

2004

The Perplexing Problem of Child Modeling Web Sites: Quasi-Child Pornography and Calls for New Legislation

Clay Calvert
Pennsylvania State University

Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/cwlr>

Recommended Citation

Calvert, Clay (2004) "The Perplexing Problem of Child Modeling Web Sites: Quasi-Child Pornography and Calls for New Legislation," *California Western Law Review*: Vol. 40 : No. 2 , Article 2.
Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol40/iss2/2>

This Article is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized editor of CWSL Scholarly Commons. For more information, please contact alm@cwsl.edu.

CALIFORNIA WESTERN LAW REVIEW

VOLUME 40

SPRING 2004

NUMBER 2

THE PERPLEXING PROBLEM OF CHILD MODELING WEB SITES: QUASI-CHILD PORNOGRAPHY AND CALLS FOR NEW LEGISLATION

CLAY CALVERT*

INTRODUCTION

When the author of this article first wrote extensively about the topic of non-nude child modeling Web sites back in 2002, it was the earliest published law journal article to identify, link and address the important twin issues of sexually explicit expression and the possible sexual exploitation of minors raised by some of these sites.¹ These issues have now accelerated, both in significance and in magnitude, during the past two years. Today,

* Associate Professor of Communications & Law and Co-Director of the Pennsylvania Center for the First Amendment at The Pennsylvania State University. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California.

1. Clay Calvert, *Opening Up an Academic Privilege and Shutting Down Child Modeling Sites: Revising Child Pornography Laws in the United States*, 107 DICK. L. REV. 253 (2002). An earlier article arising from an Internet law symposium at the University of California Hastings College of the Law had mentioned the problem of child modeling Web sites, but that article did not give the then-nascent issue significant coverage. See Clay Calvert, *Regulating Sexual Images on the Web: Last Call for Miller Time, But New Issues Remain Untapped*, 23 HASTINGS COMM. & ENT. L.J. 507, 531-33 (2001) (describing the then-budding phenomenon of non-nude child modeling Web sites and the legal issues they raise).

As of January 2004, only one other law journal article had even mentioned the problems raised by child modeling Web sites, and that reference is limited to a textual footnote. See Mitchell P. Goldstein, *Congress and the Courts Battle Over the First Amendment: Can the Law Really Protect Children From Pornography on the Internet?*, 21 J. MARSHALL J. COMPUTER & INFO. L. 141, 205 n.360 (2003) (devoting two sentences to the Child Modeling Exploitation Prevention Act of 2002). The fact that the problems are severely under-covered is further reason to explore the issue anew here.

many of the modeling Web sites have grown far racier and more risqué,² they have proliferated in number,³ and they have attracted attention in major mass media outlets.⁴ Compounding the problem, the images posted on these sites are recycled and circulated, free of charge, on “usenet” and “binaries” groups, extending the harm to the exploited children exponentially.⁵ All one needs to do is visit the link <http://www.usenet-replayer.com/top-groups.html> to look at the names of the top usenet groups to see the prevalence—and popularity—of the images online.⁶ Even more problematic to law enforcement officials, the well-intended, although constitutionally suspect, legislation designed to thwart the growth of these Web sites failed, after inaction by Congress, to become law.⁷ Similar legislation—the Child Modeling Exploitation Prevention Act⁸—was again proposed in both the United States Senate and in the House of Representatives in early 2003, but it too died without becoming law.⁹ And while much legal scholarship has been devoted to the

2. For an example of a child modeling site that pushes the limits of legality, although it never appears to cross the line from offensive legality to illegal child pornography as the latter term currently is defined under federal laws on child exploitation, see a site called “Sandra Model,” at <http://www.sandra-model.com> (last visited Jan. 4, 2004). The site, as witnessed by the free preview images available to anyone who visits it, features a thirteen-year-old girl provocatively posed in underwear, swimsuits and other revealing attire. It even includes a special online forum where fans of the young model can—and do—post comments and requests for her to pose in other sexualized garments. In March 2004, the Web site was changed to a new location, <http://www.modelsandra.com> (last visited Mar. 25, 2004).

3. A number of links to child modeling sites can be found at locations such as The Non-Nude Girl Portal, at <http://nn-teen.com> (last visited Mar. 30, 2004) and Child Super Models, at <http://www.childsupermodels.com> (last visited Mar. 3, 2004).

4. In April 2003, Oprah Winfrey devoted an episode of her hour-long television show to the topic of young girls with online modeling Web sites. *The Oprah Winfrey Show: Controversy Over Young Girls Modeling Online* (Harpo, Inc., television broadcast, Apr. 28, 2003) (transcript on file with author) [hereinafter *Oprah*]. During this episode, Winfrey said there are “thousands of these sites, little girls modeling online” and she called the modeling “so upsetting to [her].” *Id.* During the episode, Winfrey interviewed a twelve-year-old girl who is featured on the Web site known as CindyModel.com. *Id.*

The television newsmagazine *48 Hours* also devoted an episode to child modeling sites in January 2003. *48 Hours Investigates: Risky Business* (CBS television broadcast, Jan. 8, 2003) (transcript on file with author) [hereinafter *48 Hours*]. Reporter Erin Moriarty described the sites as “part of a controversial axis of children, money and sex, one in which the participants rarely talk to the media.” *Id.* Moriarty stated that “[t]oday’s most disturbing modeling Web sites might be those that feature very young, preteen girls in questionable poses and clothing.” *Id.*

5. The author was quickly able to locate republished images of several child models, free for public consumption, such as those from the “Sandra Model” Web site, *supra* note 2, in December 2003 through Usenet Replay, at <http://burner2.usenet-replayer.com/cgi/content/archive?scan=alt.binaries.pictures.children> (last visited Dec. 31, 2003).

6. *Top 50 of Every Time Visible Group Requests to Archive*, Usenet Replayer Web site, <http://www.usenet-replayer.com/top-groups.html> (last visited Jan. 2, 2004).

7. H.R. 4667, 107th Cong. (2002).

8. S. 404, 108th Cong. (2003); H.R. 756, 108th Cong. (2003).

9. The last major action taken on the House version of the Child Modeling Exploitation Prevention Act occurred in February 2003 when the bill was referred to both the House Committee on Education and the Workforce and to the House Committee on the Judiciary. 2

problem of virtual child pornography and the United States Supreme Court's decision about its regulation in *Ashcroft v. Free Speech Coalition*,¹⁰ surprisingly scant attention has been paid to child modeling in the pages of law journals.¹¹ Now, in 2004, it is time to consider anew, with the added perspective of failed bills and at least one failed state prosecution, the issues raised by child modeling Web sites.

Although the author's earlier article on this topic analyzed and critiqued the federal legislation that was then pending in 2002,¹² this article now goes several steps further and deeper by:

- Examining two major criminal prosecutions—one in Arkansas,¹³ the other in Colorado—that took place in 2002 and 2003 involving the operation of child modeling Web sites;

- Providing the comments and insights from an exclusive interview conducted in January 2004 by the author with James Steven Grady,¹⁴ the operator of a child modeling Web site called TrueTeenBabes,¹⁵ who was prosecuted on more than thirty charges related to child exploitation but acquitted on all counts in less than three hours by a jury of equal numbers of women and men;¹⁶

- Investigating, in detail, the probable underlying social and cultural forces today that may be influencing the popularity and proliferation of child modeling Web sites;

- Analyzing the new and revised 2003 federal legislation on child modeling and comparing it, for purposes of measuring improvements and weaknesses, with the 2002 legislation;

- Proposing a new theory upon which future legislation targeting child modeling Web sites in 2004 can be premised.

In summary, this article examines the unsolved problems of regulating and controlling non-nude child modeling Web sites that allegedly exploit the sexuality of both preteens and teenagers for financial profit. Part I initially describes the Web sites and illustrates the problems that now exist with them, including the difficulty in prosecuting operators under current child pornography laws.¹⁷ Part I also examines several recent efforts to prosecute those who run child modeling sites, and it explores the cultural forces that might be influencing their increasing popularity. Next, Part II compares the 2002 federal legislation that died in the House with the new legislation that

10. 535 U.S. 234 (2002).

11. See *supra* note 1 (describing the paucity of legal scholarship on child modeling).

12. Calvert, *Academic Privilege*, *supra* note 1, at 277-87 (analyzing the Child Modeling Exploitation Prevention Act of 2002).

13. *Cummings v. Arkansas*, 110 S.W.3d 272 (Ark. 2003).

