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A CALL TO REWRITE AMERICA'S CHILD PORNOGRAPHY TEST: THE DOST TEST

I. INTRODUCTION

Children are perhaps America's most precious, yet vulnerable, members of society. Their innocence and naivety leave many susceptible to the clutches of 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. Holding to a higher standard of censorship, the Supreme Court ruled in *Miller v. California*, "Pornography depicting children... may be proscribed whether or not 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, prior to 1977 Congress had yet to enact any federal statute prohibiting the use of children in the production of sexually explicit materials.² Recognizing that children were being exploited for pornography and suffering harm, Congress enacted the Protection of Children Against Sexual Exploitation Act in May of 1977 under 18 U.S.C. § 2251.³ Notwithstanding the inaction of the Protection of Children Against Sexual Exploitation Act by Congress, child pornography remains pervasive throughout the United States. In fact, child pornography is currently a billion dollar industry.⁴

¹ James E. Bristol, *Free Expression In Motion Pictures: Childhood Sexuality and a Satisfied Society*, 25 CARDOZO ARTS & ENT L.J. 333, 342 (2007), *quoting* *Miller v. California*, 413 U.S. 15, 24 (1973).

²*Id.*; See S. Rep. 95-438 at 1. Act became law under P.L. 95-225 (1978) (codified as amended at 18 U.S.C. §§2251-2252, 2256 (1994 & Sup. IV 1998)).

³ See *Id.*; 18 U.S.C. § 2251.

⁴ Allison L. Cochran, *Punishment for Virtual Pornography... It's Just a Fantasy*, 2 (Oct. 2009). (unpublished comment, on file with BePress), available at http://works.bepress.com/allison_cochran/1.

Congress's failure to eradicate child pornography is attributable to the inconsistent applications of anti child pornography laws including § 2251. Under § 2251, a person who employs or entices any minor to engage in sexually explicit conduct for the depiction of such conduct is in violation of the law.⁵ 18 U.S.C. § 2256 defines the term "sexually explicit" as the lascivious exhibition of the genital region.⁶ Today, several circuits use a non-exhaustive totality of the circumstances test known as the Dost Factor Test to determine if lasciviousness is present, and thus, if there is a presence of sexually explicit conduct.⁷ However, *United States v. Johnson* exposes the discrepancies between district courts and circuit courts in applying anti child pornography standards.⁸

In this case, 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 each video's content, the Honorable Richard E. Dorr of the United States District Court for the Western District of Missouri held the videos of each minor depicted only mere nudity, not lasciviousness or sexual explicitness.¹¹ Thus, Scott A. Johnson did not violate § 2251.¹² However, Judge Hanson of the Eighth Circuit reversed the district court's decision, finding Mr. Johnson guilty of violating § 2251 by filming child pornography.¹³ The Eighth Circuit noted that even though some of the videos showed only nudity, the intent of Mr. Johnson and the context in which the images were created violated §

⁵ 18 U.S.C. § 2251(a) 2012.

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); *United States v. Johnson*, 639 F.3d 433, 438 (8th Cir. 2011).

⁹ *See Johnson*, 733 F. Supp. 2d at 1089.

¹⁰ *See id.*

¹¹ *See id.*; *Dost*, 636 F. Supp. at 828.

¹² *See id.*

¹³ *See Johnson*, 639 F.3d at 438; 18 U.S.C. § 2251(a).

2251.¹⁴

While some scholars embrace the current anti child pornography laws, others have criticized the application of § 2251 and the Dost Factor Test because of their vague terms, their contribution to the sexualization of children, and their inconsistent focus upon either the content or the context of images. First, critics claims the term lascivious, which is used to define child pornography under § 2251, problematically varies in meaning among the different circuits across the country.¹⁵ Even more, factors such as “sexually suggestive” and “sexual coyness” found in the Dost Factor Test, which is used to define lasciviousness under § 2251, are vague and often reshaped based upon each jury member’s unique experiences.¹⁶ Second, critics assert society’s interest in sexualizing children makes it nearly impossible to properly apply the fact sensitive Dost Factor Test to discern appropriate images of children from pornography.¹⁷ As scholars Amy Adler and Robert J. Danay advocate, the Dost Factor Test’s requirement for courts and jurors to scrutinize images of naked children only contributes to society’s sexual exploitation of children.¹⁸ Finally, critics claim many federal court decisions have skewed the application of the Dost Factor Test. As scholar Robert J. Danay explains, Dost Factor Test decisions focusing solely upon the content of images fail to consider the consequences of images that may seem fairly innocuous, yet were created by a pedophile with perverse intentions.¹⁹ On the other hand, critics have also argued a Dost Factor Test centering solely upon the creator’s intent allows

¹⁴ See *id.* at 438-39.

¹⁵ See Bristol, *supra* note 1 at 353-54.

¹⁶ *Id.* at 355.

¹⁷ See *id.* at 356; Anne Higonnet, *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 COLUMBIA LAW REV. 209, 210 (2001).

¹⁹ See *id.* at 157; James R. Kincaid, *Erotic Innocence: The Culture of Child Molesting* (Durham, N.C.: Duke University Press, 1998) at 115, (citing Matthew Stadler) □[Kincaid].

virtually any image to qualify as child pornography.²⁰

To resolve these issues, juries, and in the case of bench trials, judges, should be required to apply a mandatory balance of both content based and context or intent based Dost Factors during a Dost Factor Test analysis. First, this requirement will deter jurors and judges from choosing to apply only factors that suit their personal opinions toward the case at hand. This new heightened requirement will add a greater level of assurance that a lascivious image was properly proscribed. In addition, this flexible standard will allow the definition of lasciviousness to be organic and reshape as society's standards change. Finally, this new requirement will allow courts to form solidified concepts of what types of images constitute lasciviousness and what types of 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 display the criticisms that plague the Dost Factor Test, including its vagueness, misapplication, and its unintended promotion of the sexualization of children. Finally, this comment will offer a resolution, which will allow judges and juries to continue applying the Dost Factor Test, but require that a balance of both content based and context based factors be applied during the test's implementation.

