. See *infra* Part IV for the definition of media.

¹⁷ Complaint, *supra* note 2, at 2.

girls utilizing the four-to-six-year-old models to display the merchandise.¹⁸ Lastly, the television show *Toddlers and Tiaras* portrayed three- to five-year-olds in prosthetic breasts and buttocks.¹⁹

A. THE PARRY CASE – A TEEN MODEL EXPOSED

Teen Model v. Parry is currently pending in the Southern District of New York.²⁰ The plaintiff, Hailey Clauson, is unnamed in the complaint but she is identified through various media sources as the sixteen-year-old model at the center of the case.²¹ The complaint identifies an image of Hailey posing in a “blatantly salacious manner with her legs spread, without a bra, [and] revealing portions of her breasts”²² The complaint describes Hailey as sitting “in a spread eagle position making her crotch area the focal point of the image”²³ and wearing “very short cut-off shorts with her legs widely spread...displaying what some observers believe to be pubic hair.”²⁴ The *Teen Model v. Parry* complaint alleges that the image libeled Hailey, but does not address the criminal implications of producing and disseminating the sexualized image of Hailey.²⁵ The complaint states that the image “appeals solely to the prurient interests and is otherwise utterly salacious.”²⁶ The *Teen Model v. Parry* complaint explains that “the image may portray a child in a sexually suggestive manner and may be in violation of one or more Federal and/or State laws regarding the portrayal of minors by photographers, illustrators and/or graphic

¹⁸ See *JOURS APRÈS LUNES*, *supra* note 10, at 3.

¹⁹ See e.g., TLC, <http://tlc.discovery.com/videos/toddlers-tiaras-doing-dolly-parton.html> (last visited Jan. 30, 2012).

²⁰ Complaint, *supra* note 2, at 2.

²¹ See Daily Mail Reporter, Parents sue Urban Outfitters for \$28 million after ‘salacious’ image of daughter, 15, used on T-shirts, MAIL ONLINE (Aug. 20, 2011), <http://www.dailymail.co.uk/news/article-2027729/Parents-sue-Urban-Outfitters-salacious-Hailey-Clauson-T-shirt-28m.html>; Charlotte Cowles, *Urban Outfitters had no idea Hailey Clauson was Underage*, NEW YORK MAGAZINE (Aug. 22, 2011), http://nymag.com/daily/fashion/2011/08/urban_outfitters_hailey-clauson.html; Ryan Owens and Bill Cunningham, *Photog Defends Racy Photos of Teen Model*, ABC News (Aug. 22, 2011), <http://abcnews.go.com/Entertainment/photog-defends-racy-photos-teen-model/story?id=14354327>.

²² Complaint, *supra* note 2, at 2.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

designers in sexually suggestive manners and/or portraying certain body parts.”²⁷ The complaint also suggests that the picture “provides wallpaper for the likes of pedophiles and other adults with an unnatural attraction to underage children.”²⁸

Although the *Teen Model v. Parry* complaint raises serious child sexualization issues and suggests that the image may be in violation of federal and/or New York State child pornography laws, the relief sought is purely injunctive and only intended to prevent further circulation of the image.²⁹ As a civil case, the complaint fails to address the issue of child sexualization in New York and fails to address the criminal implications of the image if it were to be considered pornography or sexualization of a child.

B. JOUR APRÈS LUNES – LINGERIE FOR FOUR-TO TWELVE-YEAR OLDS

The French company Jour Après Lunes serves as another example of child sexualization. The company sells and advertises “lounge,” a product akin to adult lingerie, for girls from four- to- twelve-years-old.³⁰ The young girls are posing in “lounge” similar to a super model on a magazine cover.³¹ According to one media description of the advertisement campaign the “little girls, clad only in bras and underwear, pose carelessly cool, wearing sunglasses and heavy makeup.”³² The product line and accompanying advertisement campaign sexualizes the participants in the campaign. Although Jour Après Lunes is a French company, the images are readily accessible via the internet. This is problematic because if sexualized images of children are not clearly defined as such, advertisement campaigns such as the Jours Après Lunes

²⁷ Complaint, *supra* note 2, at 2.

²⁸ *Id.*

²⁹ *Id.*

³⁰ JOURS APRÈS LUNES, *supra* note 18, at 5.

³¹ *Id.*

³² Mikaela Conley, *supra* note 10, at 3.

campaign can easily bypass state and/or federal pornography laws making the images accessible for viewing without legal consequences.

C. TODDLERS AND TIARAS – COSTUMES GONE TOO FAR

Yet another example of child sexualization is the television show *Toddlers and Tiaras*. The show touts a seemingly innocent agenda: “On any given weekend, on stages across the country, little girls and boys parade around wearing makeup, false eyelashes, spray tans and fake hair to be judged on their beauty, personality and costumes. *Toddlers and Tiaras* follows families on their quest for sparkly crowns, big titles, and lots of cash.”³³ This world of child beauty pageants has come under fire and exposed deeper concerns about child sexualization when a young girl dressed as a prostitute, resembling Julia Roberts in *Pretty Woman*, and a four-year old dressed as Dolly Parton with fake breast and buttocks.³⁴

The Hailey Clauson image, *Jours Après Lunes*, and *Toddlers and Tiaras* are just a few of many images that have raised questions of child sexualization. The law should be defined so that children in the media are afforded the maximum protection from child sexualization. This requires drawing a careful line so as not to exclude children from participating in advertising campaigns, while still preventing the dissemination of images similar to Hailey Clauson, *Jours Après Lunes* and *Toddlers and Tiaras* girls. These examples will be used to demonstrate that New York Penal law is ineffective in preventing child sexualization.