14. E-mail from Jim Grady, Photographer, to author (Jan. 21, 2004, 22:29:10 EST) (on file with author).

15. TrueTeenBabes Web site, at <http://www.trueteenbabes.com> (last visited Jan. 22, 2004).

16. E-mail from Jim Grady, *supra* note 14.

17. *Infra* notes 23-170 and accompanying text.

was proposed in 2003 to see if improvements were made that might increase the odds of the 2003 bill passing constitutional muster were it ever to become law.¹⁸ Part III then proposes a new theory, based on the privacy interests of minors that thus far have been all but ignored by legislators as a viable hook on which to pin bills, for regulating child modeling sites.¹⁹ This privacy-based theory takes a different tack from the 2003 federal legislation and it attempts to mitigate the First Amendment interests at stake.

Finally, the article concludes that, taking into account the social and cultural forces described in Part I, the best course of action, from a legislative perspective, may actually be inaction.²⁰ The article argues that the operators of some child modeling Web sites will eventually push the envelope too far and be prosecuted, successfully, under current state and federal statutes. Indeed, a case described in Part I.B illustrates just such a situation. Parsed differently, new laws are not necessarily better laws; the current ones on child exploitation will work well for regulating non-nude child modeling Web sites, especially when those laws are interpreted, as they were by the United States Court of Appeals for Third Circuit in *United States v. Knox*,²¹ to sweep up non-nude, clothed images “that focus on the genitalia and pubic area of minor females.”²²

I. CHILD MODELING WEB SITES: CHILD PORNOGRAPHY OR INNOCENT MODELING?

The reality of some child modeling Web sites is this— “[c]hildren as young as 7 years old are being photographed in provocative poses, wearing skimpy bathing suits, lingerie and wet T-shirts”²³ and those images are winding up on a growing number of Web sites. In 2004, one only needs to visit a Web site called “Lili Model” to get a flavor of what many non-nude child modeling Web sites are all about.²⁴ Lili purportedly is a thirteen-year-old girl who stands five-feet tall and weighs just eighty-eight pounds.²⁵ The home page for her site includes multiple teaser photographs of the little girl in various stages of undress; in several photographs, she is provocatively posed, wearing only underwear or two-piece swimsuits.²⁶ There is, however, no nudity featured on the main page of these photographs, and the site de-

18. *Infra* notes 171-196 and accompanying text.

19. *Infra* notes 197-211 and accompanying text.

20. *Infra* notes 212-224 and accompanying text.

21. 32 F.3d 733 (3d Cir. 1994).

22. *Id.* at 736-37.

23. Dave Savini, *Selling Innocence*, INVESTIGATIVE REP. & EDITORS J., July-Aug. 2002, at 34.

24. Lili Model Web site, at <http://www.lilimodel.com> (last visited Mar. 3, 2004).

25. *Bio/Hire*, Lili Model Web site, at <http://www.lilimodel.com/main.html> (last visited Mar. 3, 2004).

26. *Main Page*, Lili Model Web site, at <http://www.lilimodel.com/bio.html> (last visited

scribes itself as “a non-nude site. Lilimodel.com abides by domestic and international law.”²⁷ In January 2004, the site boasted that it had forty-one galleries featuring 1,700 online photographs of young Lili.²⁸

One can join the girl’s site, which is run by an entity called “A Model Shop” with a post office box address in Sandy, Utah.²⁹ The cost in January 2004 was \$22.95 for the first month.³⁰ The visitor to the Web site is instructed that “if you decide to use the reaccuring [sic] feature you will be re-billed for only \$15.95 per month.”³¹ The terms of the agreement tell the potential subscriber a little bit more about the site:

ALL MATERIALS, INCLUDING MESSAGES, AND OTHER COMMUNICATIONS, CONTAINED AT LILIMODEL.COM ARE NOT INTENDED TO BE ADULT MATERIAL AND DO NOT INTENTIONALLY VIOLATE ANY COMMUNITY STANDARDS OR ANY FEDERAL, STATE OR LOCAL LAWS OR REGULATIONS OF THE UNITED STATES OR ANY OTHER COUNTRY TO THE BEST OF OUR KNOWLEDGE. BUT PERSONS UNDER THE AGE OF 18 ARE CAUTIONED TO OBTAIN PARENTAL PERMISSION FIRST BEFORE VIEWING. YOU HEREBY ACKNOWLEDGE THAT MATERIALS PRESENTED AT AND/OR DOWNLOADABLE FROM LILIMODEL.COM ARE OF YOUNG MODELS DEPICTED IN SHORTS SKIRTS AND TOPS, SMALL BIKINIS, SHORT SHORTS, AND OTHER CASUAL WEAR WORN BY TEENAGE GIRLS IN VARIOUS POSES AND LOCATIONS.³²

No clothing or apparel appears to be for sale at Lili’s Web site. What “A Model Shop” thus appears to be selling is Lili herself or, more specifically, images of Lili. Web sites with images of her similarly attired young colleagues, such as “Sandra Model”³³ and “October Model,”³⁴ are also linked to Lili’s Web site. While the author of this article did not join any of these Web sites to view the pictures within them, many photographs were easily found online by searching through the Usenet Replayer Web site.³⁵

“A Model Shop,” of course, states that its stable of models and bevy of Web sites have nothing to do with the sexual exploitation of young girls; rather, the sites are all about helping young girls realize their dreams. On the business’s home page, the text provides:

27. *Id.*

28. *Id.*

29. *A Model Shop Mail Order Form*, Lili Model Web site, at <http://www.lilimodel.com/join.html> (last visited Mar. 3, 2004).

30. *Id.*

31. *Id.*

32. *Id.*

33. Sandra Model Web site, at <http://www.modelsandra.com> (last visited Mar. 25, 2004).

34. October Model Web site, at <http://www.octobermodel.com/main.html> (last visited Mar. 3, 2004).

35. Usenet Replayer, at <http://www.usenet-replayer.com> (last visited Jan. 4, 2004).

A Model Shop is a professional model and talent agency. Our website is a wonderful opportunity for our models to gain experience and recognition. We bring you the finest aspiring models ages 8 to 16 years. Every ten days we add exclusive photos of one of our teen models. In addition, we offer VHS videos featuring some of our select models.³⁶

Before there were sites by “A Model Shop” and pages featuring Lili, Sandra and October, however, there was Webe Web Corporation, with its Child Super Models Web site.³⁷ It has been reported that “[c]hild modeling appears to the brainchild of” the two men behind Webe Web, Jeff Libman and Marc Greenberg.³⁸ Webe Web Corp. “took in \$200,000 in 2001, according to Dun and Bradstreet.”³⁹ The story behind the south Florida company was originally exposed in an award-winning investigative television report⁴⁰ by a NBC station.⁴¹ During the report, Libman acknowledged a fact about some of the men who subscribe to the child modeling sites: “It gives these guys that do like young girls like that [who] would be normally gawking at these teenagers in the mall, you know, an outlet to relieve themselves of their frustrations I guess.”⁴² In a September 2002 newspaper article, Greenberg was quoted as saying “[i]f I said pedophiles are definitely not looking at these sites, that would be a crock . . . But the majority of people looking at them are not bad people. . . . If it’s within the law and people want to do it, more power to them.”⁴³

And therein lies one of the major problems with these Web sites that “portray no nudity and no sex,”⁴⁴ but feature “shots of preteen girls posing in bikinis and halter tops”⁴⁵ and allegedly appeal to pedophiles: the sites appear to be perfectly legal under current child pornography laws but clearly exploit the sexuality of real children too young to understand the ramifications of

36. A Model Shop Web site, at <http://www.amodelshop.com/main.html> (last visited Mar. 3, 2004).

37. Child Super Models Web site, at <http://www.childsupermodels.com> (last visited Mar. 3, 2004).

38. Helen Kennedy, *Parents Exposing Kids on Soft-Porn Web Sites; Scantly Clad Child Models Get Raves from Pedophiles*, DAILY NEWS (N.Y.), May 9, 2002, at News 20.

39. *Id.*

40. NBC 6 Investigative Team Honored with Murrow Award, at <http://www.nbc6.net/print/1324707/detail.html> (last updated Apr. 1, 2002). The investigation, “Selling Innocence,” was aired in late 2001. NBC 6 Investigates, *Selling Innocence* (NBC 6 television broadcast, Nov. 8, 2001). Transcript available at <http://www.nbc6.net/nbc6investigates/1315942/detail.html> (last updated Aug. 7, 2002).

It “revealed how a South Florida company was putting photos and videos of local children posed suggestively on the Internet and selling those images around the world.” *Id.* The report won the regional Edward R. Murrow Award for Investigative Reporting from the Radio and Television News Directors Association. *Id.*

41. *Selling Innocence*, *supra* note 40.