II. DECIPHERING 18 U.S.C. § 2251, THE DOST FACTOR TEST, AND THE COURT'S PROBLEMS IN *UNITED STATES V. JOHNSON*

A. § 18 U.S.C. 2251 and Its Helper "The Dost Factor Test"

Congress's concern with the growth of commercial child pornography led to the creation

²⁰ Amy Adler, *Inverting the First Amendment*, 149 U. PA L. REV. 921, 957 (2001); *United States v. Moore*, 215 F.3d 681, 687 (7th Cir. 2000). The question before the court was whether the photos provided probable cause for an arrest on child pornography charges.

of the Protection of Children Against Sexual Exploitation Act of 1977.²¹ Since that time, the Act has undergone several amendments to strengthen its protection of children in America.²² In 1984, 1986, and most recently in 1988, Congress expanded the statute's reach by raising the age of those defined as minors, extending the provision to reach offenders who print and publish child pornography, and increasing the penalties for conviction.²³ Under the current § 2251 provision, "Any 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 The question that must be asked is what constitutes sexually explicit conduct? 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 the final category, while § 2251 nor § 2256 explicitly define the meaning of the word "lascivious," the Eighth Circuit, Ninth Circuit and Third Circuit, have adopted a holistic test to assess whether material is lascivious, and thus, sexually explicit under § 2251.²⁶ The applicable test originates from the Southern District of California case, *United States v. Dost*.²⁷ Under this test, "Courts 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 typically considered 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

²¹ Ralph V. Seep, *Validity, Construction, and Application of Penalizing Sexual Exploitation of Children 18 U.S.C.A. § 2251*, 99 A.L.R. Fed. 643 sec 2(a).

²² *See id.*

²³ *Id.*

²⁴ *Johnson*, 639 F.3d at 438; *quoting* § 2256.

²⁵ *Id.*

²⁶ *See Dost*, 636 F. Supp. at 832.

²⁷ *See id.*

²⁸ *Johnson*, 733 F. Supp. 2d at 1094; *citing Dost*, 636 F. Supp. at 828.

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; 6) whether the picture is intended or designed to elicit a sexual response in the viewer.²⁹ The decision, whether it be by judge or jury, 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 Having said this, several courts, including the Eighth Circuit, hold that “Images or exhibitions of female breasts and the buttocks of either gender are not within the purview of § 2251(a).”³¹

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

1. Mr. Johnson the Coach or Mr. Johnson the Pedophile?

While the Dost Factor Test serves to define “lascivious” under § 2251, its application in both the district court and appellate court decisions in *United States v. Johnson* highlights its severe deficiencies and indicates its need for restructuring. On December 16, 2009 in the Western District Court of Missouri, a jury convicted Mr. Johnson of eight counts of attempted sexual exploitation of a minor- a violation under § 2251(a) and (e).³² His sentence carried a minimum of fifteen years in prison.³³ Mr. Johnson served as a weightlifting coach at a specialized facility for young athletes.³⁴ He had been involved in weightlifting and its

²⁹ *Id.*; citing *Dost*, 636 F. Supp. at 828 (In the case of *United v. Johnson*, the court added the additional factor of whether the picture depicts the minor as a sexual object for the jury to consider.)

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); *Dost*, 636 F. Supp. at 832.

³¹ *Johnson*, 639 F.3d at 438; see also *United States v. Gleich*, 397 F.3d 608 (8th Cir. 2005).

³² *Johnson*, 733 F. Supp. 2d at 1091; § 2251.

³³ *Id.*

³⁴ *Id.*

competitions as both a participant and as a coach for several years.³⁵ He served as a women's weightlifting coach at the 2004 Olympic Games and refereed national weightlifting competitions.³⁶ In the sport of weightlifting, weightlifters compete in classes based upon body weight.³⁷ Weightlifting coaches keep track of a lifter's weight through frequent weigh ins for competitive events.³⁸ Prior to a competition each participant stands on a scale and "weighs in" in either the nude or in underwear.³⁹ A referee of the same gender conducts the weigh in.⁴⁰ On several occasions, Mr. Johnson told female athletes to go into an examination room, completely disrobe, and weigh themselves.⁴¹ However, the females were unaware that Mr. Johnson had set up a hidden video camera to film their weigh-ins.⁴² The defendant placed the camera between two shelves, limiting its vertical view, yet providing adequate cover.⁴³ At least two female athletes were minors at the time Mr. Johnson filmed them.⁴⁴ During the police investigation, authorities found the videotapes in Mr. Johnson's home.⁴⁵ Mr. Johnson confessed to investigators that he filmed the girls without their knowledge, because he, "just wanted to film them . . . [and] see them naked."⁴⁶ A grand jury indicted Mr. Johnson on ten counts of sexual exploitation of a minor under § 2251, and only two of these charges were dismissed.⁴⁷

³⁵ *Id.*

³⁶ *Johnson*, 639 F.3d at 435-36.

³⁷ *Id.* at 436.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Johnson*, 733 F. Supp. 2d at 1091.

⁴² *Id.*

⁴³ *Id.* at 1092.

⁴⁴ *Id.* at 1091.

⁴⁵ *Id.* at 1092.

⁴⁶ *Id.*

⁴⁷ *Johnson*, 733 F. Supp. 2d at 1092.

