CHANGING FACES: MORPHED CHILD PORNOGRAPHY IMAGES AND THE FIRST AMENDMENT

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ABSTRACT

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

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

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

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

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INTRODUCTION

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

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

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

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2 See, e.g., United States v. Hotaling, 634 F.3d 725, 727 (2d Cir. 2011) (describing how one defendant created morphed images).
4 Id. at 258.
5 Hotaling, 634 F.3d at 730.
6 Id.
8 4 IAN C. BALLON, E-COMMERCE AND INTERNET LAW § 40.01[2] (2017) (“Unlike computer-created images or depictions of adults altered to appear to be child pornography, at least one court has held that a morphed depiction of actual children (in this case, an identifiable child’s face superimposed on the body of a young naked boy in a suggestive pose) was not protected by the First Amendment and could serve as the basis for a child pornography possession conviction under the CPPA.”) (citing United States v. Bach, 400 F.3d 622 (8th Cir.), cert. denied, 546 U.S. 901 (2005)).
9 Sharon Kirkey, Do You Know Where Your Child’s Image Is? Pedophiles Sharing Photos from Parents’...
pictures in a variety of ways, and images that may not appear prurient to the average viewer might elicit an unexpected and inappropriate response if viewed by a pedophile or someone with pedophilic interests. Unbeknownst to parents, viewers can save their children’s images and later use them to create morphed child pornography. While there is limited data reflecting how common this practice is, Canadian law enforcement officers report that this practice is worrisome to their department. Moreover, the Australian Children’s eSafety Commissioner reported that about 50% of all images on one pedophile image-sharing site with at least forty-five million images originated on social media and family blogs.

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

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


Id.

Id.

Id.


Kirkey, supra note 9 (“Pictures of children doing perfectly normal things—a snapshot of a child at a gymnastics performance, a toddler playing with a Tonka truck—have been stolen and implanted on child sexual abuse imagery sites, pedophile photo-sharing galleries and highly sexualized ‘child modeling’ websites, says the head of Canada’s national tip line for online child pornography.”).
I. CHILD PORNOGRAPHY AND THE FIRST AMENDMENT

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

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

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

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18 458 U.S. 747.
19 Id. at 752.
20 Id.
21 N.Y. PENAL LAW § 263.15 (McKinney 2017).
22 Ferber, 458 U.S. at 760–61 (“Respondent does not contend that the State is unjustified in pursuing those who distribute child pornography. Rather, he argues that it is enough for the State to prohibit the distribution of materials that are legally obscene under the Miller test. While some States may find that this approach properly accommodates its interests, it does not follow that the First Amendment prohibits a State from going further. The Miller standard, like all general definitions of what may be banned as obscene, does not reflect the State’s particular and more compelling interest in prosecuting those who promote the sexual exploitation of children.”).
23 Id. at 757–58.
an interest in protecting children from the harm these images cause and that this interest outweighed the defendant’s right to free speech.\textsuperscript{24}

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

The Court expanded the child pornography exception to the First Amendment in 1990.\textsuperscript{31} In \textit{Osborne v. Ohio},\textsuperscript{32} a defendant was convicted of possessing images of nude adolescent boys in “sexually explicit position[s].”\textsuperscript{33} Unlike \textit{Ferber}, where the defendant was convicted for distributing pornographic images,\textsuperscript{34} the defendant in \textit{Osborne} was viewing images in his own home.\textsuperscript{35} The

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

\textsuperscript{25} \textit{Id.} at 758 & n.9.

\textsuperscript{26} \textit{Id.} at 758.

\textsuperscript{27} \textit{Id.} at 759.

\textsuperscript{28} \textit{Id.} at 761.

\textsuperscript{29} \textit{Id.} at 762.

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


\textsuperscript{32} \textit{Id.}

\textsuperscript{33} \textit{Id.} at 107.

\textsuperscript{34} \textit{Ferber}, 458 U.S. at 751–52.