42. *Id.*

43. David Crary, *Web Sites Called “Fix for Pedophiles,”* DESERET NEWS (Salt Lake City), Sept. 16, 2002, at A02.

44. *Id.*

45. *Id.*

their actions. And while the children who model supposedly benefit financially from the sites,⁴⁶ the gain for some in the audience is more prurient. As United States Representative Mark Foley, a Republican from West Palm Beach, Florida, and one of the sponsors of the federal legislation described in Part II of this article puts it, “[t]hese Web sites are nothing more than a way for pedophiles to get their fix.”⁴⁷ He also calls the sites “eye candy for pedophiles. They are selling young people on a platter.”⁴⁸ Paul O’Connell, a lieutenant with the Broward County, Florida sheriff’s department who has investigated the sites, agrees. He describes the sites as “eye candy for perverts”⁴⁹ and claims they fuel “a sexual desire—a deviant sexual desire—for those people that look at these types of Web sites.”⁵⁰ O’Connell considers the parents who consent to their children taking part in such sites to be “pimps. They’re pimping their own children in a child-erotica atmosphere.”⁵¹

With such alleged harms caused by the child modeling Web sites, why is prosecution so difficult? Why are new laws necessary to regulate them? The next section begins to address these questions.

A. *The Problems of Prosecution*

The threshold problem with prosecution of the operators of non-nude child modeling sites is that the images that appear on the vast majority of sites, although sexual in appeal, simply do not always appear to constitute child pornography as defined under federal law. To amount to child pornography and thereby constitute the sexual exploitation of children, federal law requires that a minor be shown engaging in “sexually explicit conduct,”⁵² a term that includes images depicting a “lascivious exhibition of the genitals or pubic area of any person,”⁵³ as well as a laundry list of more specific acts.⁵⁴ Since no specific sexual acts are present on the non-nude child modeling Web sites that are the focus of this article and that are the subject of the federal legislation described later, the legal spotlight necessarily turns to

46. A site called CindyModel that features a twelve-year-old girl in non-nude images that can be found at <http://www.cindymodel.com/> reportedly gets over 16,000 new clicks a day and generates thousands of dollars a month. *Oprah*, *supra* note 4.

47. Andy Sullivan, *Lawmakers Taking Aim at Child Modeling Sites*, HOUS. CHRON., May 8, 2002, at A16.

48. Larry Lipman, *Bill Targets Child Models on Web Sites*, PALM BEACH POST, Feb. 14, 2003, at 3A (quoting Rep. Mark Foley R-W. Palm Beach).

49. *Dateline NBC: Picture Perfect?* (NBC television broadcast, Aug. 6, 2002).

50. *Id.*

51. *Id.*

52. 18 U.S.C. § 2251 (2003).

53. *Id.* § 2256(2)(A)(v).

54. *Id.* § 2256 (2)(A)(i)-(iv). These acts encompass “sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex” as well as “bestiality,” “masturbation,” and “sadistic or masochistic abuse.” *Id.*

whether the images feature a lascivious exhibition of the genitals or pubic area.

What is necessary for a photograph to be considered a “lascivious exhibition” under federal law? First, it is clear that “the possession of pictures of nude minors, without more, is protected speech under the First Amendment.”⁵⁵ As the Eighth Circuit Court of Appeals wrote in 2002, “more than mere nudity is required before an image can qualify as ‘lascivious’ within the meaning” of federal child pornography laws.⁵⁶ The court observed:

A picture is “lascivious” only if it is sexual in nature. Thus, the statute is violated, for instance, when a picture shows a child nude or *partially clothed*, when the focus of the image is the child’s genitals or pubic area, and when the image is intended to elicit a sexual response in the viewer.⁵⁷

It is important to note here, as the italicized language above indicates, that while nudity by itself is *not* lascivious and thus does not constitute child pornography under federal law, a *clothed* image of a minor may nonetheless be lascivious if it is focused and cropped in a particular way. The United States Court of Appeals for the Third Circuit, in *United States v. Knox*,⁵⁸ refused to “read a nudity requirement into [the federal] statute that has none.”⁵⁹ In reaching its conclusion that a lascivious exhibition may exist even when the genital and pubic area are clothed, the appellate court wrote:

The harm Congress attempted to eradicate by enacting the child pornography laws is present when a photographer unnaturally focuses on a minor child’s clothed genital area with the obvious intent to produce an image sexually arousing to pedophiles. The child is treated as a sexual object and the permanent record of this embarrassing and humiliating experience produces the same detrimental effects to the mental health of the child as a nude portrayal. The rationale underlying the statute’s proscription applies equally to any lascivious exhibition of the genitals or pubic area whether these areas are clad or completely exposed.⁶⁰

The key from *Knox*, in terms of that case’s applicability to non-nude child modeling Web sites, is that “the scantily clad genitals or pubic area of young girls can be ‘exhibited’ in the ordinary sense of that word.”⁶¹ Nudity thus is *not* required for a lascivious exhibition under federal law.

55. *Lesoine v. County of Lackawanna*, 77 Fed. Appx. 74, 78 (3d Cir. 2003) (summarizing the holding of *Osborne v. Ohio*, 495 U.S. 103, 112 (1990) and *New York v. Ferber*, 458 U.S. 747, 765 n.18 (1982)).

56. *United States v. Kemmerling*, 285 F.3d 644, 645-46 (8th Cir. 2002), *cert. denied*, 537 U.S. 860 (2002).

57. *Id.* at 646 (emphasis added).

58. 32 F.3d 733 (3d Cir. 1994).

59. *Id.* at 749.

60. *Id.* at 750.

61. *Id.* at 745.

Federal appellate courts typically take into consideration six factors, first identified in the district court case of *United States v. Dost*,⁶² to determine whether an exhibition of genitalia or the pubic area is lascivious.⁶³ It is important to understand that “a visual depiction need not involve all of these factors to be a ‘lascivious exhibition of the genitals or pubic area.’ The determination will have to be made based on the overall content of the visual depiction, taking into account the age of the minor.”⁶⁴

As used and described recently by the United States Court of Appeals for the Third Circuit in *Doe v. Chamberlin*:⁶⁵

The first factor under *Dost* is whether a forbidden area is the focus. The second is whether the setting of the depiction is sexually suggestive or generally associated with sexual activity. The third is whether the pose or attire of the minor is unnatural or inappropriate given her age. The fourth is whether the child is naked. The fifth is whether the child shows sexual coyness or willingness to engage in sex. The sixth is whether the photo is intended or designed to elicit a sexual response in the viewer.⁶⁶

The child modeling sites at issue in this article, such as “Lili Model”⁶⁷ and those linked from the “Child Super Models”⁶⁸ Web site, do not appear to be child pornography under the federal statute for several reasons. First, they clearly do not portray children engaged in any sexual acts like those prohibited under child pornography laws, such as intercourse, masturbation or bestiality.⁶⁹ Second, they do not feature nudity. Third, the clothed images in bikinis and underwear do not appear in *most* cases—at least from an observation by the author of the free preview pictures at the sites described above—to fall within the scope of the *Dost* factors.

That said, however, as some of the sites keep pushing the limits and the child models appear in lingerie and thongs, it may be that a *Knox*-like conviction for non-nude child pornography is possible with a mainstream—if that word is even appropriate for this content—child modeling site. For instance, the site of “Lili Model” included on its main page in early January 2004, one preview photograph of the thirteen-year-old girl for “Gallery #40” that depicts her twirling her hair, hip thrust out to her side, while wearing black thong underwear, knee-high black socks and a sheer black crop top.⁷⁰

62. 636 F. Supp. 828 (S.D. Cal. 1986).

63. *Id.* at 832.

64. *Id.*

65. 299 F.3d 192 (3d Cir. 2002).

66. *Id.* at 196.

67. *See supra* note 24 and accompanying text (describing the free portion of the content of this Web site).

68. Child Super Models Web site, at <http://www.childsupermodels.com> (last visited Mar. 3, 2004).

69. *See supra* notes 52-54 (listing the specific acts that constitute sexually explicit conduct under federal law).

70. Lili Model Web site, at <http://www.lilimodel.com.html> (last visited Mar. 3, 2004).

Her pose and look are more daring than models in a Victoria's Secret catalogue and, of course, Lili isn't even selling underwear. Some of the free preview images that existed on "Sandra Model" in January 2004 were similarly racy; the photograph teasing "Gallery #24" featured the young girl coyly hiking up a black "French Maid" outfit to reveal lacy red underwear.⁷¹

Applying the *Dost* factors to such photographs to determine whether they are lascivious, it is highly questionable whether either the poses or the attire in these images are at all age appropriate. If anything, they are inappropriate. Likewise, the children in each image exhibit sexual coyness. In neither image, however, is there a close-up shot of the pubic area or genitalia. And while there is no nudity, it is important to remember that nudity is not required for the material to constitute child pornography.⁷²

The bottom line, of course, is that it will be up to a prosecutor in the future to make a test case, under existing child pornography laws, of such non-nude photographs available on sites like "Lili Model" and "Sandra Model." Jury determinations of lasciviousness would, as the district court in *Dost* expressed, need to be made "on a case-by-case basis using general principles as guides for analysis."⁷³ And without actually joining the sites, as the author refused to do, it is impossible to determine if the private members' photographs are racier or tamer. It is, indeed, the very uncertainty of successful prosecutions under extant child pornography and child exploitation laws that demonstrates what some in Congress now perceive to be a need for new legislation specifically targeting non-nude child modeling Web sites.