2. The Videotapes

A thorough analysis of each video taken by Mr. Johnson was conducted, each video representing a separate violation of § 2251.⁴⁸ The first count describes, “The scale faces the table, such that when a person stands on it, a side view is captured.”⁴⁹ The minor enters the room, undresses completely, weighs herself, and redresses.”⁵⁰ While, this view shielded minor's pubic region, the video showed the minor from just below her shoulders to her calves.”⁵¹ Under the second count, “The scale faces the table.”⁵² The minor disrobes outside of the camera's view.⁵³ The minor weighs herself naked, giving the camera a side view from just above her breasts to her calves.”⁵⁴ However, the video did not clearly show the minor's pubic area and captured no frontal nudity.⁵⁵ Under the third count, “The scale faces the wall opposite the camera, such that the camera captures a rear view of the person standing on the scale.”⁵⁶ The camera's zoom appears to be increased.”⁵⁷ While the minor weighed herself naked and the frame showed from her left buttocks to just below her knee, the image captured no frontal view.”⁵⁸ Under the fourth count, even though the victim was completely naked at the time, only a side view was visible.”⁵⁹ Under the fifth count, not only did Mr. Johnson face the scale toward the table, but he also enhanced the camera's zoom to a similar degree as the video in count four.”⁶⁰ Nevertheless, the

⁴⁸ *See Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Johnson*, 733 F. Supp. 2d at 1092.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Johnson*, 733 F. Supp. 2d at 1093.

⁶⁰ *Id.*

video showed no nudity, but only a female in red workout shorts.⁶¹ Under the sixth count, the frame showed the scale facing the table.⁶² 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.⁶³ In addition, the far left side of the frame briefly showed the minor's pubic region.⁶⁴ Under the seventh count, the frame consisted of a side view and showed the minor from her upper back to her calves.⁶⁵ Under the eighth count the scale directly faced the camera.⁶⁶ The minor weighed herself three separate times: once fully clothed, once wearing a bra and underwear, and once only wearing underwear.⁶⁷ The video showed the minor from her shoulders to her calves.⁶⁸

The two victims testified that they were both fifteen and sixteen at the time Mr. Johnson filmed counts one, three, four, five, and eight.⁶⁹ In addition, "There was no evidence that Mr. Johnson had tried to enhance the videos by freeze framing any of the images."⁷⁰ While a jury returned a verdict of guilty, Judge Dorr granted Mr. Johnson's motion for acquittal notwithstanding the verdict and found that Mr. Johnson had not violated § 2251 under any of the counts.⁷¹

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

While Judge Dorr of the United States District Court for the Western District of Missouri

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Johnson*, 733 F. Supp. 2d at 1093.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 1096.

⁷¹ *See generally id.*

conducted a thorough analysis using the Dost Factor Test to detect lasciviousness, the Judge chose to focus heavily on each video's content and disregarded Mr. Johnson's sexual intentions. On December 16, 2009, after analyzing the videos using the Dost Factor Test, the jury returned a guilty verdict on all eight counts.⁷² However on January 15, 2010, Mr. Johnson filed a motion for acquittal notwithstanding the verdict.⁷³ The Western District Court of Missouri held, "Although 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."⁷⁴ Judge Dorr emphasized the crime charged against Mr. Johnson is limited specifically to a video depiction of a "lascivious exhibition of the genitals or pubic area. . ." ⁷⁵ He also turned to the American Heritage Dictionary's definition of the term "lascivious," which states "of or characterized by lust, lewd, lecherous."⁷⁶ Thus, the district court sided with the majority of courts, who have held that mere nudity does not constitute the, "lascivious exhibition of the genitals or pubic area."⁷⁷ Citing examples of lasciviousness, the district court looked to *United States v. Rivera*.⁷⁸ In this case, the Second Circuit held a reasonable jury could find images showing a minor female lying naked with her legs spread and the camera focusing on the pubic area serve to elicit a sexual response in a viewer, and thus are unquestionably lascivious.⁷⁹ 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.⁸⁰ Distinguishing Mr. Johnson's videos from these cases, Judge Dorr opined the videos contained only mere nudity,

⁷² *Johnson*, 733 F. Supp. 2d at 1093.

⁷³ *Id.*

⁷⁴ *Id.* at 1091.

⁷⁵ *Id.* at 1093; § 2251.

⁷⁶ *Id.* at 1094.

⁷⁷ *Johnson*, 733 F. Supp. 2d at 1094.

⁷⁸ See *United States v. Rivera*, 546 F.3d 245 (2d Cir. 2008).

⁷⁹ *Id.* at 1095; *Id.* at 250.

⁸⁰ *Id.* at 1096; *United States v. Horn*, 187 F.3d 781, 789 (8th Cir. 1999).

were not created with any sexual intent, and did not cause any damage to the minors.

In its first point, the district court held the content of the videos taken by Mr. Johnson constituted only mere nudity.⁸¹ In his reasoning, Judge Dorr stated, “There 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.”⁸² Mr. Johnson did not attempt to perfect the camera’s zoom, the camera’s placement, or the scale’s placement to make the minors’ pubic area the focal point of the video.⁸³ In addition, Judge Dorr remained unconvinced that a video showing a nude female from her lower back to just below her knees was meant to target the minor’s pubic area.⁸⁴ Finally, Judge Dorr highlighted the fact that Mr. Johnson never told the two girls to pose in a certain way or to wear certain suggestive clothing during the weigh ins.⁸⁵ Thus, according to the district court, the videos constituted only mere nudity.

In its second point, the district court determined the videos did not have a sexual intent. The district court held it was undisputable that these videos depicted two minors taking off their clothes, stepping onto a scale, getting off the scale, dressing, and leaving the room.⁸⁶ However, Judge Dorr reasoned that by doing precisely what Mr. Johnson asked, the two minors were not portrayed with the intent of being sexual objects, where the videos would be uploaded to a website devoted to sexual images.⁸⁷ Therefore, the videos were not intended to elicit a sexual response in viewers any more than mere nudity would elicit.⁸⁸ Furthermore, Judge Dorr

⁸¹ *See id.*

⁸² *Id.*

⁸³ *Id.* at 1096-97.

⁸⁴ *Id.* at 1096.

⁸⁵ *Johnson*, 733 F. Supp. 2d at 1097.