\textsuperscript{35} \textit{Osborne}, 495 U.S. at 107.
case suggests that the defendant did not create the images, nor did he offer the images for sale to a third party. The Court relied on the earlier Ferber decision, noting that the state has a strong interest in protecting “the physiological, emotional, and mental health” of children. Along with this harm, the Court held that “[i]t is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand.” The Osborne Court identified additional grounds for upholding the conviction, many rooted in the Ferber decision. It rested part of its holding on the harm caused by the circulation of the image, noting that “[t]he pornography’s continued existence causes the child victims continuing harm by haunting the children in years to come.” Lastly, the Osborne Court identified a new ground for excluding child pornography from the protection of the First Amendment, recognizing that pedophiles use pornographic images “to seduce other children into sexual activity.”

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

Shortly after the Osborne decision, those seeking to end the creation, distribution, and possession of child pornography faced a new challenge. Technology was advancing, and pedophiles were finding new ways to create images depicting the sexual abuse of children. Considering these advancements, Congress set out to address the changing face of child pornography. It did so through the enactment of the Child Pornography Prevention Act of 1996 (CPPA).
Through the enactment of the CPPA, Congress attempted to broaden the definition of child pornography. While federal law previously designated only actual images of children engaged in pornographic acts as constituting the criminal offense of child pornography, the CPPA expanded on the definition of child pornography to include “any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture” that is, or appears to be, of “a minor engaging in sexually explicit conduct” and any sexually explicit image that is “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression” it depicts “a minor engaging in sexually explicit conduct.”

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

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

Congress also noted that pedophiles often use child pornography “to stimulate and whet their own sexual appetites.” These significant concerns, Congress noted, are not diminished simply because an image is virtual. While no child is harmed in the creation of such an image, Congress was concerned...
that children might be harmed in the future as a result of the image’s circulation.53

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

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

53 See id.
55 Id. at 236 (“In contrast to the speech in Ferber, speech that is itself the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production.”).
56 See generally id.
57 Id. at 240; id. at 261 (O’Connor, J., concurring in part and dissenting in part) (citing 18 U.S.C. § 2256(8)(B) (2000)).
58 Id. at 240 (majority opinion); id. at 261 (O’Connor, J., concurring in part and dissenting in part) (citing 18 U.S.C. § 2256(8)(B)).
59 Id. at 264 (O’Connor, J., concurring in part and dissenting in part).
60 Id. at 242 (majority opinion).
61 Id. at 244–45.
62 Id. at 245.
63 Id. (“The prospect of crime, however, by itself does not justify laws suppressing protected speech.”) (citing Kingsley Int’l Pictures Corp. v. Regents of Univ. of N.Y., 360 U.S. 684, 689 (1959)).
Thus, without actual children depicted in the images, the Free Speech Coalition successfully argued that *Ferber’s* justification for excluding child pornography from the First Amendment’s protection was inapplicable in virtual child pornography cases.64 The Court agreed, holding that the language of the CPPA, making it unlawful to possess any images that seem to depict an actual child engaged in sexually explicit activity, was too broad.65

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

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

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

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64 See id. at 250–51.
65 Id. at 258. The Court pointed out that in its earlier case of *New York v. Ferber*, its “judgment about child pornography was based upon how it was made, not on what it communicated.” Id. at 250–51.
66 Id. at 246.
68 Free Speech Coal., 535 U.S. at 246 (citing *Miller*, 413 U.S. at 24).
69 Id. at 247–48 (“Both themes—teenage sexual activity and the sexual abuse of children—have inspired countless literary works. William Shakespeare created the most famous pair of teenage lovers, one of whom is just 13 years of age. . . . Contemporary movies pursue similar themes. Last year’s Academy Awards featured the movie, *Traffic*, which was nominated for Best Picture. . . . The film also contains a scene where, although the movie audience understands the act is not taking place, one character believes he is watching a teenage boy performing a sexual act on an older man. Our society, like other cultures, has empathy and enduring fascination with the lives and destinies of the young. Art and literature express the vital interest we all have in the formative years we ourselves once knew, when wounds can be so grievous, disappointment so profound, and mistaken choices so tragic, but when moral acts and self-fulfillment are still in reach. Whether or not the films we mention violate the CPPA, they explore themes within the wide sweep of the statute’s prohibitions. If these films, or hundreds of others of lesser note that explore those subjects, contain a single graphic depiction of sexual activity within the statutory definition, the possessor of the film would be subject to severe punishment without inquiry into the work’s redeeming value.” (citations omitted)).
70 Id. at 248.
71 Id. at 242 (finding the “[r]espondents [did] not challenge” the provision that the images fell “within the definition of virtual child pornography” and thus the Court need not consider the issue).
sexual activity, do not necessarily harm a child in their creation. Many of the actual children in these images were never photographed for pornographic purposes. They were often not posed in a sexualized manner. In fact, these images are often “innocent” and can be found all over the Internet. While some pedophiles use photos of children they know from their own lives, others find images to morph on social media and other websites.