Nudity, however, is featured on some sites that feature child models, such as one that existed in 2004 called "Gentle Angels."⁷⁴ The nudity even appears in the free preview photographs.⁷⁵ That site describes itself as featuring the "world's most amazing collection of exclusive images featuring wonderful girls of 16 or younger!"⁷⁶ Its operators profess to have "put a lot of work in giving you the most. Th[r]ough a unique combination of the young body's natural beauty with creativity and technique of the photographers we try to reveal the incredible charm and sensuality of the girls."⁷⁷ Nude sites such as this are not the focus of this article because, conceivably, the application of the "six so-called *Dost* factors"⁷⁸ identified above can much more easily sweep up certain images that go beyond general displays of child nudity. Likewise, the federal legislation discussed in Part II is not

71. Sandra Model Web site, at <http://www.sandra-model.com> (last visited Mar. 3, 2004).

72. *Supra* notes 59-61 and accompanying text.

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

74. Gentle Angels Web site, at <http://www.ukrainian-angels.com> (last visited Mar. 3, 2004).

75. *Id.*

76. *Id.*

77. *Id.*

78. *United States v. Brunette*, 256 F.3d 14, 18 n.4 (1st Cir. 2001).

aimed at such nude sites. The more vexing problem under current child pornography laws, then, is the prosecution of those who operate non-nude sites.

Two contrasting cases and prosecutions from 2003—one leading to a successful conviction upheld on appeal, the other resulting in a quick acquittal and a possible wrongful prosecution lawsuit—help to illustrate some of the difficulties in applying current laws against child pornography to these modeling web sites. The cases illustrate, in turn, the possible reasons why some call for new legislation described later in Parts II and III of this article.

B. A Tale of Two Cases

In June 2003 in *Cummings v. Arkansas*,⁷⁹ the Supreme Court of Arkansas upheld the conviction of a married couple, who ran a paid Web site called Cindysworld2000.com, on criminal charges of permitting a child to engage in sexually explicit conduct for use in a visual or print medium.⁸⁰ Under the relevant Arkansas law at issue in *Cummings*:

Any parent, legal guardian, or person having custody or control of a child who knowingly permits the child to engage in or to assist any other person to engage in sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct shall be guilty of a Class B felony for the first offense and a Class A felony for subsequent offenses.⁸¹

In this case, Donna Cummings and James Cummings argued that photographs of a thirteen-year-old girl identified only as “C.G.” (Donna’s daughter, James’ step-daughter) in “various stages of undress, posing in a suggestive manner”⁸² that were posted on the site were done so only “for modeling purposes.”⁸³ The couple thus contended they did not “knowingly” engage the girl in sexually explicit conduct within the meaning of the state statute. James Cummings made a similar argument to challenge his conviction on another charge—producing, directing, or promoting a sexual performance⁸⁴—involving the photographs and some videotapes that he had produced involving the girl, but that apparently were not yet posted on the Web site.

Two of the posted photographs included some nudity— “[i]n one of the photographs, C.G.’s breast is partially exposed. In another photograph,

79. 110 S.W.3d 272 (Ark. 2003).

80. *Id.* at 274.

81. ARK. CODE ANN. § 5-27-303(b) (Michie 2003).

82. *Cummings*, 110 S.W.3d at 277.

83. *Id.*

84. ARK. CODE ANN. § 5-27-403(a) (providing: “It is unlawful for any person if, knowing the character and content of the material, he produces, directs, or promotes a performance that includes sexual conduct by a child, other than seventeen (17) years of age.”).

C.G.'s pubic area is exposed."⁸⁵ The young girl was also pictured in "very revealing swimwear, thong panties, and things like that."⁸⁶

The Supreme Court of Arkansas rejected the Cummings' argument that they did not "knowingly" permit the girl to engage in sexually explicit conduct. The court wrote that "in the present case, the jury could have inferred that the appellants' intent in making the videotapes, as well as in operating the website which displayed pictures of C.G. in various stages of undress, was for sexual purposes and not for 'modeling purposes,' as the appellants contend."⁸⁷ In reaching this conclusion, the high court observed that circumstantial evidence of state of mind is relevant, and that "members of the jury are allowed to draw upon their common knowledge and experience to infer it from the circumstances."⁸⁸

This is an important blow against those who operate Web sites that exploit the sexuality of children yet claim their intent in running such sites is for modeling purposes only. Mere assertions and self-serving declarations by Web site operators like James Cummings will not always be enough to escape conviction. It will be left to jurors, taking into account circumstantial evidence such as the actual images and content of the Web sites at issue, to determine the purpose behind them and the state of mind of the defendant(s).

Beyond the state-of-mind issue, the *Cummings* decision is important for another reason. In particular, the Supreme Court of Arkansas found that two of the ostensible modeling images posted on the Web site—one partially showing the thirteen-year-old girl's breast and another showing her pubic area—actually depicted sexually explicit conduct under Arkansas law.⁸⁹ This is important because, although the supreme court was applying Arkansas law that used the term "lewd exhibition"⁹⁰ rather than the federal law's phrase "lascivious exhibition,"⁹¹ it nonetheless treated the words "lewd" and "lascivious" as synonymous and it considered the federal court *Dost* factors described above⁹² in making its lewdness determination.⁹³ In reaching its conclusion that the two posted images were lewd, the Supreme Court of Arkansas wrote:

85. *Cummings*, 110 S.W.3d at 277.

86. *Id.* at 274.

87. *Id.* at 277-78.

88. *Id.* at 277 (quoting *Proctor v. Arkansas*, 79 S.W.3d 370 (Ark. 2002)).

89. *Id.* at 279.

90. See ARK. CODE ANN. § 5-27-401(3) (Michie 2003) (defining "sexual conduct" to mean "actual or simulated sexual intercourse, deviate sexual activity, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals or pubic area of any person or the breasts of a female") (emphasis added).

91. See 18 U.S.C. § 2256(2)(v) (2003) (defining sexually explicit conduct to include a "lascivious exhibition of the genitals or pubic area of any person").

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

93. *Cummings*, 110 S.W.3d at 277-79.

Since C.G. was thirteen years old at the time of trial, it is clear that she was no older than thirteen years old at the time she was photographed and videotaped. There is substantial evidence from which the jury could conclude that the scenes depicted in the videotape and the photographs depicted on the website were "lewd" . . .⁹⁴

While this holding is an important decision for future attacks on those who run child modeling Web sites, it is, perhaps, even more important to note its limitations and weaknesses. First, the definition of "lewd exhibition" used in Arkansas sweeps within its ambit a greater amount of content than the federal law's definition of "lascivious exhibition." In particular, the Arkansas statute provides that lewd exhibitions may be of the "genitals or pubic area of any person *or the breasts of a female*."⁹⁵ In contrast, the federal definition does *not* include exhibitions of the female breast, but, instead, is limited by its terms to "lascivious exhibition[s] of the genitals or pubic area of any person."⁹⁶ It thus was possible, under Arkansas law, to hold as lewd the image of C.G. in which her breast "is partially exposed,"⁹⁷ but the same would not be possible under federal child exploitation laws. Under federal laws, this image, without more, would be protected speech because it does not involve a display of either the genitals or pubic area. Revisions must be made to the federal child exploitation laws if such images of the breasts of young girls posted on ostensible child modeling sites are to be considered lascivious. Some states, it should be noted, sweep up even more content than that of the Arkansas statute, such as lewd images of the buttocks⁹⁸ or anus.⁹⁹

The other limitation of the *Cummings* case is that there was, according to the Supreme Court of Arkansas, an apparently unclothed exposure of the young girl's pubic area.¹⁰⁰ In the Web sites that are the focus of this article, however, the girls' pubic areas are always clothed. To this extent, then, the

94. *Id.* at 279.