⁸⁶ *Id.*

⁸⁷ *Id.*; *United States v. Wallenfang*, 568 F.3d 649, 660 (8th Cir. Iowa 2009). The Eighth Circuit concluded that a minor was portrayed as a sexual object, because the photographs were primarily sexual in subject and were placed on a website primarily devoted to sexual images.

⁸⁸ *Id.*

reasoned that, “Regardless 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.’”⁸⁹ Thus, according to the district court, the videos were not created with a sexual intent.

In its final point, the district court explained the actions of Mr. Johnson did not qualify as a violation under § 2251, because the minors did not suffer any damages. According to Judge Dorr, “The females were in an organized weightlifting program, Mr. Johnson was their coach, and it was undisputed that weighing in the nude was a common practice with weight lifters.”⁹⁰ Judge Dorr opined that from the viewpoint of the minor females, they were not asked to do anything unusual.⁹¹ Until the girls realized they had been videotaped, they had no reason to be upset or damaged.⁹² As a result, the district court granted Mr. Johnson’ motion for acquittal notwithstanding the jury’s guilty verdict.⁹³

4. The Eighth Circuit Court of Appeal’s Emphasis on the Intent Over the Content of the Videotapes

Upon review, Judge Hanson and the Eighth Circuit Court of Appeals found Mr. Johnson guilty of violating § 2251 by deemphasizing the videos’ contents and stressing the defendant’s sexual intentions.⁹⁴ Judge Hanson, writing the opinion for the Eighth Circuit, found the district court’s analysis to be misplaced.⁹⁵ First, the Eight Circuit distinguished what images constitute mere nudity and what images rise to the level of lasciviousness.⁹⁶ Judge Hanson reasserted the district court’s point that “More than mere nudity is required before an image can qualify as

⁸⁹ *Johnson*, 733 F. Supp. 2d at 1093; § 2251.

⁹⁰ *Id.* at 1094.

⁹¹ *Id.* at 1094.

⁹² *Id.* at 1094.

⁹³ *Id.* at 1100.

⁹⁴ *See generally, Johnson*, 639 F.3d at 433.

⁹⁵ *Id.* at 439.

⁹⁶ *See id* at 440.

'lascivious' within the meaning of the statute [§ 2251]."⁹⁷ However, the Eighth Circuit stressed that lascivious images provide more than just a clinical view of the portions of a child's anatomy.⁹⁸ Relying upon the Third Circuit's decision in *United States v. Knox*, Judge Hanson explained that surely "[N]o 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."⁹⁹

Next, using this distinction between mere nudity and lasciviousness in his Dost Factor Test analysis of the videos, Judge Hanson and the Eighth Circuit opined that the minors were portrayed as sexual objects.¹⁰⁰ First, Judge Hanson emphasized the camera's focus and zoom stating a reasonable jury could find that Johnson adjusted the zoom to tighten the focus of the camera on the area where the females' genitals would be if they had faced the camera, thereby fulfilling the first Dost Factor.¹⁰¹ The first Dost Factor asks whether the focal point of the image is on the minor's genital or pubic area.¹⁰² For example, in at least one video, the camera's focus has 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.¹⁰³ 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.¹⁰⁴ Second, Judge Hanson opined that a reasonable jury could have concluded that, because the videos show the

⁹⁷ *Id.*; *United States v. Kemmerling*, 285 F.3d 644, 645-46 (8th Cir. 2002).

⁹⁸ *Id.* at 439. *See Id.* at 646. In *United States v. Kemmerling*, the court distinguished images of the genitalia of young males which we labeled as 'lascivious' from those that could be classified as depicting mere nudity.

⁹⁹ *Id.*; *United States v. Knox*, 32 F.3d 733, 750 (3d Cir. 1994). In *United States v. Knox*, the Third Circuit held that a child's genitals need not be fully, or even partially exposed to constitute lasciviousness under 18 U.S.C. § 2256.

¹⁰⁰ *See id.* at 440.

¹⁰¹ *Johnson*, 639 F.3d at 440.

¹⁰² *Dost*, 636 F. Supp. at 832.

¹⁰³ *Id.* at 436-37.

¹⁰⁴ *Id.*

girls from their shoulders to their calves, including naked breasts, the facial features of the girls were of little or no importance to Mr. Johnson.¹⁰⁵ Finally, Judge Hanson indicated that, “Some 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.”¹⁰⁶ Thus, the Eighth Circuit held 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.¹⁰⁷

In his next point, Judge Hanson distinguished that the lascivious act need not be committed by the child, but by the alleged perpetrator. In an example, Judge Hanson applied the Fifth Dost Factor that asks whether sexual coyness or a willingness to engage in sexual activity is present.¹⁰⁸ According to Judge Hanson, the young women in the videos were not acting in an obviously sexual manner, failing to find any coyness or willingness to engage in sexual activity.¹⁰⁹ However, the Eighth Circuit held this does not necessarily indicate that the videos were not lascivious.¹¹⁰ In *United States v. Horn*, the Eighth Circuit held “[L]ascivious 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.’”¹¹¹ Thus, even images of children acting innocently (such as the girls in this case) can be lascivious if they are intended to be sexual.¹¹² Judge Hanson also noted that all six Dost Factors do not need to be present for an image to be proscribed under § 2251.¹¹³

¹⁰⁵ *Id.*; *See, e.g.*, *United States v. Brown*, 579 F.3d 672, 684-85 (6th Cir. 2009).

¹⁰⁶ *Id.* at 437.

¹⁰⁷ *Johnson*, 639 F.3d at 439.

¹⁰⁸ *Id.* at 440.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*, *quoting* *Horn*, 187 F.3d at 790.

¹¹² *Johnson*, 639 F.3d at 439.

¹¹³ *Id.*; *Wallenfang*, 568 F.3d at 657, *quoting* *United States v. Wolf*, 890 F.2d 241, 245 (10th Cir. 1989) (alterations omitted).