³³ See TLC, *supra* note 19, at 5.

³⁴ See Mikaela Conley, *supra* note 10, at 3; *Id.*

III. CURRENT NEW YORK LAW IS INEFFECTIVE IN CURBING CHILD SEXUALIZATION

The photographs of Hailey Clauson, the Jours Après Lunes models, and televised images of the young girls in Toddlers and Tiaras are problematic and should be illegal. The images show the girls wearing little to no clothing. The girls are sexualized because of the way they are dressed and posing in the images. New York State's intent to protect children is demonstrated by the current law forbidding child pornography, but unfortunately, some of the images described above do not run afoul of the law.

New York State Penal Law section 263.15 states that “a person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than seventeen years of age.”³⁵ The law defines sexual conduct as the “actual or simulated sexual intercourse...or lewd exhibition of the genitals.”³⁶ Performance includes performance in photographs, motion pictures and visual depictions exhibited before an audience.³⁷ Simulated sexual conduct refers to the “appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals or buttocks.”³⁸ The conduct is promoted by selling, publishing, distributing, circulating, disseminating, exhibiting or advertising.³⁹ Although the Supreme Court has determined that the State has a compelling interest in protecting children,⁴⁰ case law has

³⁵ N.Y. Penal Law § 263.15 (McKinney 2001).

³⁶ N.Y. Penal Law § 263.00(3) (McKinney 2001) (stating that sexual conduct “means actual or simulated sexual intercourse, oral sexual conduct, anal sexual conduct, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.”).

³⁷ N.Y. Penal Law § 263.00(4) (McKinney 2001) (stating that performance “means any play, motion picture, photograph, or dance. Performance also means any other visual representation exhibited before an audience.”).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *New York v. Ferber*, 458 U.S. 747, 756 (1982).

interpreted the statute as, almost exclusively, applying to images depicting sexual acts rather than sexualization of children.⁴¹

Sexual acts and sexualization are distinguishable. Sexualization refers not only to the conduct or the act of having sex, but also to the manner in which the individual is portrayed.⁴² Judicial interpretations of the statute have shed light on the extent to which New York Law protects children. New York state courts have determined that the lewd exhibitions of genitals and images of children engaged in sexual activity violate child pornography laws, but images of sexualized children not performing sexual activity do not.⁴³

In *People v. Pinkoski* the court tried to clarify what constitutes child pornography. The court held that sexual conduct includes the “lewd exhibition of the genitals”⁴⁴ The County court, referencing the crime of possessing child pornography, elaborated as follows:

[T]he legislature was faced with how to define these crimes in such a way as to exclude such harmless, commonplace actions as a parent's photographing his or her infant child(ren) in the bathtub, etc. The legislature attempted to distinguish between the two by providing in Article 263 that to constitute a crime, the behavior must involve more than mere nudity: first, genitals must be visible; second, they must be more than merely visible—they must be exhibited; and finally, the exhibition of genitals must be lewd.⁴⁵

On appeal, the appellate court tried to clarify the meaning of “lewd.”⁴⁶ The *Pinkoski* court then defined lewd as “characterized by lust,” or “showing or intended to excite lust or sexual desire,

⁴¹ American Psychological Association, *supra* note 13, at 3.

⁴² MERRIAM-WEBSTER DICTIONARY, *supra* note 12, at 3 (defining sexualize to mean “to make sexual: endow with a sexual character or cast); AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 13, at 3.

⁴³ See *People v. Horner*, 752 N.Y.S.2d 147 (2002) (where a video of a teenager exposing his genitals was not considered child pornography).

⁴⁴ *People v. Pinkoski*, 752 N.Y.S.2d 421 (2002).

⁴⁵ *Id.*

⁴⁶ *Id.* at 424.

especially in an offensive way.”⁴⁷ The court defined offensive as being offensive to “accepted standards of decency.”⁴⁸ In reviewing the lower court’s finding, the *Pinkoski* appellate court affirmed that the photographs taken by the mother of the six-year-old victim of her buttocks and bare chest were not lewd.⁴⁹ On the other hand, a photograph of “a frontal view of the victim with her pants down to her ankles and with her left hand on her stomach and her right hand on her groin area in close proximity to her genitalia, as if she were about to fondle herself or entice the viewer to do so,” was considered lewd.⁵⁰ The *Pinkoski* appellate court stated that “such depiction is far from that of a family photograph of a nude child either lying on a blanket or bathing, and assuredly could not be considered an artistic rendering of a nude.”⁵¹

Similarly, in *People v. Horner*, the court distinguished between child nudity and children simulating sexual conduct when the court was presented with several images of children in the nude but not explicitly engaging in or simulating sexual activity.⁵² The *Horner* court applied the *Dost* Factors articulated in *United States v. Dost*⁵³ to determine whether the photographs were a “lascivious exhibition of the genitals or pubic area.”⁵⁴

The *Dost* factors are as follows:

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

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Pinkoski*, 752 N.Y.S.2d at 424.

⁵¹ *Id.*

⁵² *People v. Horner*, 752 N.Y.S.2d at 149.

⁵³ Although *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), was decided in the Southern District Court of California, New York Appellate courts have used the *Dost* factors as guidance in determining whether a visual depiction is a lascivious exhibition of genitals.