95. ARK. CODE ANN. § 5-27-401(3).

96. 18 U.S.C. § 2256(2)(v). The federal definition mirrors that of many states that do not include the female breast within their definitions of either lewd or lascivious exhibitions. *See, e.g.*, MISS. CODE ANN. § 97-5-31(b)(v) (2004) (defining sexually explicit conduct to include a "[l]ascivious exhibition of the genitals or pubic area of any person"); N.Y. PENAL LAW § 263.00 (McKinney 2003) (providing an even more narrow definition that omits the term pubic area and, instead, includes only a "lewd exhibition of the genitals").

97. *Cummings*, 110 S.W.3d at 277.

98. *See, e.g.*, 720 ILL. COMP. STAT. 5/11-20.1 (2003) (defining child pornography to include images in which a minor is "depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed genitals, pubic area, buttocks, or, if such person is female, a fully or partially developed breast of the child"); MASS GEN. LAWS ANN. ch. 272, § 29C (West 2004) (same definition).

99. *See* TEX. PENAL CODE ANN. § 43.25 (Vernon 2004) (defining sexual conduct, for purposes of child exploitation laws, to include images involving a "lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola").

100. *Cummings*, 110 S.W.3d at 277-78 (taking together the description that the Web site displayed C.G. in "various stages of undress" and the fact that, in one of the photographs, her

facts of *Cummings* can be distinguished from the images—at least, the free preview images—on most non-nude child modeling Web sites.¹⁰¹

The *Cummings* case, however, is not the only instructive legal battle from 2003 regarding child modeling Web sites. In a blow to seemingly overzealous prosecutors, a jury of six men and six women in Arapahoe County, Colorado acquitted James Grady of thirty-nine counts of child sexual exploitation in March 2003.¹⁰² Grady, who was arrested nearly a year before, in April 2002,¹⁰³ operated a photography studio and a teen modeling Web site featuring girls ages thirteen to seventeen¹⁰⁴ “in sometimes provocative poses, wearing bikinis, short skirts or lingerie.”¹⁰⁵

Some of the images featured girls in “thongs, platform shoes and thigh-high boots.”¹⁰⁶ The girls, however, were not duped into taking part; in fact, all “needed a parent to sign a consent form.”¹⁰⁷

In exclusive correspondence with the author in January 2004, Grady wrote that, in the fall of 2000, he “dreamed up the TrueTeenBabes idea and we started production of images in January of 2001.”¹⁰⁸ Girls from thirteen to seventeen years of age who wanted to be models on the Web site, which Grady called TrueTeenBabes.com, could apply online from the site of “Jimmy Stephans Photosports”¹⁰⁹ by connecting to a special link.¹¹⁰ That link, which includes required parental consent forms, provides, in part, that:

101. Most of these sites “do not feature nudity or overtly sexual material.” *Young ‘Model’ Sites Feel the Heat*, available at Age of Consent Web site, <http://www.ageofconsent.com/comments/teenmodellaw.htm> (last visited Jan. 4, 2004).

102. J. Sebastian Sinisi, *Not-Guilty Verdict in Photos of Teens Jurors Acquit Centennial Man of 39 Counts of Child Sex Exploitation*, DENV. POST, Mar. 14, 2003, at B-01. Prosecutors originally had charged Grady with a whopping 726 counts related to child exploitation. Robert Sanchez, *Centennial Man Grady Faces 726 Counts of Child Porn*, ROCKY MTN. NEWS (Denver), Apr. 13, 2002, at 8B. An additional 160 charges were added about one month later, bringing to a total of 886 counts against Grady. Tillie Fong, *160 Charges Added in Porn Case; Centennial Man Faces a Total of 886 Counts Related to Web Site*, ROCKY MTN. NEWS (Denver), May 29, 2002, at 18A.

103. Karen Rouse, *Centennial Man Held in Child-Porn Operation*, DENV. POST, Apr. 7, 2002, at B-01.

104. Brian D. Crecente, *FBI Joins Inquiry into Local Child-Porn Ring*, ROCKY MTN. NEWS (Denver), Apr. 10, 2002, at 24A. According to the article, Grady had listed fifty-four girls as employees. *Id.*

105. Gabrielle Crist, *Suit May Follow Porn Acquittal*, ROCKY MTN. NEWS (Denver), Aug. 14, 2003, at 27A.

106. Sinisi, *supra* note 102.

107. *Id.*

108. E-mail and accompanying attachment from Jim Grady, Photographer, to author (Jan. 22, 2004, 10:10:12 EST) (on file with author).

109. Jimmy Stephans Photosports Web site, at <http://www.jimmystephans.com> (last visited Mar. 19, 2004). Grady described “Jimmy Stephans Photosports” as an operating division designed “to handle all the non-porn style work and sites, including TrueTeenBabes.com and the image production for it” for a business called Group Five Photosports, LLC. E-mail from Jim Grady, *supra* note 108.

110. <http://www.jimmystephans.com/060.html> (last visited Mar. 19, 2004).

All girls ages 13 to 17 are welcome to apply for this project and to submit your pictures for our consideration. If you are selected you must have full parental permission before you can be scheduled for your first photo session. Please download the parent's information packet from the link on this page for your parent or guardian to review.¹¹¹

The TrueTeenBabes.com business soon took off, but it wasn't long before it caught the eye of local law enforcement officials. Grady's case was initially touted as the largest child pornography bust in the history of Colorado.¹¹² Now, however, after the jury returned its not guilty verdict, Grady may file a lawsuit against those same law enforcement officials for wrongful arrest, false imprisonment and malicious prosecution.¹¹³ By January 2004, he had given statutory notice to file a formal lawsuit under Colorado's Government Immunity Act, although he had not yet filed the actual lawsuit.¹¹⁴ All of the sound, fury and bluster in the press by law enforcement officials against James Grady eventually amounted to nothing in court for prosecutors.

Grady's case demonstrates the difficulty of prosecution of the operators of child modeling sites that feature non-nude images. He ran the Web site called "trueteenbabes.com,"¹¹⁵ available to anyone willing to pay the \$20-per-month subscription fee.¹¹⁶ Grady claimed he "took pictures of the girls to help launch their modeling careers."¹¹⁷ At trial, in fact, thirteen girls who had posed for him testified on his behalf and "described Grady as a caring man who never laid a hand on them."¹¹⁸ The district attorney, nonetheless, "had charged Grady with 13 counts of causing, inducing or enticing children to be sexually exploited; 13 counts of possessing sexually exploitive material; and 13 counts of preparing and publishing sexually exploitive material."¹¹⁹ Those

111. *Id.*

112. Crist, *supra* note 105.

113. *Id.*

114. E-mail from Andrew Contiguglia, Attorney for James Grady, to author (Jan. 12, 2004, 14:02:51 EST) (on file with author).

115. Grady's Web site is now back up and running. See TrueTeenBabes.com Web site, at <http://www.trueteenbabes.com> (last visited Jan. 12, 2004). The site describes itself as offering photographs:

of the highest quality seen on the Internet. It simply isn't the same as any other site. The variety is awesome—Aspiring Colorado Glamour Models, Tan Florida Teen Beach Babes and California Teenage Bathing Beauties from ages 13 to 17 looking better than any darn swimsuit model in the catalogs, and showing off in the latest bikinis and lingerie, in classic indoor glamour images, daring outdoor pictures, even a series of funny behind the scenes images and so darn much more you won't believe it.

About This Site, TrueTeenBabes.com Web site at <http://www.trueteenbabes.com/about.html> (last visited Mar. 19, 2004).

116. Eric Dexheimer, *A Model Prisoner*, DENV. WESTWORD, Aug. 14, 2003, at News.

117. Hector Gutierrez, *Acquittal in Porn Case*, ROCKY MTN. NEWS (Denver), Mar. 14, 2003, at 14A.

118. *Id.*

charges, filed under Colorado's sexual exploitation of children act,¹²⁰ centered on a total of 220 images and thirteen alleged victims.¹²¹ Jurors were shown 220 photos of the girls "wearing bikinis and lingerie that revealed some partial nudity."¹²² The images on the Web site were described in a recent newspaper article as follows:

All the trueteenbabes photos are racy; none would show up in a high school yearbook. Yet the 220 pictures the cops eventually determined to be illegal show a wide range of tastes—and interpretations of the law. While some feature girls in sheer tops, in others girls are wearing bathing suits or blouses you might see at any high school. (A sheriff's investigator pointed out that two girls are touching in one photo—a hint of sexual activity. In reality, the photo shows one girl jamming a washcloth into another's mouth.)¹²³

Despite all of the charges and the hundreds of images, the case hinged on one issue: according to the judge, prosecutors were required to prove that Grady himself was "sexually gratified or aroused by the material."¹²⁴ The reason for inclusion of this jury instruction flows from the terms of the applicable Colorado statute, as traced below.