According to Judge Hanson, 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.¹¹⁴ 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.¹¹⁵

Finally, the Eight 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.¹¹⁶ For example Judge Hanson considered that "On at least one occasion after a lifter had come out from the examination room, he [Mr. Johnson] pointedly asked the young woman (age 15-16) if she had stripped down completely."¹¹⁷ Even more, when investigators asked Mr. Johnson why he had filmed the two minors he stated that, "[H]e thought they were 'cute' and that he was curious about what they looked like naked."¹¹⁸ Mr. Johnson even admitted to police, "[M]y pervertedness got the best of me."¹¹⁹ Thus, the Eighth Circuit held a reasonable jury could find that Mr. Johnson intended the videos to be sexual in nature and to elicit a sexual response in the viewer.¹²⁰ The Eighth Circuit Court of Appeals reversed the Judge Dorr and the district court's decision to grant Mr. Johnson's motion for acquittal notwithstanding the verdict.¹²¹

¹¹⁴ *Id.* at 440.

¹¹⁵ *Id.* at 440-41; *Dost*, 636 F. Supp. at 832.

¹¹⁶ *Id.* at 441.

¹¹⁷ *Johnson*, 639 F.3d at 436.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 441; *See Kemmerling*, 285 F.3d at 646 (concluding that the purpose of the pictures, "appear[ed] to be to elicit a sexual response from the viewer. These images were not designed, for instance, to provide a clinical view of the portions of the children's anatomy that are pictured.").

¹²¹ *Id.*

III. 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 gathered extensive criticism regarding its vague terms, its unintentional promotion of sexualizing children, and its misapplication among the courts. According to scholar Steven L. Gras, “To 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.”¹²² The Dost Factor Test, according to Gras, 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.¹²³ Likewise, scholar James E. Bristol opines that child pornography laws, including the Dost Factor Test, rightfully eradicate the abhorrent exploitation of children that originates from the production of “kiddy-porn.”¹²⁴ To Bristol, this test helps to diminish one of society’s worst crimes.¹²⁵ However, many scholars believe the Dost Factor Test consists of vague and confusing language, promotes the sexualization of children, and focuses too heavily on either the content or the context and intent behind the images. Even Bristol claims the Dost Factor Test’s problems of

¹²² Gras, *supra* note 27 at 634.

¹²³ *Id.* at 623; This notion can be seen by the number of cases, which have followed the Dost holding. See e.g. *Wolf*, 890 F.2d at 244-46 (affirming trial court's use of Dost factors in measuring "lasciviousness" of photo of partially nude girl); *United States v. Villard*, 885 F.2d 117, 122 (3d Cir. 1989) (adopting Dost factors to determine whether photos of nude boy are "lascivious" genital exhibition); *United States v. Mr. A*, 756 F. Supp. 326, 328-29 (E.D. Mich. 1991) (using Dost factors to find that genitalia of children were not lasciviously exhibited in photos taken by parents).

¹²⁴ Bristol, *supra* note 1 at 336, 48 (explaining “Kiddy Porn” consists of motion pictures depicting sex crimes perpetrated against real children.)

¹²⁵ *Id.*

visual interpretation, law application, and product accessibility allow motion pictures with illegal depictions of children to enter the marketplace unnoticed.¹²⁶ Judges and jurors who apply this test are often left wondering what exactly it is they are supposed to interpret.¹²⁷ 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 to apply.

A. Vagueness and Discrepancy in the Application of 18 U.S.C. § 2256, § 2251 and the Dost Factor Test

Scholars have criticized the United States's anti-child pornography laws, including 18 U.S.C. § 2251, § 2256 (specifically the term "lascivious"), and the Dost Factor Test due to their vagueness and differences in interpretation. For instance, according to 18 U.S.C. § 2256, child pornography is defined as "any visual depiction ... of sexually explicit conduct involving a minor."¹²⁸ However, legal scholar Allison Cochran explains this language leaves a lot of grey area.¹²⁹ Because this definition requires the depicted minor to be engaged in sexual activity, Cochran asks, "What about a minor just standing in a picture in their underclothes or even naked?"¹³⁰ Is that really 'sexually explicit?'"¹³¹ Cochran also asks, "What about one teen taking a picture of themselves engaged in some sort of sexual activity, then they send it out to their friends or post it on a blog, are they guilty of child pornography?"¹³² Clearly, § 2256 lacks any indication of how the courts should interpret its language.

¹²⁶ *Id.* at 363, 55.

¹²⁷ *Id.*

¹²⁸ 18 U.S.C. § 2256.

¹²⁹ Cochran, *supra* note 4; § 2256.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

Critics also find § 2251 problematic because it is unclear what the term “lascivious” under § 2256 describes, resulting in the inconsistent application of § 2251 against alleged offenders. As Bristol explains, photographs of nude, partially nude, or fully clothed children create quasi-legal scenarios, with the deciding factor being whether a child’s body was portrayed with lascivious intent.¹³³ However, Bristol raises the question of what, exactly, “lascivious” describes.¹³⁴ To Bristol the word “lascivious” could describe the child, the child’s act, the filmmaker’s intent, or even the viewer’s reaction.¹³⁵ Even worse, the circuit courts’ inconsistent applications of § 2251 and the term “lascivious” offer little guidance into the meaning of the statute. For example, Bristol notes the court in *United States v. Kimmerling* ruled a picture is “lascivious” only when it is sexual in nature.¹³⁶ Thus, § 2251 is violated when a picture illustrates a child nude, partially clothed, or when the focus of the image is the child’s pubic area.¹³⁷ However, Bristol also notes in *New York v. Ferber*, the Supreme Court took a different stance, holding that images must “visually depict sexual conduct by children” in order to be “lascivious,” and prohibited under § 2251.¹³⁸ In *United States v. Knox*, Solicitor General Drew Days made a similar argument, claiming “lascivious” must mean that the child is depicted as lasciviously engaging in sexual conduct.¹³⁹ Adding even further discrepancy, the Third Circuit disagreed with Days, holding “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.¹⁴⁰ Bristol demonstrates that in applying § 2251 one is left to ponder whether “lascivious” describes the

¹³³ Bristol, *supra* note 1 at 351; *Massachusetts v. Oakes*, 491 U.S. 576, 583 (1983).