⁵⁴ *Horner*, 752 N.Y.S.2d at 149.

whether the visual depiction is intended or designed to elicit a sexual response in the viewer.⁵⁵

Applying the *Dost* factors, the *People v. Horner* decision concluded that the photographs were child pornography.⁵⁶ The *Horner* decision elaborated that a finding of public lewdness does not require the subject of the pictures to be unclothed,⁵⁷ for example, an individual “taking ‘crotch shots’ of minors at family photo shoot falls within statutory prohibition despite genitalia being covered.”⁵⁸

The *People v. Gibeault* holding expanded the *Horner* court’s holding by clarifying that for a visual depiction to be considered a lewd exhibition of the genitals it “requires a consideration of ‘the combined effect of the setting, attire, pose and emphasis on the genitals and whether the depiction is designed to elicit a sexual response in the viewer.’”⁵⁹ In the *Gibeault* case, a video of a teenager exposing his penis for a fraction of a second was at the center of the dispute.⁶⁰ The court held that this momentary exposure was not sexually suggestive or a lewd exhibition. The judges reasoned that even though there are “instances throughout the videotape when either defendant or the teen [exhibited] uncovered portions of his genitals or buttocks...none of the depictions were simulated sexual conduct...”⁶¹ The majority determined that the images were not a lewd exhibition because the “setting, attire and poses of these momentary exposures were decidedly not sexually suggestive.”⁶²

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *People v. Gibeault*, 773 N.Y.S.2d 751, 753 (2004).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

IV. NEW YORK LAW AS APPLIED TO THE GIVEN MEDIA EXAMPLES

Both the described case law and statutes raise questions about the ability to protect children in situations such as the Hailey image, Jours Après Lunes, and Toddlers and Tiaras. Whereas the Hailey image arguably would be considered a violation of New York Penal Law section 263.00, the Jours Après Lunes, and Toddlers and Tiaras images would not.

A. THE HAILEY CLAUSON IMAGES

The Hailey image is distinguishable from the image implicated in *Fraser* in several respects. First, the image itself does not show Hailey engaging in sexual conduct. Second, the images of Hailey, on first look, appear to show her fully clothed, even though the complaint states that portions of her genitalia and breast may be visible.⁶³ The image does not show Hailey engaging in sexual activity based on the definitions given in New York Penal Law section 263.00.⁶⁴

New York Penal Law section 263.00(3) defines sexual conduct as, among others, the “lewd exhibition of the genitals.”⁶⁵ Applying the standard set forth in *Pinkoski*, the Hailey photograph should be considered a “lewd exhibition of genitalia” for several reasons.⁶⁶ First, the photograph, although allegedly showing a young Hailey fully clothed, makes her crotch area the focal point of the image by having her sit on the back of a motorcycle with her legs spread.⁶⁷ Hailey’s photograph does not seem to show her genitalia or breast, though the complaint alleges otherwise.⁶⁸ Even if, contrary to what the complaint alleges, we assume that Hailey is fully

⁶³ *Id.*

⁶⁴ N.Y. Penal Law § 263.00 (McKinney 2001).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Marianne Garvey, *supra* note 6, at 2; E ONLINE, *supra* note 6, at 2; Complaint, *supra* note 2, at 2.

⁶⁸ Charlotte Cowles, *supra* note 21, at 5; Ryan Owens & Bill Cunningham, *supra* note 21, at 5.

clothed, the *Horner* court's decision supports a finding of lewdness because the subject of the image need not be unclothed.⁶⁹

Furthermore, the Hailey image is characterized by "lust or sexual desire, especially in an offensive way,"⁷⁰ and sexualizes Hailey.⁷¹ The Hailey image is distinguishable from the *Pinkoski* image because Hailey appears to be fully clothed.⁷² Yet viewed in context of the setting and the manner in which Hailey is posing, the image is suggestive and meant to elicit a sexual response. The Hailey images are photographs as defined by New York Penal Law section 263.00 and were disseminated when they were placed on t-shirts and sold at numerous boutiques.⁷³

The image does not depict Hailey nude or simulating sexual conduct, but pursuant to *Horner* the image should be characterized as sexual conduct. Similar to the *Horner* court we can use the *Dost* factors to demonstrate that there is a violation of section 263.00 and that Hailey's image should be considered a "lascivious exhibition of the genitals or pubic area."⁷⁴ The first factor is "whether the focal point of the visual depiction is on the child's genitalia or pubic area."⁷⁵ Even though the purpose of the picture might be to advertise a product, the focal point, as the complaint alleges, is in fact the teen's genital area.⁷⁶ As a result, the first *Dost* factor is met. The second factor, "whether the setting of the visual depiction is sexually suggestive, i.e., in a place or a pose generally associated with sexual activity" is also satisfied.⁷⁷ Hailey is sitting in a pose that is generally associated with sexual activity – "her legs spread in a highly sexual

⁶⁹ *Horner*, 752 N.Y.S.2d at 150.

⁷⁰ *Pinkoski*, 752 N.Y.S.2d at 424.

⁷¹ Complaint, *supra* note 2, at 2.

⁷² *Id.*

⁷³ N.Y. Penal Law § 263.00 (McKinney 2001); Complaint, *supra* note 2, at 2.

⁷⁴ *Horner*, 752 N.Y.S.2d at 149.