Under Colorado's child sexual exploitation law, "[s]exually exploitative material' means any photograph, motion picture, videotape, print, negative, slide, or other mechanically, electronically, chemically, or digitally reproduced visual material that depicts a child engaged in, participating in, observing, or being used for explicit sexual conduct."¹²⁵ Sexually explicit conduct, in turn, is defined as "sexual intercourse, erotic fondling, erotic nudity, masturbation, sadomasochism, or sexual excitement."¹²⁶ Because Grady's photographs of the young girls on TrueTeenBabes.com clearly did not involve intercourse, fondling, masturbation, sadomasochism or any sexual excitement,¹²⁷ the only possible term left under the law that might apply to the photographs was *erotic nudity*. This term is defined under Colorado law as:

the display of the human male or female genitals or pubic area, the undeveloped or developing genitals or pubic area of the human male or female child, the human breasts, or the undeveloped or developing breast area of

120. See COLO. REV. STAT. § 18-6-403(3)(a)-(c) (2003) (defining the crimes of sexual exploitation of a child).

121. Fong, *supra* note 102.

122. Gutierrez, *supra* note 117.

123. Dexheimer, *supra* note 116.

124. Gutierrez, *supra* note 117; see Dexheimer, *supra* note 116.

125. COLO. REV. STAT. § 18-6-403(2)(j) (2003).

126. *Id.* § 18-6-403(2)(e).

127. Colorado defines sexual excitement as "the real or simulated condition of human male or female genitals when in a state of real or simulated overt sexual stimulation or

the human child, *for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.*¹²⁸

The “persons involved” in this case were both the minors photographed by Grady and Grady himself. The photographs obviously weren’t taken for the sexual gratification of the models; they did it to make money and to launch modeling careers. “It was obvious that the models weren’t really sexually gratified or even simulating sexual gratification, so that left the photographer,” said Andrew Contiguglia, an attorney for Grady, in an email to the author.¹²⁹ As for James Grady, the prosecution could not prove that the photographs were made for the purpose of Grady’s own sexual gratification or stimulation. One of his attorneys had told the jury, “[e]very model said they saw no sign of his sexual gratification or stimulation.”¹³⁰ Because the images were taken for a different and legitimate purpose—his business—they were protected.¹³¹ As interpreted by a Colorado appellate court, “photographs taken for family, artistic, or *any other legitimate purpose are not proscribed by the statute.*”¹³²

128. *Id.* § 18-6-403 (2)(d) (emphasis added). In interpreting this language, a Colorado appellate court recently held:

A display or picture qualifies as “erotic nudity” upon finding that the display or picture meets two separate conditions. First, in the context of this case, the display or picture must depict the human breasts or undeveloped or developing breast area of a child. Second, this display or picture must be for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved. No more is required.

People v. Gagnon, 997 P.2d 1278, 1281-82 (Colo. Ct. App. 1999). In addition, it is clear that complete exposure of the breast or pubic area is not necessary to constitute erotic nudity, as “equal or greater harm to a child can result from the type of poses to which a child is subjected and the process of taking the photos than from the amount of the human breast actually depicted in the photos.” *Id.* at 1282.

129. E-mail from Andrew Contiguglia, Attorney for James Grady, to author (Jan. 12, 2004, 15:50:15 EST) (on file with author).

130. Gutierrez, *supra* note 117.

131. For a very different case, both in terms of the facts and outcome, in which the Supreme Court of Colorado found that photographs were taken for the sexual gratification of the photographer rather than for a legitimate purpose, see *Colorado v. Batchelor*, 800 P.2d 599 (Colo. 1990). In *Batchelor*, the court observed that the defendant:

took the photographs at night with a camera that took instant photographs and concealed the photographs in a small box hidden in a locked downstairs closet of his residence. The evidence indicated that the child had no knowledge that the photographs were being taken. Thus, the photographs and the circumstances surrounding the photographs indicated that Batchelor secretly took the photographs, maneuvered the child so that he could focus graphically on her anal and vaginal area, and that Batchelor concealed the photographs from anyone else’s view. This was sufficient evidence from which the trier of fact could conclude beyond a reasonable doubt that Batchelor took the photographs for the purpose of sexual gratification as required by the statute.

Id. at 605.

132. *Gagnon*, 997 P.2d at 1283 (emphasis added).

The case of James Grady, as one Colorado newspaper observed, revealed “how little law-enforcement authorities understood the law. A review of court documents, as well as interviews with legal experts and participants in the case, shows that cops and prosecutors had far more than their share of misinterpretations, misunderstandings and flat-out mistakes.”¹³³ The material clearly did not constitute images of sexually explicit conduct, in particular, erotic nudity, under the relevant statute. The Grady case, in contrast to the outcome in *Cummings* described earlier, thus stands as an important victory for those who run non-nude child modeling sites and for First Amendment advocates. Jurors in Colorado followed the law and were not swayed by the media hype surrounding the case which billed it, in one article, as about “kiddie porn.”¹³⁴

In an e-mail interview conducted by the author, James Grady called the press coverage given to his case “anything but fair. It was 100% slanted, and major parts of it were fabrications—100% fabrications.”¹³⁵ Grady believes, in fact, that there was a very close connection between some members of the media and the law enforcement officials involved in his case. As he wrote to the author in an e-mail correspondence:

The tips came from the media and a deal was made with two [television] stations that they would not conduct the raid until such time as the media could be present and go live.

The[y] got the warrant prior to 4:00 pm, sat in the parking lot for 2.5 hours—with me talking to them off and on, inviting them in, etc. They waited until two girls (both age 18) were in the building doing a pre-scheduled online chat and raided when they could toss those girl[s] to the ground and announce on TV they had broken up a live sex show between two teen females and a male.

The male they referred to was more than 100 feet, through two doors, away from the girls—actually in the front windows (floor to ceiling) on the building hooking a VCR to a TV in the reception area. Nowhere near the girls, and in no way involved in any “Sex Show” but the sheriff called it a live sex show to the 2 media outlets present.

Remember, one daughter of the then sheriff worked for one of those media outlets.¹³⁶

Grady is upset, however, by more than just the biased media coverage and the too-close-for-comfort connection between the media and the government; the amount of money he spent successfully defending against the criminal counts is massive. “The costs of the legal fees tops \$125,000.00 and I’ll be paying that off for years to come. I am further trying to finance an appeal of the law itself and the constitutionality,”¹³⁷ Grady says. Income has also dried up, with Grady remarking that “[t]he site had 1800 or more mem-

133. Dexheimer, *supra* note 116.

134. Kirk Mitchell, *\$1 Million Bail for Porn Suspect; Girl, Mom, Defend Internet Photographer*, DENV. POST, Apr. 9, 2002, at B-01.

135. E-mail from Jim Grady, *supra* note 14.

136. *Id.*

137. *Id.*

bers the day of the raid, now it has barely enough to pay the rent. The lab is gone and the assets of it are junk stored in rafters."¹³⁸

Grady's side of the case is important to tell and understand, for it shows the unjustified damages that can be done by those who seek to crack down on child modeling sites that are neither illegal nor exploitive to the girls who work for them.

With the Cummings and Grady cases in mind, the next section examines the cultural forces that may help to explain both why so many young girls like those on James Grady's Web site seem so willing to engage in non-nude modeling today and why, in turn, their images are so popular with those sitting behind computer screens across the United States.

C. *The Cultural Forces Behind the Rise of Child Modeling Sites*

"Kids today are raised in a hypersexual culture where they're told every day that sex will make them happy."¹³⁹ That's what Michael Milburn, psychology professor at the University of Massachusetts-Boston and co-author of the book *Sexual Intelligence*,¹⁴⁰ observed in May 2003. Signs and signals of the "intense sexualization of teen culture of recent years,"¹⁴¹ particularly for young girls, are everywhere:

- In May 2002, Abercrombie & Fitch, already known for its hypersexualized marketing campaigns, announced plans to sell thong underwear to ten- to fourteen-year-old girls.¹⁴²

- *The New York Times* reported in November 2002 that teenage girls "are initiating more intimate contact, sometimes even sex, in a more aggressive manner, according to the anecdotal accounts of many counselors, psychologists, magazine editors and teenagers."¹⁴³ The article observed that the "teenage girl as sexual aggressor is a recurring character in music videos, almost macho in her pursuit of sex and advertising her pleasure in it."¹⁴⁴

- The popular music scene plays against a "backdrop of hypersexualized stars like Britney Spears."¹⁴⁵ The "Lolita tease"¹⁴⁶ Spears¹⁴⁷ and her

138. *Id.*

139. Alexandra Hall, *The Mating Habits of the Suburban High School Teenager*, BOSTON MAG., May 2003, at Features.

140. SHEREE CONRAD & MICHAEL MILBURN, *SEXUAL INTELLIGENCE: THE GROUNDBREAKING STUDY THAT SHOWS YOU HOW TO BOOST YOUR "SEX IQ" AND GAIN GREATER SEXUAL SATISFACTION* (2001).