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

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

advertises, promotes, presents, distributes, or solicits . . . any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe [it is] . . . an obscene visual depiction of a minor engaging in sexually explicit conduct; or . . . a visual depiction of an actual minor engaging in sexually explicit conduct.

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

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72 Kirkey, supra note 9.
74 See Kirkey, supra note 9.
75 Id.
76 Id.
77 Id. The images pedophiles find sometimes originate on a parent’s social media feed or on a family blog. Id.
79 Id. at 256.
80 See id. at 242.
81 Id. at 234.
Moreover, under the Act, a state no longer needed to prove that a defendant ever had an image depicting actual child pornography in his possession. Instead, the Act criminalized the solicitation of such material, regardless of whether the material was ever in the possession of a charged defendant. By enacting this legislation, Congress attempted to close the loopholes the Court’s decision left open.

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

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

A. Federal Court Cases Involving Morphed Child Pornography

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

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84 See id.
85 See United States v. Williams, 553 U.S. 285, 293 (2008) (“The statute does not require the actual existence of child pornography. In this respect, it differs from the statutes in Ferber, Osborne, and Free Speech Coalition, which prohibited the possession or distribution of child pornography. Rather than targeting the underlying material, this statute bans the collateral speech that introduces such material into the child-pornography distribution network.”).
86 Id. at 288.
87 See id. at 289–90.
89 See Boland, 698 F.3d 877; Hotaling, 634 F.3d 725; United States v. Bach, 400 F.3d 622 (8th Cir. 2005).
90 See Boland, 698 F.3d at 884 (citing Hotaling, 634 F.3d at 729; Bach, 400 F.3d at 622).
In protecting children from harm was significant enough to overcome such a challenge.91

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

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

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

91 Id.
92 634 F.3d 725.
93 Id. at 727.
94 Id. at 729.
95 Id.
96 Id. at 729–30.
97 Id. at 730.
98 Id.
99 Id.
100 Id.
101 Id.
102 Id. at 727 (describing how the defendant indexed, labeled, and encoded the photos into files in HTML, a format commonly used to post items on the Internet).
URLs and were encoded in HTML. \footnote{103} “[T]he HTML images were titled ‘[Jane Doe] Upstate NY’s Hottest Teen’ and bore the actual first name of the minor depicted” in the image. \footnote{104}

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

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

The victims and their guardians in Boland sought to recover damages against a convicted defendant who morphed their children’s heads onto pornographic images. \footnote{112} Boland, the defendant, morphed the images in preparation for a child
pornography trial in which he was expected to be called as an expert.\textsuperscript{113} His goal was to show the jury that it is impossible to differentiate real child pornography from fake imagery.\textsuperscript{114} In preparing for trial, the court explained, “Boland created lasting images of Doe and Roe, two identifiable children, purporting to engage in sexually explicit activity.”\textsuperscript{115}