⁷⁵ *Id.*

⁷⁶ Complaint, *supra* note 2, at 2.

⁷⁷ *Horner*, 752 N.Y.S.2d at 149.

and suggestive manner” – but the setting seems to be outdoors, likely not a place associated with sexual activity.⁷⁸ The third factor is whether Hailey is in an “unnatural pose, in inappropriate attire, considering the age of the child.”⁷⁹ As indicated in the second factor, Hailey is sitting in a sexual and suggestive pose, wearing very short cut-off shorts which could be considered inappropriate for a child of age fifteen;⁸⁰ as a result the third factor may be satisfied. The fourth factor merely asks whether or not the child is clothed, and Hailey could be partially or fully clothed depending on what would be considered the acceptable mode of dress for a girl her age. The fifth *Dost* factor is “whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity.”⁸¹ This factor is also satisfied because the image depicts Hailey sitting in a sexually suggestive manner. The last factor asks whether the image is “intended or designed to elicit a sexual response in the viewer.”⁸² In describing the audience viewing such images the *Horner* court stated that the response elicited can also be from a pedophile.⁸³ Though the Hailey image was intended to sell a product the image incidentally appeals to the pedophile viewer. The image is a visual depiction of a young underage girl sitting in a sexually suggestive manner therefore the image, arguably, was intended to, elicit a response from a pedophile viewer. As both the *Horner* and *Dost* courts expressed, there is no requirement that all the factors be satisfied. Even if some of these factors are not satisfied, some such as one, two, and five are satisfied, potentially rendering the Hailey image in violation of New York State Penal Law section 263.00.⁸⁴ The Hailey image should be considered sexually explicit and trigger a violation of New York Penal Law section 263.00.

⁷⁸ Complaint, *supra* note 2, at 2.

⁷⁹ *Horner*, 752 N.Y.S.2d at 149.

⁸⁰ Complaint, *supra* note 2, at 2.

⁸¹ *Horner*, 752 N.Y.S.2d at 149.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ N.Y. Penal Law §§ 263.00(1)-(5) (McKinney 2001).

The fact that the image has been in mass circulation already suggests that there needs to be greater enforcement in preventing the dissemination of such images. The image of Hailey is still accessible via the internet as this comment is written. It is available for commentators to express their views about the image or to provide viewers such as the likes of pedophiles an opportunity to view Hailey's image.⁸⁵

The *Gibeault* decision stated that to determine whether there is "lewd exhibition of genitalia...the setting, attire, pose and emphasis on genitals and whether the depiction is designed to elicit a sexual response in the viewer" should be considered.⁸⁶ This standard is similar to the *Dost* factors. Looking at the combined factors there is a "lewd exhibition of genitalia"⁸⁷ because of Hailey's pose, her attire and the focus on her genital area.

New York Penal Law section 263.15 states that "a person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than seventeen years of age."⁸⁸ Under this provision, the photographer and any other crew involved in producing, directing or promoting the performance would be in violation of the statute if a court were to find that the image portrays sexual conduct defined as the "lewd exhibition of genitals."⁸⁹

B. TODDLERS AND TIARAS

Toddlers and Tiaras is another example of child sexualization that does not constitute a violation of New York Penal Law, but should. The show features young girls competing in beauty pageants.⁹⁰ The contestants are as young as three-years-old and up to six-years-old.⁹¹

⁸⁵ Marianne Garvey, *supra* note 6, at 2.

⁸⁶ *Gibeault*, 773 N.Y.S.2d at 753.

⁸⁷ N.Y. Penal Law § 263.00 (McKinney 2001).

⁸⁸ N.Y. Penal Law § 263.15 (McKinney 2001).

⁸⁹ N.Y. Penal Law §§ 263.00(5), (3) (McKinney 2001).

⁹⁰ See TLC, *supra* note 19, at 5.

The concept of child beauty pageants is seemingly innocent, but the show raised eyebrows when a four-year-old contestant dressed up in prosthetic breasts and buttocks when imitating Dolly Parton.⁹² Another contestant, age three, dressed as a prostitute. These are the two main images discussed here.⁹³ Both images of the girls were displayed on national television and depicted on various media outlets over the internet.⁹⁴

New York Penal Law section 263.00 defines sexual performance as including “sexual conduct by a child less than sixteen years of age.”⁹⁵ Performance includes a motion picture or “any other visual representation exhibited before an audience”⁹⁶ Unlike *Fraser*, the girls in *Toddlers and Tiaras* are not engaged in sexual activity.⁹⁷ Similarly, the portrayal of the young girls on *Toddlers and Tiaras* is distinguishable from the images described by the *Pinkoski* court. The *Toddlers and Tiaras* girls are fully dressed. The definition of sexual conduct excludes the young girls wearing prosthetic breasts and buttocks.⁹⁸ There is no “lewd exhibition of the genitals” that would trigger the *Pinkoski* standard.⁹⁹ Although, the four-year-old wearing prosthetic breasts and buttocks, or the three-year-old dressed as a prostitute might trigger the *Pinkoski* courts definition of lewd,¹⁰⁰ it is unlikely that this is sufficient for the images to constitute sexual conduct since the statute also requires the “lewd exhibition of the genitals.”¹⁰¹

⁹¹ *Id.*

⁹² See Mikaela Conley, *supra* note 10, at 3.