141. Hall, *supra* note 139.

142. David Ford, *Abercrombie's Lolita Line of Thongs Goes Beyond Bad Taste*, S.F. CHRON., May 26, 2002, at E2.

143. Alex Kuczynski, *She's Got to Be a Macho Girl*, N.Y. TIMES, Nov. 3, 2002, § 9, at 1.

144. *Id.*

145. Shanda Deziel, *Avril's Edge*, MACLEAN'S, Jan. 13, 2003, at 22.

146. Steve Hochman, *Duff Serves the Pop Without the Tart*, L.A. TIMES, Jan. 26, 2004, at E1.

147. Britney Spears, although now in her early twenties, embraces the role of teen nymphet. A rather recent article in the *San Francisco Chronicle* described her as:

rival, Christina Aguilera, “have infected millions of girls with an early onset of body consciousness, with the bare midriff becoming the ‘tweener’ equivalent of cleavage. The mating dance begins in grade school, and approximately four out of 10 American girls will become pregnant at least once before reaching age 20.”¹⁴⁸

• Oral sex is increasing among young teens today and a recent national study estimated that about 20 percent of all children ages fourteen and under have had sex,¹⁴⁹ and “[t]een-age lesbian exhibitionism is the latest fad behavior to come out of the closet.”¹⁵⁰

In a recent essay in *Off Our Backs*, Tizzy Asher of the Shoreline Community College Women’s Center in Washington, writes that “[t]he cultural construct of the teenage Lolita is not likely to disappear.”¹⁵¹ She contends:

In this culture of heterosexual, patriarchal privilege, men are entitled to the bodies of girls. And why shouldn’t they be? Men have seen girls’ bodies in numerous sexy and emotionless displays, in everything from movies to television to advertising. There is also little distinction between real and fantasy girls. This popular culture will not acknowledge the emotional and physical consequences of its abuse because it does not see girls as human beings; instead, they are as inanimate as mountains and exist only to be conquered.¹⁵²

Linda Perlstein, the education reporter for the *Washington Post* and the author of a recent book called *Not Much, Just Chillin’: The Hidden Lives of Middle Schoolers*, observed in late 2003 that “[t]he sexuality in middle-schoolers’ music, their movies, their television shows is a universe removed from what we were exposed to in the ‘80s.”¹⁵³ In describing her research for the book, Perlstein wrote:

a whipless kitten longing to be eternal jailbait. Her lips are as pink as fresh bubblegum, her voice as modulated as Minnie Mouse’s, her sexuality still that of the calculating nymphet. Humbert Humbert would be the first to say that, at 20, she’s too old to play the Lolita role, but Britney offers little to replace it.

Neva Chonin, *The Divas: From Girls to Women*, S.F. CHRON., Apr. 7, 2002, at Sunday Date-book 60.

Spears has influenced teen fashions, producing what some have called a “Britney Effect” that has produced “more skin on today’s 14-year-old girls than the tabloids would allow in their ads for pornographic movies a generation ago.” Froma Harrop, *Sartorial Sex Abuse: Protect Teens From Fashion*, PROVIDENCE J.-BULL. (R.I.), Aug. 14, 2002, at B5.

148. Joe Williams, *Act Your Age!*, ST. LOUIS POST-DISPATCH, May 18, 2003, at F3.

149. Jane Elizabeth & Mackenzie Carpenter, *More Youths Are Having Sex and They’re Having It Younger*, PITTSBURGH POST-GAZETTE, Sept. 14, 2003, at A-18.

150. Suzanne Fields, *Civilization, Lip-Gloss Morality; Youth Values Bend with Trends*, WASH. TIMES, Jan. 22, 2004, at A21.

151. Tizzy Asher, *Girls, Sexuality and Popular Culture*, OFF OUR BACKS, May-June 2002, at 22, 24.

152. *Id.* at 23.

153. Linda Perlstein, *Middle School Madness*, WASH. POST, Sept. 7, 2003, at W22.

While preteen crushes remain intact, it would obviously be wrong to say that the world of sexuality remains as it was 20 years ago. Easily what has surprised me most about today's middle-schoolers is the sexual nature of the thoughts running through their heads, the kinds of knowledge they have to process nearly every day, regardless of what they are actually doing.¹⁵⁴

Perlstein also described what she observed one night at a teen dance club near Baltimore, Maryland. She wrote that the club:

was jammed full of teenagers as young as 13, grinding against each other, boys coming up to girls and circling their crotches into behinds, girls bending at the waist to simulate oral sex on the boys. I'd read about "freaking," but until I saw it this close, and this young, it didn't faze me. This was one of the creepiest scenes I'd ever witnessed. Even if they didn't leave the club and actually do the activities they were mimicking, what would happen down the road when they did? Would their sex ever be personal? Intimate? Sweet?¹⁵⁵

The question, for purposes of this article and, more broadly, for social scientists to address, is whether it is at all surprising, given this pop cultural climate of sexualized preteens and teens, that child modeling Web sites are on the rise. They seem, if anything, symptomatic spawn of the current culture—the furthest and most disturbing push on a metaphorical envelope that is continuously pushed further and further in more mainstream media products like music videos.¹⁵⁶

Might the media have such an influence? A survey of 1,000 parents, conducted in April 2003 on behalf of the organization Common Sense Media, found that eighty-eight percent think that the amount of sexual content in media contributes to children becoming sexually active at younger ages.¹⁵⁷ Jane D. Brown, a journalism professor at the University of North Carolina-Chapel Hill, writes that while some adolescents are able to resist and to control the media's influence, "[o]thers are seduced, and model their developing sexual lives on the frequently unhealthy sexual media content they consume."¹⁵⁸ Brown and other researchers observed in 2002:

Whether through the glossy pages of magazines, the surreal images of music videos, or the pulsing beat of songs piped through headphones, media-

154. *Id.*

155. *Id.*

156. Cf. Jeffrey Jensen Arnett, *The Sounds of Sex: Sex in Teens' Music and Music Videos*, in *SEXUAL TEENS, SEXUAL MEDIA* 253, 256 (Jane D. Brown et al. eds., 2002) ("If there is such a thing as a typical music video it features one or more men performing while beautiful, scantily clad young women dance and writhe lasciviously. Often the men dance, too, but the women always have fewer clothes on.").

157. Surveys and Polls, Common Sense Media Web site, at <http://www.commonsensemedia.org/information/polls.php> (last visited Feb. 8, 2004).

158. Jane D. Brown et al., *Introduction and Overview*, in *SEXUAL TEENS*, *supra* note 156,

borne images of sexuality and potential sexual behaviors swirl around today's American adolescents just when they are working to define themselves as sexual beings . . . and are especially receptive and vulnerable to the "sexual scripts" . . . they encounter.¹⁵⁹

Lynn Ponton, a psychiatry professor at the University of California at San Francisco and author of a recent book on teens and sex,¹⁶⁰ adds that "[t]he media and the Internet continually feed teenage boys the idea that girls are sexual objects at their disposal. It's gotten significantly worse in the last five and ten years."¹⁶¹

The media-saturated sexual culture may even be fueling the younger age that some law enforcement officials claim they are witnessing kids becoming pimps and prostitutes.¹⁶² As a recent newspaper article described the situation in Oakland, California: "What's troubling, social workers said, is that girls and boys involved are getting younger and they see it as an extension of the hip-hop or youth culture where being a so-called 'pimp' or a 'player' is not only acceptable but financially rewarding and not as dangerous as selling drugs."¹⁶³

Given all of these facts, one must wonder whether the young girls who engage in child modeling online, as well as the parents who consent to their participation, are so influenced by popular culture that they ignore the harms and sexual exploitation and, instead, accept the activity as normal. Professor Tricia Rose, chair of the American Studies department at the University of California at Santa Cruz, believes that some young girls who embrace sexier attire succumb to pop culture pressures that equate hipness with dressing like strippers or fashion models.¹⁶⁴

Popular culture thus may be contributing to the supply of girls for child modeling Web sites. On the flip side, it also may be contributing to the demand for the sites. In particular, popular culture may be creating a dangerous expectation for grown men that viewing scantily clad, young adolescents who strike provocative poses on Web sites falls within the normal realm of behavior, both for the girls and for themselves. After all, if they see young girls wearing sexier clothes everyday in shopping malls and around town and they know that young girls are increasingly engaging in oral sex, then

159. Michael J. Sutton et al., *Shaking the Tree of Knowledge for Forbidden Fruit: Where Adolescents Learn About Sexuality and Contraception*, in *SEXUAL TEENS*, *supra* note 156, at 26 (citations omitted).