¹³⁴ *Id.* at 353-54; *Dost*, 636 F. Supp. at 832; *aff’d* *United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987).

¹³⁵ *Id.* at 354.

¹³⁶ *Johnson*, 639 F.3d at 440; *Kemmerling*, 285 F.3d at 646.

¹³⁷ *Id.*

¹³⁸ Bristol, *supra* at note 1 at 353-54; *New York v. Ferber*, U.S. 747, 764 (1982).

¹³⁹ Adler, *supra* note 16 at 954 (2001); Brief for the United States at 9, *Knox v. United States*, 510 U.S. 939 (1995) (No. 92-1183).

¹⁴⁰ Adler, *supra* note 16 at 954; *Knox*, 32 F.3d at 747.

child (as held in *Kimmerling*), the conduct of the child (as held in *Ferber* and argued by Days in *Knox*), or the filmmaker's intent (as held in *Knox*).¹⁴¹ Such inconsistencies among the courts in defining "lasciviousness" demonstrate the need for the circuits to adopt a more cohesive and reliable standard for proscribing child pornography and finding persons guilty under § 2251.

Finally, the Dost Factor Test's vague terms, coupled with each trier of fact's unique life experiences, make it nearly impossible to create a universal fact intensive test for lascivious images. Bristol raises the question; can a depiction be lascivious based upon the factors outlined in *United States v. Dost*?¹⁴² According to scholar Anne Higonnet, this question cannot be answered, because ineffective word choice within the Dost Factor Test allows interpretations of the word "lascivious" to shift.¹⁴³ For example, Bristol asks, what are the precise meanings of the Dost Factor Test's terms, "sexually suggestive," "sexual coyness," and "designed to elicit sexual response in the viewer?"¹⁴⁴ Because such terms are open to multiple interpretations by the courts, it is no wonder the district court and court of appeals in *United States v. Johnson* drew such different conclusions regarding the lasciviousness of Mr. Johnson's videos.

In addition, the application of the Dost Test Factors may differ based upon a juror's unique life experiences. As Bristol opines, while some laws enjoy clarity and precision, interpreting images of children may never be ascribed these attributes.¹⁴⁵ Whether a filmmaker, the public, or triers-of-fact, each individual will interpret from a *sitz im leben*, or a situation in life.¹⁴⁶ Characteristics including cultural values, education, tolerance levels, politics, and

¹⁴¹ Bristol, *supra* note 1 at 353-54.

¹⁴² Bristol, *supra* note 1 at 353-54; *Dost*, 636 F. Supp.at 832; *affd Wiegand*, 812 F.2d 1239.

¹⁴³ *Id.* at 355; Higonnet, *supra* note 13 at 160-61.

¹⁴⁴ *Id.*; *Dost*, 636 F. Supp.at 832.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 355.

religious beliefs will only complicate one's interpretation.¹⁴⁷ 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 (start here)

Many scholars find the Dost Factor Test ineffective because society embraces the sexualization of children in the marketplace and the Dost Factor Test itself encourages the sexualization of children. First, scholars claim the sexualization of children in society makes it difficult to determine an objective test that can differentiate between lascivious and non-lascivious content involving children. As Anne Higonnet opines, "[E]roticism 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."¹⁴⁸ Higonnet asserts that children's bodies advertise a plethora of society's products, including swimsuits, fragrances, clothing, electronics, and other commodities.¹⁴⁹ Reason being, as Higonnet explains, "[E]very industry based on the display of adult bodies spawns a juvenile counterpart."¹⁵⁰ 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.¹⁵¹ In another example of sexualizing children, Bristol describes how southern United States citizens are infatuated with child beauty pageants.¹⁵² Bristol states, "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

¹⁴⁷ Bristol, *supra* note 1 at 355.

¹⁴⁸ *Id.* at 364; Higonnet, *supra* note 13 at 153.

¹⁴⁹ *Id.* at 363; *Id.* at 144.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 364.

¹⁵² Bristol, *supra* note 1 at 365; See generally, C. Calvert, *The Perplexing Problem of Child Modeling Web Sites: Quasi-Child Pornography and Calls for New Legislation*, CAL. W. L. REV. 231 (2004).

gown.”¹⁵³ 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.¹⁵⁴

Second, several critics claim the Dost Factor Test itself contributes to the sexualization of children. According to scholar Amy 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.’”¹⁵⁵ Essentially, the court or juror 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.¹⁵⁶ To Adler, this requirement under the Dost Factor Test creates the daunting interpretive difficulty for society to ascertain a pedophile’s exact intent, even the intent of a necrophilic.¹⁵⁷ For example, Scholar Robert J. Danay illustrates how the Third Circuit Court of Appeals in *United States v. Knox* used its own pedophilic gaze to hold that an image could constitute “lascivious exhibition of the genitals” even if the child wore clothes.¹⁵⁸ 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 reveal a picture’s sexually stimulating nature.¹⁵⁹ To Danay, this test wrongfully places a “sexual child on public display while simultaneously condemning those who view children in such a manner.”¹⁶⁰ Through cases such as *Knox* and *Dost*, Danay states, the American courts have become “unwitting cultural conduits

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 356.

¹⁵⁵ Adler, *supra* note 16 at 954; *Wiegand*, 812 F.2d at 1244 (emphasis added).

¹⁵⁶ *Id.*; Danay, *supra* note 14 at 154; Amy Adler *The Perverse Law Of Child Pornography*, 101 COLUM. L. REV. 209, 213 (2001).

¹⁵⁷ Adler, *supra* note 16 at 955; *Foster v. Virginia*, No. 0369-87-2, 1989 WL 641956, at 4 (Va. Ct. App. Nov. 21, 1989). The court in *Foster v. Virginia* urged the jury to ascertain the intent of a man accused of committing necrophilia against children.