⁹³ Here, it is the portrayal of certain young girls that is questionable and not necessarily the entire show. See Rebecca Macatee, *supra* note 93, at 16; Katherine Riley, *Toddlers & Tiaras Recap: Pretty Woman? Pretty Inappropriate*, E-Online (Sept. 7, 2011), http://www.eonline.com/news/toddlers_tiaras_recap_pretty_woman/262414.

⁹⁴ See Mikaela Conley, *supra* note 10, at 3; Katherine Riley, *supra* note 93, at 16.

⁹⁵ N.Y. Penal Law § 263.00(1) (McKinney 2001).

⁹⁶ N.Y. Penal Law § 263.00(4) (McKinney 2001).

⁹⁷ See Rebecca Macatee, *supra* note 93, at 16; Mikaela Conley, *supra* note 10, at 3.

⁹⁸ N.Y. Penal Law § 263.00(3) (McKinney 2001).

⁹⁹ *Pinkoski*, 752 N.Y.S2d at 421.

¹⁰⁰ *Id.* at 424 (stating that lewd means “characterized by lust” or “showing or intended to excite lust or sexual desire, especially in an offensive way”).

¹⁰¹ N.Y. Penal Law § 263.00(3) (McKinney 2001).

Both images are similar to the *Pinkoski* image of the victim exhibiting her bare chest and buttocks, where such images were not considered pornographic.¹⁰²

The images show the girls fully clothed with no specific focal point and as a result there is no “lascivious exhibition of the genitals or pubic area”¹⁰³ The *Dost* factors are not satisfied either, and the images do not amount to a violation of section 263.00. The first factor is not met because the focal point is not “on the child’s genitalia or pubic area.”¹⁰⁴ Secondly, the setting is a child beauty pageant, which in this case, is not likely to be considered sexually suggestive. Also, the girls are not posing provocatively suggesting sexual activity.¹⁰⁵ Third, the two images do not display the girls in an unnatural pose.¹⁰⁶ The attire may be considered inappropriate given both girls’ ages, but this alone is not enough.¹⁰⁷ The fourth factor merely asks how the child is dressed, and here the girls are fully dressed.¹⁰⁸ The fifth factor asks whether “the visual depiction suggests sexual coyness or willingness to engage in sexual activity.”¹⁰⁹ Whether or not this factor is satisfied is questionable because the girls are merely dressed up “inappropriately” which does not necessarily suggest a willingness to engage in sexual activity. The girls’ appearance simply suggests the intent to imitate popular media icons.¹¹⁰ On the other hand it can be argued that a child dressed as a prostitute does suggest a willingness to engage in sexual activity. In light of case law, it is more likely that a court presented with the images would see the child’s outfit as a costume than a sign that the child is exhibiting a willingness to engage in sexual activity. The last *Dost* factor asks whether the image is meant to elicit a sexual response

¹⁰² *Pinkoski*, 752 N.Y.S.2d at 424.

¹⁰³ *Horner*, 752 N.Y.S.2d at 149.

¹⁰⁴ *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Dost*, 636 F. Supp. at 832.

¹¹⁰ Rebecca Macatee, *supra* note 93, at 16; Mikaela Conley, *supra* note 10, at 3.

in, if not the average viewer, a pedophile viewer. It is possible that the image would elicit a response from at least a pedophile viewer, given that one of the girls is dressed as a prostitute and the other is wearing prosthetic breasts and buttocks. On the other hand, whether the image does elicit a response is distinguishable from whether it was intended to, and here it is unlikely that a court would find that the costumes were intended to elicit a response from a pedophile viewer. Overall, evaluating the application of the *Dost* factors, it is unlikely that a court would consider the images child pornography.

The *Gibeault* analysis provides a similar result, leaving the girls in the image unprotected and exposed to child sexualization. This is because in *Gibeault* the court did not find a teenager exposing his penis for a fraction of a second to be child pornography.¹¹¹ Here, the girls are fully clothed, the setting is a child beauty pageant and the images do not focus on the child's genitalia.

The Toddlers and Tiaras images can be viewed by the public without violating New York law; however, the children are being sexualized and the law should prevent child sexualization.

C. JOURS APRÈS LUNES (JAL)

Jours Après Lunes, a French company that sells “lounge” for girls four to twelve-years old provides another example of why it is necessary for the law to prevent child sexualization. The clothing worn by the young girls is akin to lingerie for adult women.¹¹² Though much of the clothing resembles simple undergarments for young girls, the images and some of the clothing sexualize the girls. These images are prominently available on the designer's website.¹¹³

¹¹¹ *Gibeault*, 773 N.Y.S.2d at 753.

¹¹² JOURS APRÈS LUNES, *supra* note 10, at 3.

¹¹³ *Id.*

New York Penal Law section 263.00(3) states that sexual performance can be depicted in photographs and the *Fraser* court stated that this includes digital images.¹¹⁴ In this case, the images are of young girls who seem to be playing dress-up.¹¹⁵ The setting seems to be in a home or studio.¹¹⁶ The girls are shown reclining, playing with each other and looking at themselves in the mirror.¹¹⁷ Not all of these images can be considered a violation of section 263.00, even though many of them sexualize the JAL girls. For example, one of the images shows a young girl bending down, with her buttocks to the camera, wearing underwear with a “peep-hole.”¹¹⁸

It is unlikely that the *Fraser* standard would apply to the JAL girls since the images do not depict the girls engaging in sexual activity.¹¹⁹ The *Pinkoski* “lewd exhibition of genitals” standard is not met either since the JAL images are more similar to the images taken of the victim baring his/her chest and buttocks than the images that were found to be pornographic.¹²⁰ Unlike the *Pinkoski* images that were found to be pornographic, the JAL images do not portray or suggest sexual activity.¹²¹

Applying the *Dost* factors, some of the images should be excluded as being the “lascivious exhibition of genitals or pubic area.”¹²² The first factor is satisfied where the focal point of the image is one of the JAL girl’s buttocks.¹²³ In the very same image the girl is seen squatting down, with the picture showing the girl’s buttocks.¹²⁴ The second *Dost* factor would be satisfied in this situation since the image depicts the child wearing underwear and bending

¹¹⁴ N.Y. Penal Law § 263.00(4) (McKinney 2001); *Fraser*, 752 N.E.2d at 246.