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

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

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\item \footnote{113} Id. at 879.
\item \footnote{114} Id. at 880.
\item \footnote{115} Id.
\item \footnote{116} Id. at 880–81.
\item \footnote{117} Id. at 883 (noting a free speech challenge to actual child pornography can be easily rejected and asking, “what of morphed images like the ones Boland created?”).
\item \footnote{118} Id.
\item \footnote{119} See id. at 884.
\item \footnote{120} Id.
\item \footnote{121} Id. (citing Osborne v. Ohio, 495 U.S. 103, 111 (1990)). Similarly, the Bankruptcy Appellate Panel of the Sixth Circuit recently held that Boland could not discharge his debt to his victims because had an intent to injure the children depicted in the morphed child pornography he created. \textit{In re} Boland, No 17-8019, 2019 WL 580720 (B.A.P. 6th Cir. Feb. 13, 2019). One cannot discharge damage awards for willful or malicious injuries in bankruptcy, so the question in the case was whether the creation of these images met the requisite scienter. Id. at *5. The court looked to the injury to the children and concluded that Boland’s intent to invade their “legally protected interests in their reputation, emotional well-being and right to privacy” established that Boland’s conduct was willful. Id. at *12–14.
\item \footnote{122} Boland, 698 F.3d at 884 (citing United States v. Hotaling, 634 F.3d 725, 730 (2d Cir. 2011)).
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\end{footnotesize}
B. State Court Cases Involving Morphed Child Pornography

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

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

Congress enacted child pornography legislation three times, in 1994, 1996, and 2003; each time it broadened the definition of child pornography. Section 827.071(5) requires that actual children engage in sexual conduct. As the federal experience reflects, if our legislature
wants to follow Congress’s example and prohibit the possession of the types of photographs involved here, we are confident that it can, and perhaps should, craft an appropriate statute.\textsuperscript{131}

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

In New Hampshire, the state supreme court also held that the state child pornography statute did not cover morphed child pornography.\textsuperscript{136} The defendant in \textit{State v. Zidel} was charged with the possession of child pornography\textsuperscript{137} after he morphed images of innocent children\textsuperscript{138} with images of naked adults.\textsuperscript{139} The defendant lawfully possessed the innocent images of the children, as he took them himself in his role as photographer of a camp.\textsuperscript{140} Zidel did not intend to share the images.\textsuperscript{141} Instead, he accidentally included them on a disc presented to the camp director at the end of the summer.\textsuperscript{142}

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

\begin{itemize}
\item \textsuperscript{131} Id. at 457 (emphasis added).
\item \textsuperscript{132} H.R. 7017, 2018 Leg., Reg. Sess. (Fla. 2018); see FLA. STAT. ANN. § 847.001–.202.
\item \textsuperscript{133} H.R. 7017, 2018 Leg., Reg. Sess. (Fla. 2018).
\item \textsuperscript{134} Id.
\item \textsuperscript{136} State v. Zidel, 940 A.2d 255, 265 (N.H. 2008).
\item \textsuperscript{137} Id. at 256.
\item \textsuperscript{138} Id.
\item \textsuperscript{139} Id.
\item \textsuperscript{140} See id.
\item \textsuperscript{141} See id.
\item \textsuperscript{142} Id.; see also Brief for the Defendant at 3, \textit{Zidel}, 940 A.2d 255 (No. 2006-0549).
\item \textsuperscript{143} N.H. REV. STAT. ANN. § 649-A:3 (West 2018); \textit{Zidel}, 940 A.2d at 256–57 (quoting N.H. REV. STAT. ANN. § 649-A:3).
\end{itemize}
real.” The Supreme Court of New Hampshire agreed, holding that these morphed, or composite, images did not constitute child pornography under the state statute.