¹⁵⁸ Danay, *supra* note 14 at 155; *Knox*, 32 F.3d at 744.

¹⁵⁹ *Id.* at 155-56.

¹⁶⁰ *Id.*

and amplifiers,” to the concept of children being sexual objects.¹⁶¹ Thus, to Danay, this flawed process of extinguishing child pornography is part of the reason society can never fully eliminate the problem of child pornography.¹⁶²

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 or the intent and context of the 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 Factors in their analysis fail to consider the pedophile who fulfills his perverse intentions with innocuous images of minors. For example, Adler explains the Third Circuit Court of Appeals misapplied the Dost Factor Test in *United State v. Villard* by holding that child pornography inheres in a photo.¹⁶³ 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, because “a deviant's subjective response could turn innocuous images into pornography.”¹⁶⁴ However, scholars find a problem with this approach. As Danay explains, the sexual naïveté of a depicted child could *be* the arousing factor for pedophiles.¹⁶⁵ For example, according to Danay, “a recent survey involving members of the North American Man Boy Love Association (NAMBLA), an organization for pedophiles, revealed that its members derived erotic stimulation through watching ‘children on network television, the Disney Channel, and mainstream films.’”¹⁶⁶ Such evidence illustrates the limited scope a “content only” application of the Dost Factor Test has in

¹⁶¹ *Id.* at 156.

¹⁶² *Id.* at 168; *see* The History of Sexuality: An Introduction, Vol. 1, trans. by Robert Hurley 264 (New York: Vintage Books, 1990) [Foucault].

¹⁶³ Adler, *supra* note 16 at 957; *Villard*, 885 F.2d 117).

¹⁶⁴ *Id.* at 958; *United States v. Amirault*, 173 F.3d 28, 34 (1st Cir. 1999).

¹⁶⁵ Danay, *supra* note 14 at 157; *see* Kincaid, *supra* note 15 at 115.

¹⁶⁶ *Id.* at 157; *see id.*

prosecuting those with perverse intentions against children.

On the other hand, there are scholars claiming judges and/or juries that focus too heavily on intent or context based Dost Factors wrongfully disregard the content of the image, embrace society's captivation of naked children, and rule from the perspective of the pedophile. First, Bristol notes that there is a trend for grand juries and courts to not seem bothered by the actual content of the photos.¹⁶⁷ In fact, nude portrayals of children date back to the classics age, where children were depicted in Greek statues and Renaissance paintings.¹⁶⁸ According to Bristol, "[P]eople are not bothered [by the content of such images] because they've been fascinated by the content for centuries."¹⁶⁹ Second, as Adler explains, child pornography laws focus on the perspective of the pedophile, which can be problematic, because pedophiles can have many preferences and not all child nudity is the same.¹⁷⁰ For example, in *United States v. Moore*, the Seventh Circuit Court of Appeals analyzed photographs of two young boys naked in the Australian wilderness.¹⁷¹ One photograph depicted a boy walking across a stream, while the other showed a boy climbing a tree.¹⁷² Although the court found that neither photo "appears to depict sexual activity or sexuality," the court still concluded that the pictures seemed "designed to provoke a sexual response."¹⁷³ Using this case, Adler asserts that when viewed from the

¹⁶⁷ Bristol, *supra* note 1 at 358 (2007); *United States v. Various Articles of Merchandise, Schedule 230* F.3d 649, 651 (3d. Cir. 2000) (explaining Despite Bristol's indication that the image could have fulfilled the Dost Factor of sexual coyness, the image escaped prosecution. McBride's image shows Uli Hager as a young boy with his genitalia exposed, as if contemplating the viewer will follow him into the dark room beyond the door he leans upon..)

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Adler, *supra* note 16 at 958.

¹⁷¹ *Id.* at 360; *Moore*, 215 F.3d at 687 (explaining question before the court was whether the photos provided probable cause for an arrest on child pornography charges.)

¹⁷² *Id.*

¹⁷³ *Id.*

perspective of pedophiles, all photos of children could be erotic in one way or another.¹⁷⁴ Thus, an intent centered application of the Dost Factor Test can lead to an exclusion of images that would not be considered lascivious had each image's content also been reviewed.

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

While scholars have proposed a “harm analysis” test and an “incitement” test to reform America’s anti child pornography laws, each proposed remedy is an unrealistic suggestion to fix the current problems of America’s child pornography laws. Under the first suggested reform, the “harm analysis” test, scholar Bruce Ryder recommends prohibiting the possession of materials containing images of children if the images caused “harm” to children in their production.¹⁷⁵ Under this approach, child pornography should be limited to materials where children engage in “explicit sex acts.”¹⁷⁶ Ryder opines this “harm analysis” test would refocus judicial attention, not on hidden prurient qualities inherent in particular impugned materials, but on the express advocacy of harm, sexual or otherwise, to children.¹⁷⁷ Proponents also assert this reform 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 can be pursued.¹⁷⁸ However, critics of the “harm analysis” test such as scholar James Marsh stress that this reform disregards the concept that child pornography in and of itself causes personal injury to the child involved.¹⁷⁹ For example, the court in *New York v. Ferber* noted, “A child who has posed for a camera must go through life knowing that the recording is circulating within the mass

¹⁷⁴ *Id.*

¹⁷⁵ Robert J. Danay, *supra* note 14 at 186; Bruce Ryder, “The Harms of Child Pornography Law” (2003) 36 UNIV. OF BRITISH COLUMBIA LAW REV. 101 at 114. [Ryder].

¹⁷⁶ *Id.* at 186.

¹⁷⁷ *Id.* at 187.

¹⁷⁸ *Id.* at 187-88; [2001] 1 S.C.R. 45 [Sharpe] at 83-84.