¹¹⁵ JOURS APRÈS LUNES, *supra* note 10, at 3.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Pinkoski*, 752 N.Y.S2d at 424.

¹²¹ *Pinkoski*, 752 N.Y.S2d at 424, JOURS APRÈS LUNES, *supra* note 10, at 3.

¹²² *Dost*, 636 F. Supp. at 832.

¹²³ JOURS APRÈS LUNES, *supra* note 10, at 3.

¹²⁴ *Id.*

down or squatting which renders the image sexually suggestive.¹²⁵ On the other hand it is more likely that a court would find the image similar to the *Pinkoski* court's example of the nude child lying on a blanket in a family photograph.¹²⁶ As a result, the third *Dost* factor is not going to be satisfied. The fourth *Dost* factor merely asks whether the child is clothed and here, the girl is wearing undergarments and therefore partially clothed. The fifth *Dost* factor asks whether the image suggests a willingness to engage in sexual activity.¹²⁷ Unlike the Hailey image, the images of the JAL girls are focused on portraying the product by dressing the children in the "lounge." ¹²⁸ However, the last *Dost* factor may be satisfied if it was intended to elicit a response from a pedophile viewer.¹²⁹

Similar to the *Dost* factors result, the application of the *Gibeault* case leads to the same conclusion. The setting is a studio that looks like a home, a place that may or may not be associated with sexual activity. The JAL girls are dressed in undergarments, and are not posing so as to emphasize their genitals.¹³⁰ As a result, the JAL girls' images are not covered by section 263.00.

V. PROPOSED AMENDMENT TO NEW YORK PENAL LAW TO HELP PREVENT CHILD SEXUALIZATION

A revised law that excludes sexualized media images of children would help to prevent sexualization of young girls such as Hailey Clauson, the JAL girls and the girls in *Toddlers and*

¹²⁵ *Id.*

¹²⁶ *Pinkoski*, 752 N.Y.S.2d at 424.

¹²⁷ *Dost*, 636 F. Supp. at 832.

¹²⁸ *JOURS APRÈS LUNES*, *supra* note 10, at 3.

¹²⁹ *Dost*, 636 F. Supp. at 832.

¹³⁰ *Gibeault*, 773 N.Y.S.2d at 753.

Tiaras.¹³¹ This comment proposes the following addition to current New York Penal law section 263.00 in order to prevent child sexualization in the media:

Purpose

The purpose of this proposal is to prevent child sexualization in the media only.¹³²

Definitions:

1. Media: Media refers to television, magazines, newspapers, the internet, and other forms of mass communication primarily used to entertain or advertise to a large population of target audiences.
2. Production: Production of a sexualized image of a child includes photographs, videos or films.
3. Distribution and Dissemination: An image is distributed or disseminated through the media when it is placed in an advertisement, television show, movie, or on the internet. The purpose of such image must be, at least in part, to generate revenue in connection with the displayed image or campaign that features the sexualized child.
 - a. Media distribution and dissemination does not include images that are solely personal family photographs that are circulated, distributed, displayed or presented to friends or family members to view.
 - b. Media production, distribution, and dissemination does not include the proper production, distribution or dissemination of images.¹³³ Proper production includes scientific use to further research in a particular field of medicine or prosecuting violators of this provision.¹³⁴
4. Child: A child is any person under the age of sixteen.
5. Sexualization of a child: A child is sexualized when that child's value "comes only from his or her sexual appeal or behavior, to the exclusion of other characteristics,"¹³⁵ when that child is "is sexually objectified – that is, made into a thing for others sexual use, rather than seen as a person with the capacity for independent action and decision making; and/or sexuality is inappropriately imposed."¹³⁶

¹³¹ Mikaela Conley, *supra* note 10, at 3.

¹³² It should be noted that New York Court of Appeals has held that consumers of child pornography are also liable pursuant to section 263.00, here however the proposed amendment solely addresses the production and post-production distribution and dissemination of such images. *See People v. Keyes*, 75 N.Y.2d 343, 348 (1990) (stating that consistent with its efforts to eradicate the social evil of child pornography, Penal Law § 263.15 is directed at the consumers of child pornography as well as at its manufacturers and distributors."). *Id.*

¹³³ *See* L. Steven Grasz and Patrick J. Pfalzgraff, *Child Pornography and Child Nudity: Why and How States May Constitutionality Regulate The Production, Possession, And Distribution of Nude Visual Depictions Of Children*, 71 Temp. L. Rev. 609, 609 (1998) (stating that proper purpose of possession includes possession of images by "a physician, psychologist, sociologist, scientist ... prosecutor, judge, or other person having a proper interest in the material or performance.").