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

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

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144 Zidel, 940 A.2d. at 256.
145 For the purposes of this Article, morphed and composite images represent the same thing—images created by combining portions of a real child’s image with portions of an adult or virtual image.
146 Zidel, 940 A.2d. at 263.
147 Compare id. at 265 (determining that the application of the state statute to the defendant’s conduct violated the defendant’s First Amendment right to free speech), with Parker v. State, 81 So. 3d 451, 457 (Fla. Dist. Ct. App. 2011) (“Although the parties urge us to consider the First Amendment ramifications of section 827.071, we confine our analysis to the statutory language.”).
148 Zidel, 940 A.2d at 265.
149 Id. at 262–63 (citing New York v. Ferber, 458 U.S. 747, 756–57 (1982)); see also Osborne v. Ohio, 495 U.S. 103, 109, 111 (1990) (extending the holding in Ferber to allow states to prohibit even the mere possession of child pornography to protect the victims and destroy the market for such acts).
150 Zidel, 940 A.2d at 262 (citing N.H. REV. STAT. ANN. § 649-A:1 (2007)) (“The legislature finds that there has been a proliferation of exploitation of children through their use as subjects in sexual performances. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children. The public policy of the statute demands the protection of children from exploitation through sexual performances. . . . In accordance with the United States Supreme Court’s decision in New York v. Ferber, this chapter makes the dissemination of visual representations of children under the age of 16 engaged in sexual activity illegal irrespective of whether the visual representations are legally obscene.”); see also Parker, 81 So. 3d at 457 (finding Florida’s child pornography statute does not allow prosecution for morphed images).
152 Zidel, 940 A.2d at 263.
The state argued that morphed images like those at issue in the *Zidel* case constituted unprotected speech.\(^{153}\) The court noted that in *Osborne*, the Court’s desire to protect children seemed broader than solely protecting children from sexual abuse.\(^{154}\) The court considered *Osborne’s* finding that “‘penaliz[ing] those who possess and view’ child pornography will decrease its production, ‘thereby decreasing demand.’”\(^{155}\) The court even discussed *Osborne’s* finding that many sexual predators use child pornography to convince other children to engage in illicit and illegal acts.\(^{156}\) However, the New Hampshire Supreme Court held that Zidel’s conduct was protected under the First Amendment.\(^{157}\)

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

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

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\(^{153}\) *Id.* at 262.

\(^{154}\) See *id.* at 264.

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

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

\(^{157}\) *Id.* at 265.

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

\(^{159}\) *Bach*, 400 F.3d at 625.

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

\(^{161}\) *Zidel*, 940 A.2d at 264–65.

\(^{162}\) *Id.* at 265.

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

\(^{164}\) *Zidel*, 940 A.2d at 265.

\(^{165}\) See discussion supra Section II.A.
The New Hampshire Supreme Court’s decision in State v. Zidel says nothing to the contrary. That decision invalidated a statute barring possession of morphed images because the state child-pornography laws aimed only to “combat the harm resulting to children from the distribution of depictions of sexual conduct involving live performance[s] or visual reproduction of live performances by children.” A morphed image, the state court reasoned, does not involve a live sexual performance. The federal child-pornography statutes, by contrast, target “computers and computer imaging technology” that can “invade the child’s privacy and reputational interests” by “alter[ing] innocent pictures of children to create visual depictions of those children engaging in sexual conduct.” The legitimate government interest in avoiding “injury to [a] child’s reputation and emotional well-being,” allows Congress to prohibit morphed images.166

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

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

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

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

166 Doe v. Boland, 698 F.3d 877, 884 (6th Cir. 2012) (citations omitted).
167 See also United States v. Stewart, 839 F. Supp. 2d 914, 925 (E.D. Mich. 2012) (“The Sixth Circuit has upheld the criminalization of graphic manipulation of a photograph by a defendant even where a child was not used to create the original images and where there is no explicit evidence of harm to the photographed child.”); United States v. Anderson, No. 4:12CR3083, 2012 WL 6967610, at *6 (D. Neb. Dec. 26, 2012), report and recommendation adopted, No. 4:12-CR-3083, 2013 WL 396014 (D. Neb. Jan. 30, 2013), aff’d, 759 F.3d 891 (8th Cir. 2014) (“Following the reasoning in Bach, Hotaling and Boland, the undersigned magistrate judge finds the morphed image in this case . . . is not protected under the First Amendment. Unlike the allegations in Zidel and Gerber, [the defendant] has been charged with distributing child pornography, implicating associated and foreseeable psychological harm to an identifiable child . . . that may not arise from mere possession of the image.”). See generally Boland, 698 F.3d 877; United States v. Hotaling, 634 F.3d 725 (2d Cir. 2011); Bach, 400 F.3d 622.
168 See, e.g., Carmen M. Cusack, Busting Patriarchal Booby Traps: Why Feminists Fear Minor Distinctions in Child Porn Cases, 39 SOUTHERN U. L. REV. 43, 59 (2011) (“The Gerber court concluded that the altered images were analogous to virtual child pornography, not actual child pornography, since the photo of the child’s face did not evidence the exploitation of a real child who actually engaged in or simulated the sexual
argue that the child pornography exception to the First Amendment is grounded less in the reputational harm a child’s image being shared publicly causes, than in the actual harm creation of the pornographic image itself causes.169 This distinction is important because in today’s digital world, some images do not cause any harm in their creation.170 However, the circulation harm is significant.171