¹⁷⁹ James R. Marsh, *Predators, Porn & the Law: America’s Children in the Internet Era: Marsha’s Law: A Federal Civil Remedy for Child Pornography Victims* 61 SYRACUSE L. REV. 459, 495 (2011).

distribution system for child pornography.”¹⁸⁰ According to the Supreme Court, the fear of exposure and the tension of keeping the images secret have profound emotional repercussions upon children.¹⁸¹ Moreover, scholar Debra Burke states 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.¹⁸² Under Ryder’s proposed test, pedophiles would be allowed to keep for their own perversion images that fall short of causing what Ryder defines as “harm” to children.

Under the second suggested reform, the “incitement” test, Burke calls for courts to evaluate the context of a situation in order to determine if an incitement to imminent lawless activity exists (similar to Justice Brandenburg’s incitement formula).¹⁸³ Explaining the proposed incitement test, Burke states “[W]hile 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 this approach does not fix all of the child pornography law issues.¹⁸⁵ Burke explains that under the

¹⁸⁰ *New York*, 458 U.S. at 760.

¹⁸¹ *Id.*

¹⁸² Debra D. Burke: *Thinking outside the box: Child Pornography, Obscenity, and the Constitution*, VA. J. L. & TECH. 43 (2003); Ann Wolbert Burgess, *Child Pornography and Sex Rings* 86-87 (1984); (discussing the use of child pornography and erotica by pedophiles); Vernon L. Quinsey & Martin L. Lalumiere, *Assessment of Sexual Offenders Against Children* 15 (1996) (explaining few areas of research on human sexual behaviors have produced more consistent results than the fact that child molesters are more sexually aroused than normal males to pictures and descriptions of sexual activities and children relative to similar stimuli involving adults).

¹⁸³ *Id.* at 46; see Eric M. Freedman, *A Lot More Comes into Focus When You Remove the Lens Cap: Why Proliferating New Communications Technologies Make it Particularly Urgent for the Supreme Court to Abandon its Inside-Out Approach to Freedom of Speech and Bring Obscenity, Fighting Words, and Group Libel Within the First Amendment*, 81 IOWA L. REV. 883, 908 (1996) (discussing the importance of the setting as well as the recipients of the message in evaluating the propensity of the speech to incite); see also *James v. Meow Media*, 300 F.3d 683, 696 (6th Cir. 2002) (“The protections of the First Amendment have always adapted to the audience intended for the speech”).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

incitement test, “there is still no controlling for pedophiles, who are aroused by the photos of children clad in underwear in clothing catalogues.”¹⁸⁶ Even more, the creation of virtual child pornography has only blurred the line dividing protected free speech and permissible regulation.¹⁸⁷ Today’s circuits are split on whether virtual child pornography is merely an innocuous invention of the mind or a real threat to the safety and security of a child.¹⁸⁸ Thus, the implementation of an incitement test, similar to that suggested by Justice Brandenburg in defining obscenity, may not be enough to quash the ever-expanding world of child pornography.

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

A. The Western District of Missouri and Eighth Circuit’s Misapplication of the Dost Factor Test in *United States v. Johnson*

The misapplication of the Dost Factor Test by favoring only content based factors or only intent and context based factors has lead to discrepancies among the different circuits. 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 Dost Factor Test analysis upon the content of the images, thus overturning the jury’s conviction of Mr. Johnson on all eight violations of § 2251.¹⁸⁹ However, Judge Hanson and the court of appeals explains that while nearly all the videos of the victims did not film a child’s pubic region, such images would have been captured on film if the child had merely turned to face the camera.¹⁹⁰ Based on the camera’s angle and testimony of Mr. Johnson, Judge Hanson

¹⁸⁶ *Id.* at 46–47.

¹⁸⁷ Burke, *supra* note 183 at 47.

¹⁸⁸ *Id.* at 3.

¹⁸⁹ See generally, *Johnson*, 733 F. Supp. 2d 1089.

¹⁹⁰ See generally, *Johnson* 639 F.3d 433.

opined that the defendant's sexual intent made the images lascivious, even if the images were unable to meet certain content based factors.

B. The New Dost Factor Test Would Require Both the Content of an Image and Context in Which the Image was Created to be Assessed in Determining Lasciviousness

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 context based Dost Factors be analyzed and present in order to proscribe an image under §2251. This new provision to the current Dost Factor Test will accomplish three goals. First it will insulate the Dost Factor Test analysis from the emotions of jurors and judges, who wish to apply only those factors that suit their predispositions. Second, the new Dost Factor Test will remain organic as technology and child pornography change over time. Third, it will allow courts to form distinct categories of images that are lascivious and proscribed 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. Requiring that both the content and context of each image be analyzed and that both content and context based factors be present for an image to be lascivious will restrict a judge or juror from applying only those factors that suit his or her feelings toward the defendant. Had these amendments existed during *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 angle and testimony), but also that the image contained proscribed content. Despite these new requirements creating a higher standard for prosecution, 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 context 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 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 being applied to analyze the potential lasciviousness of an image, the content based factors of "sexual coyness" or "sexually suggestive" 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" will be allowed to change as America's culture changes. The new Dost Factor Test will never be outdated to assess potentially lascivious images. Even more, the new Dost Factor Test's adaptability will allow it to be applicable to new technology, such as virtual child pornography. Finally, the current Dost Factor test is non-exhaustive, with judges free to add and eliminate factors in their analysis, as they deem necessary.¹⁹¹ This principle would remain intact under the new Dost Factor Test. However, under the new rule, there must always remain a balance between factors analyzing the content and factors analyzing the context of the images.

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 lead to inconsistent rulings, as seen in *United States v. Johnson*. Such

¹⁹¹ *Johnson*, 733 F. Supp. 2d at 1094, citing *Dost*, 636 F. Supp. 828.

decisions keep the public from understanding the meaning of “lascivious” and thus, understanding what types of images constitute sexually explicit conduct under § 2251. However, with the circuit’s consistent implementation of a set of both context and content-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.

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.