¹³⁴ *Id.*

¹³⁵ American Psychological Association, *supra* note 13, at 3.

¹³⁶ *Id.*

Violations of the proposed amendment

1. Images of children may not be used to advertise, or entertain a large audience if such images display a sexualized child. The production, distribution or dissemination of sexualized images of children in the media shall be considered a violation of this provision.
2. A child is sexualized in an image pursuant to this proposal if section 5a combined with at least two other listed factors are satisfied:
 - a. The style of dress of the child, this includes when a child is dressed in clothing that reveals or accentuates the child's genital area or breasts, or where the child is fully clothed but the focal point of the image (5d) is on the child's genital area or breasts and,
 - b. the setting – taking into account if the setting is one that is associated with sexual activity or,
 - c. the manner in which the child is posing, sitting, or standing in the image or,
 - d. the focal point of the image is the child's buttocks, genitals or breasts or,
 - e. the image of the child is suggesting sexual activity or,
 - f. the image of the child implying sexual readiness or,
 - g. the image is accentuating the child's breast, buttocks or genitals via the use of prosthetic devices or other methods to provide sexual allure, or entertainment for media purposes.
3. An individual who produces, disseminates, or distributes images of a sexualized child, as defined under this provision, is in violation of this provision;
4. Violators of this provision are subject to a minimum fine equivalent to no less than fifty percent (50%) of the revenue generated as part of the distribution or display of the image(s) and/or imprisonment of no less than three months.

It is likely that this proposed addition to current law will raise First Amendment concerns; however the proposed statute is not in violation of the First Amendment and merely seeks to prevent sexualization of children.

A. THE PROPOSED AMENDMENT DOES NOT RUN AFOUL OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

The First Amendment of the United States Constitution prevents congress from “abridging the freedom of speech.”¹³⁷ However, there are exceptions for certain categories of speech.¹³⁸ This includes pornography produced with real children.¹³⁹ Both federal and New

¹³⁷ U.S. CONST. amend I.

¹³⁸ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 246 (2002) (stating that the First Amendment does protect “certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children”).

York law have defined, through case law, what constitutes child pornography. Therefore the question is whether the inclusion of the child sexualization amendment to current New York law is in violation of the First Amendment. The primary argument against the proposed statute will be that it limits artistic freedom, however it is unlikely that a reasonable person would find that sexualization of children has serious literary value. The application of the First Amendment has been evaluated through numerous Supreme Court interpretations as related to child pornography.

For example, in *New York v. Ferber*, the United States Supreme Court reasoned that States have greater latitude in determining what should constitute child pornography.¹⁴⁰ In *Ferber*, a bookstore sold films depicting young boys masturbating in violation of New York Penal Law section 263.10.¹⁴¹ The Court stated that child pornography is not protected by the First Amendment.¹⁴² Furthermore, this greater leeway is not in contrast to the test articulated in *Miller v. California*, which stated that “a work may be subject to state regulation where that work, taken as a whole, appeals to the prurient interest in sex; portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, taken as a whole, does not have serious literary, artistic, political, or scientific value.”¹⁴³

The *Miller* test is:

(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently 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.¹⁴⁴

¹³⁹ *Id.*

¹⁴⁰ *New York v. Ferber*, 458 U.S. 747, 756 (1982).

¹⁴¹ *Id.* at 752.

¹⁴² *Id.*

¹⁴³ *Miller v. California*, 413 U.S. 15, 24 (1973).

¹⁴⁴ *Id.* at 24.

In *Pope v. Illinois* the Supreme Court elaborated that the third prong of the tripartite test is not measured by “whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole”¹⁴⁵ In this case, two adult bookstore owners were charged with selling obscene magazines. The Supreme Court reasoned that the material in question does not need to obtain majority approval to merit the protection of the First Amendment and at the same time it does not matter whether the “value of the work [varies] from community to community based on the degree of local acceptance it has won.”¹⁴⁶ The proper standard is whether the work is “utterly without any redeeming social value.”¹⁴⁷

In a more recent case, the Supreme Court held parts of the federal Child Pornography Prevention Act unconstitutional because it was overbroad.¹⁴⁸ The statute under contention banned virtual or technologically altered child pornography where the images appeared to depict minors or convey the impression that they were minors, when in reality no minors were used in the production of the images.¹⁴⁹ The court reasoned that “[p]ictures of what appear to be 17-year-olds engaging in sexually explicit activity do not in every case contravene community standards.”¹⁵⁰ The court elaborated that a work’s value is not determined by a single explicit scene but is considered as a whole.¹⁵¹ Lastly, the Court held that “pornography can be banned

¹⁴⁵ *Pope v. Illinois*, 581 U.S. 497, 500-01 (1987).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 503.

¹⁴⁸ *Ashcroft v. Free Speech Coal.*, 535 U.S. at 235.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

only if obscene, but under *Ferber*, pornography showing minors can be proscribed whether or not the images are obscene under the definition set forth in *Miller v. California*.¹⁵²

Assuming that the first two prongs of the tripartite *Miller* test are satisfied by the proposed statute, the third prong is likely to garner the most contention. However, a reasonable person is unlikely to find that cases such as Hailey Clauson, the JAL images or Toddlers and Tiaras have literary or artistic value since they attempt to sexualize children. This is further supported by the *Pope* court's statement that we do not look to an ordinary member of any given community to determine whether the work has artistic value but rather look to a reasonable person. In the three examples presented in this comment, it is likely that the individuals involved in the production and dissemination of such images will argue that the images have artistic value. An argument from just the media community is not sufficient. In light of case law, the more likely outcome is that a reasonable person would not find artistic value where there is sexualization of a child.