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

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

An individual whose image is morphed with an illicit image and shared as child pornography avoids much of the trauma sexual abuse survivors experience;174 however, as the Second, Sixth, and Eighth Circuit Courts of conduct depicted. The sexually explicit content depicting an adult was neither child pornography nor obscenity. The harm principle, required by the Gerber court and other courts, is the best way for the government to protect children while avoiding the expansion of Williams and treading into anti-woman territory."

169  This is essentially the argument set forth by the Court in Free Speech Coalition. Ashcroft v. Free Speech Coal., 535 U.S. 234, 241 (2002).
170  K i r k e y , supra note 9.
171  As a former Special Victims Unit prosecutor, this Author recognizes that the harm in the creation of a pornographic image of children is distinctive from the harm caused by the circulation of an image depicting child pornography. However, courts should find that this is a distinction without legal significance.
172  See CANADIAN CENTRE FOR CHILD PROTECTION, SURVIVORS’ SURVEY 124 (2017), https://www.protectchildren.ca/app/en/esa_imagery/esa_imagery-survey_results (discussing the harm survivors experience as a result of circulation such as fearing discovery would cause further distribution of their images).
173  CANADIAN CENTRE FOR CHILD PROTECTION, supra note 172, at 265.
174  See id. at 267.
Appeals have explained, morphed child pornography implicates real children and has the potential to cause them reputational and psychological harm.\textsuperscript{175}

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

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

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

\begin{itemize}
\item \textsuperscript{175} \textit{See} discussion \textit{supra} Section II.A.
\item \textsuperscript{176} \textit{Ashcroft v. Free Speech Coal.}, 535 U.S. 234, 252 (2002).
\item \textsuperscript{177} \textit{Id}. at 251.
\item \textsuperscript{179} \textit{Free Speech Coal.}, 535 U.S. at 251–52.
\item \textsuperscript{180} \textit{Id}. (citations omitted).
\item \textsuperscript{181} For an example of law enforcement officers discovering such pornographic pictures on a search warrant, see \textit{McFadden v. State}, 67 So. 3d 169, 174 (Ala. Crim. App. 2010).
\item \textsuperscript{182} \textit{See State v. Zidel}, 940 A.2d 255, 256 (N.H. 2008) (finding the defendant accidentally gave the morphed images away).
\end{itemize}
risk of future circulation of these morphed images is too real and too harmful to ignore.

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

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

\textsuperscript{184} See generally id. (discussing the gendered nature of online harassment and its effect on women).
\textsuperscript{185} Id. at 373.
\textsuperscript{186} Id. at 395 (“Commentators trivialize the harassment of women online by arguing that: (1) it constitutes innocuous teasing, (2) women can address the harassment on their own, and (3) cyber-harassment coheres with the internet’s unique norms.”).
\textsuperscript{187} Id.
\textsuperscript{188} Id. at 396–97.
\textsuperscript{189} Id.
\textsuperscript{190} E.g., FLA. STAT. ANN. § 784.049 (West 2017) (“Sexually cyberharass’ means to publish a sexually explicit image of a person that contains or conveys the personal identification information of the depicted person to an Internet website without the depicted person’s consent, for no legitimate purpose, with the intent of causing substantial emotional distress to the depicted person.”).
\textsuperscript{191} See Citron, \textit{supra} note 183, at 396–97.
false light invasion of privacy.”192 Like revenge porn, a morphed image of a child in and of itself might not physically harm the individual pictured at its creation, but the harm of it being viewed or circulated is prevalent and worrisome.193 However, unlike most adult revenge porn cases, where the adult might have consented to the image’s existence at its creation, young children are unable to give consent to any image taken—innocent or otherwise. A defendant (related or otherwise) should not be able to possess a child’s image if he has ill intent with regard to how that image will be treated.194

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

192 Hessick, supra note 73, at 1478 (“The conceptual foundation of this harm relies on the distribution of an image to other individuals, just as reputation and privacy torts require publication.”).
193 See id. at 1478–81.
194 See Layla Goldnick, Note, Coddling the Internet: How the CDA Exacerbates the Proliferation of Revenge Porn and Prevents a Meaningful Remedy for Its Victims, 21 CARDOZO J.L. & GENDER 583 (2015). As seen in child pornography cases, courts must balance the harm caused by revenge porn with the defendant’s right to free speech. Id. at 595. In response to First Amendment concerns, states criminalizing revenge porn often require proof of more than simply sharing an intimate image of an adult without the adult’s consent to share such image. Id. at 616. On these statutes centers on the intent of the defendant, perhaps even more so than in his actions in sharing the harmful material. See id. Some statutes require a showing that the defendant shared the image with the intent to harass the victim. See id. Other state statutes require a showing that the image was taken with the expectation that it would remain private. See id. Some states require a showing that either the victim suffered a financial loss as a result of the nonconsensual sharing or that the defendant shared it seeking a financial gain. Id. at 617. Taken as a whole, revenge porn statutes include requirements that focus on how the charged defendant used the image to take advantage of a victim or to take advantage of an opportunity to use another’s image for personal gain. Id. at 615–17. Any time a defendant possesses a child’s image and transforms it into morphed child pornography, he takes advantage of the child’s image—an image that he has no lawful right to possess or manipulate. This “taking advantage” parallels the statutes criminalizing revenge porn. Layla Goldnick lists the following states as having this (or a similar) requirement:


Id. at 616 n.233.
either threatened to be posted or actually posted online. This privacy harm has caused many state legislatures to criminalize the nonconsensual sharing of intimate images.

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

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

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

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196 Id. at 50. The authors represent victims of revenge porn. See id. at 49.
197 See id. at 50 (“While these statutes differ substantially from state to state, all of them ban the intentional distribution of nude images and video when that distribution is without the consent of the party depicted. Taken as whole, these states and the proposed federal law are important steps in legislating a right to sexual privacy. And it makes sense: our health records (HIPAA) and our educational records (FERPA) are private under federal law; why shouldn’t material that’s more personal warrant protections?”). Additionally, in many states, victims of revenge porn can recover damages under tort law against individuals who nonconsensually share their image. See Paul J. Larkin, Jr., Revenge Porn, State Law, and Free Speech, 48 LOY. L.A. L. REV. 57, 84 (2014) (noting that a damages remedy for “offensive publication of private details of an individual’s life” is provided by the Restatement (Second) of Torts, which is adopted by most jurisdictions and often cited by judges). While there are certainly similar causes of actions available under tort law for victims of morphed child pornography, an examination of those actions is outside the scope of this Article. Therefore, this section is limited to criminal liability for revenge porn.
198 Citron, supra note 183, at 406.
199 See id. at 397–98.
Under Mississippi law, child pornography is defined as “an actual child engaging in sexually explicit conduct.” These are just three examples of state statutes that do not include language in their child pornography definitions that would permit a conviction to stand based on the possession of morphed child pornography.

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

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

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

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

(a) Any person who—

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

204 Other state child pornography laws that do not allow for the prosecution of morphed images include ARIZ. REV. STAT. ANN. § 13-3553 (2018) and KY. REV. STAT. ANN. § 531.335 (West 2016).
205 See discussion supra Section II.A.
or in or affecting interstate or foreign commerce by any means, including by computer; or
(B) advertises, promotes, presents, distributes, or solicits through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—
(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or
(ii) a visual depiction of an actual minor engaging in sexually explicit conduct.207

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

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

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

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

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

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

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

CONCLUSION

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

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


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

224 See generally id.

225 See Kirkey, supra note 9.
legislatures should amend their child pornography statutes, potentially by following the PROTECT Act as outlined in this Article. Lastly, law enforcement in the United States should commence a public health campaign addressing the realities of morphed child pornography, encouraging parents to make well-informed decisions before sharing pictures of their children online. These cogent paths forward can offer meaningful legal and social benefits to victims and potential victims of child sexual abuse and pornography while protecting the First Amendment rights of the accused.