Even if the tripartite test is not satisfied, the *Ashcroft* court's decision, which allows limitations on child pornography whether or not the image meets the *Miller* test, supports a finding that the proposed amendment would not run afoul of the First Amendment.¹⁵³ The proposed amendment is distinguishable from the statute held unconstitutional in the *Ashcroft* decision because in *Ashcroft* the statute attempted to ban virtual depictions of "fake" children, whereas the proposed statute proposes a ban on images depicting actual children.¹⁵⁴

¹⁵² *Id.* at 240.

¹⁵³ *Ashcroft v. Free Speech Coal.* 535 U.S. at 234 (stating that pornography depicting actual children can be proscribed whether or not the images are obscene because of the State's interest in protecting the children exploited by the production process).

¹⁵⁴ *Id.* at 253 (stating that the fact that the virtual depictions of "fake" children may cause a third party to act in an unlawful way is not sufficient to extend child pornography to virtual depictions because it would limit free speech, especially in the adult and film industry, in violation of the First Amendment).

The proposal, if implemented, addresses a legitimate policy concern of preventing sexualization of children in the media which, if continued, may lead to unintended consequences such as social and psychological issues in children who are being sexualized and those that are being exposed to child sexualization.

B. THE PROPOSED AMENDMENT SHOULD BE ADOPTED AS A MATTER OF PUBLIC POLICY TO PREVENT PSYCHOLOGICAL AND SOCIAL HARM RESULTING FROM CHILD SEXUALIZATION.

There are many examples of child sexualization in different media outlets and “when we sexualize children...we begin a daunting descent that puts us on the path of seeing children in a sexual way.”¹⁵⁵ States should enact legislation to restrict depictions of children such as Hailey, the children involved in *Toddlers and Tiaras*, and the *Jours Après Lunes* models to protect children from psychological and emotional harm.¹⁵⁶ Attorneys, Steven Grasz and Patrick Pfalzgraff suggest including child nudity in current legislation.¹⁵⁷ Through their bare minimum clothing, setting and posing styles the children create an image of “sex” without any real simulation of sexual conduct.

The purpose of the law should be to prevent child sexualization in the media. A study conducted by the American Pediatrics Association states that “the media may act as a 'superpeer' in convincing adolescents that sexual activity is normative behavior for young teenagers.”¹⁵⁸ This effect is largely based on exposure of young children to sexualization, and does not even include the children that are themselves sexualized.¹⁵⁹ Furthermore, studies suggest that “nude images of children tend to reduce taboos and inhibitions restraining abusive, neglectful or

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Sarah Gilbert, *Sex in the Media: A New Study Finds Troubling Links to Teens*, *The Daily Finance* (Sept. 4, 2010), <http://www.dailyfinance.com/2010/09/04/sex-in-the-media-a-new-study-finds-troubling-links-to-teens/>.

¹⁵⁹ *Id.*

exploitative behavior towards children.”¹⁶⁰ The same study suggests that “nude photographs of children tend to make children more acceptable as objects of abuse, neglect, and mistreatment, especially sexual abuse and exploitation.”¹⁶¹ As a matter of policy, our laws should prevent child sexualization in the media in order to prevent child abuse, psychological and social harm to children. The effect would also extend to preventing psychological and social impact on children influenced by sexualization of children in the media, as the American Pediatric Association suggests.¹⁶²

VI. CONCLUSION

The Hailey Clauson images, Toddlers and Tiaras, and Jours Après Lunes, raise concerns about child sexualization in the media. Pursuant to New York Penal Law, a child standing nude, on his/her own does not necessarily constitute pornography.¹⁶³ Take for example, a frontal photograph of a nude child with her hand near her genitalia,¹⁶⁴ the court considered this image lewd, but not the photograph of the child’s buttocks and bare chest.¹⁶⁵ A child standing naked does not constitute pornography; the definition of pornography is not satisfied even if it is a bunch of nude children.¹⁶⁶ This indicates that the law requires some simulation of sex in order to find a violation of the statute. The proposed law includes situations where a child is sexualized and a victim of child pornography. The proposal is not overbroad and still protects images such as the innocent family photo of the child in the bathtub. The proposed amendment defines sexualization with specificity to cover images that are similar to the Hailey image, or the JAL

¹⁶⁰ L. Steven Grasz and Patrick J. Pfalzgraff, *supra* note 133, at 21.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Pinkoski*, 752 N.Y.S2d at 424.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

images. The proposal also prevents sexualization of children who are sexualized on television shows such as *Toddlers and Tiaras*. New York Penal Law should aim to protect children from sexualization as well as from physical and psychological harm resulting from child sexualization. Here, the children are not harmed physically, but there may be psychological implications of sexualizing the children at a young age.¹⁶⁷

Current New York Penal Law does not prevent children such as Hailey Clauson and the girls from *Toddlers and Tiaras* and *Jours Après Lunes* from becoming victims of child sexualization. The proposed amendment would help to prevent child sexualization in the media without running afoul of the First Amendment. The law, as it stands now, seeks to criminalize child pornography but does not cover all of the media examples discussed in this comment.

¹⁶⁷ Ryan Owens & Bill Cunningham, *supra* note 21, at 5.