160. LYNN E. PONTON, *THE SEX LIVES OF TEENAGERS: REVEALING THE SECRET WORLD OF ADOLESCENT BOYS AND GIRLS* (2000).

161. Hall, *supra* note 139.

162. Chauncey Bailey, *Report Says Oakland Pimps Getting Younger; Oakland Task Force Finds 13-Year-Old Boys, Girls Selling Sex as Extension*, *ALAMEDA TIMES-STAR*, Jan. 26, 2004, at Local News.

163. *Id.*

164. Vanessa E. Jones, *Wearing Thin the Skimpy, Pop-Princess Look Raises Eyebrows at*

they may expect that the selling of such images on Web sites simply is par for the course.

The comments of at least one mother of an online child model suggest such an influence may be taking place. During an April 2003 episode of *The Oprah Winfrey Show* devoted to child modeling sites, the mother stated, "I don't feel that she's any more exposed to the small percentage of questionable people on the Net than if she's walking around the mall or we are walking to school."¹⁶⁵ The same mother, when interviewed for a segment of the CBS television news magazine, *48 Hours*, stated the following in response to the reporter's assertion that older men are looking at the pictures of her daughter, "That's true. But you know what? There's older men walking down the sidewalk when she's walking down the sidewalk to go play, you know. I mean, you can't stop that, unfortunately."¹⁶⁶

In summary, popular culture may provide the mechanism that facilitates the evolution and proliferation of child modeling sites like the kind addressed here. The author of this article now urges social scientists to further investigate the apparently positive correlation between the increasing sexualization of young girls in popular culture and popular fashion, on the one hand, and the increase in the number and popularity of child modeling Web sites, on the other hand. If the correlation¹⁶⁷ crosses over to causation,¹⁶⁸ then the legal system bears a large responsibility for correcting the problems that our culture has generated.

From a legal perspective, the changing cultural norms and mores regarding teen and preteen sexuality are incredibly important. Why? Because what both judges and jurors are willing to call "lascivious"¹⁶⁹ under federal law or "lewd"¹⁷⁰ under various state laws will be influenced by these shifts over time. We may be less willing to consider as lascivious, in today's sexualized teen culture in which the increasing show of skin is normalized, some exhibitions of the pubic area and/or genitals, clothed or unclothed, than we were, perhaps, ten years ago.¹⁷¹ If this is the case—that we simply are more accept-

165. *Oprah*, *supra* note 4.

166. *48 Hours*, *supra* note 4.

167. See generally MICHAEL SINGLETARY, *MASS COMMUNICATION RESEARCH: CONTEMPORARY METHODS & APPLICATIONS* 227 (1994) ("It is important to recognize that correlation is not the same as causation. In other words, if two variables are correlated, it does not necessarily follow that one *causes* any change in the other.")

168. "Causality means that a change which occurs in one variable (the cause) brings about a change in another variable (the effect)." JAMES H. WATT & SJEF A. VAN DEN BERG, *RESEARCH METHODS FOR COMMUNICATION SCIENCE* 37 (1995).

169. 18 U.S.C. § 2256(2)(A)(v) (2003).

170. ARK. CODE ANN. § 5-27-401 (Michie 2003); 720 ILL. COMP. STAT. ANN. 5/11-20.1 (West 2004); MASS. GEN. LAWS ch. 272, § 29C (2004); N.Y. PENAL LAW § 263.00 (McKinney 2004); TEX. PENAL CODE ANN. § 43.25 (Vernon 2004).

171. Cf. Marina Pisano, *Images Stir Vulgarly Debate Anew*, SAN ANTONIO EXPRESS-NEWS, Sept. 14, 2003, at 1K (quoting Jean Kilbourne, "who pioneered the study of harmful media images of women," for the proposition that "[w]hat would have struck us as vulgar and eyes pornography not that long ago, just slides by . . .").

ing as a culture of the images displayed on the typical non-nude child modeling Web site—then it may be that prosecutors are wasting taxpayer dollars in going after operators of the sites. It makes prosecutions more difficult when jurors are more willing to accept, as an ordinary part of life, images of consenting young girls, posing in bikinis and underwear, posted on the Web.

Despite this very real possibility, legislators already are taking up the call to arms to create new laws that would make prosecutions easier and ensnare the operators of child modeling Web sites. Those efforts are described in the next part of this article.

II. THE CHILD MODELING EXPLOITATION PREVENTION ACT OF 2003: SLIGHTLY IMPROVED, STILL IMPERFECT

In February 2003, to address at the federal level the problems of prosecuting those who run non-nude child modeling Web sites like those described in the Introduction and in Part I of this article, U.S. Representative Mark Foley, a Florida Republican, introduced the Child Modeling Exploitation Prevention Act (CMEPA).¹⁷² At the same time, Senator Jim Bunning, a Kentucky Republican, introduced a parallel measure in the United States Senate.¹⁷³

The bills, which were designed to amend portions of the Fair Labor Standards Act of 1938 relating to oppressive child labor,¹⁷⁴ coined the term “exploitive child modeling” and provided that “no employer may employ a child model in exploitive child modeling.”¹⁷⁵ The companion bills defined this term to mean “modeling involving the use of a child under 17 years old for financial gain without the purpose of marketing a product or service other than the image of the child.”¹⁷⁶

In an apparent effort to protect legitimate forms of expression involving images of minors and thereby to mitigate potential First Amendment challenges to the measures were they to become law, the concurrent legislation provided that the term exploitive child modeling “does *not* apply to an image which, taken as a whole, has serious literary, artistic, political, or scientific value.”¹⁷⁷ This language tracks the third prong of the United States Supreme Court’s definition for obscenity outlined more than thirty years ago in *Miller v. California*.¹⁷⁸ The Court recently emphasized the importance of this lan-

172. H.R. 756, 108th Cong. (2003).

173. S. 404, 108th Cong. (2003).

174. 29 U.S.C. § 212 (2003).

175. H.R. 756 §§ 2-3(a); S. 404.

176. *Id.* § 3(a).

177. *Id.* (emphasis added).

178. 413 U.S. 15, 24 (1973). The three-part test for determining whether speech is obscene asks:

(a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct

guage regarding serious value, when it struck down, in 2002, the Child Pornography Prevention Act (CPPA) of 1996 as fatally overbroad because, in part, that law failed to provide protection for computer-generated images of minors that possess such serious artistic or literary value.¹⁷⁹

It is important to note that the 2002 version of the CMEPA—a bill that died after referral to two different House committees—failed to include this language from *Miller*.¹⁸⁰ In fact, the 2002 measure failed to include *any* language providing exemptions for material deemed to have artistic value. The 2003 version of the CMEPA thus is, from a free-speech perspective, an improvement over the 2002 bill.

What prompted this change or difference? It may have been, although the legislative history does not provide any indication one way or the other, the influence of a law journal article. Between the time of the introduction of the 2002 version of the CMEPA in May 2002 and the introduction of the revised measure in February 2003, a law journal article was published that specifically pointed out the flaw with the 2002 bill and called for the exact change adopted in 2003. As the author of this article wrote in fall 2002:

Given the Court's recent concern with the inclusion and exclusion of statutory language relating to the artistic value of sexually explicit speech, the Court would likely be concerned that the CMEPA does not include a *Miller*-like exemption for works that possess serious artistic value. The addition of such language might increase the CMEPA's odds of surviving judicial review.¹⁸¹

Whether or not the article actually influenced the change, its proposal was directly incorporated into the 2003 version of the CMEPA. The artistic value exception in the new version of the CMEPA likely would, were the bill to be adopted and prosecutions under it to subsequently ensue, produce often confusing and complicated battles of expert witnesses over whether or not particular images of young girls posed in underwear or bikinis either possess or lack serious artistic value. Divining whether a photograph has serious artistic value would not be an easy task for jurors. If anyone would actually benefit from this new language, then, it surely would be individuals who pass judicial scrutiny to testify as experts in artistic photography.

There is another difference—this one less significant in terms of First Amendment interests—between the 2003 legislation and the 2002 version. In particular, the new legislation defines exploitive child modeling, for purposes of amending child labor laws, as “modeling involving the use of a

specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id.

179. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 246 (2002) (holding that “[t]he CPPA prohibits speech despite its serious literary, artistic, political, or scientific value”).

180. H.R. 4667, 107th Cong. (2002).

child under 17 years old for financial gain without the purpose of marketing a product or service other than the image of the child.”¹⁸² The 2002 version of the CMEPA provided that “the term ‘exploitive child modeling’ means the display of a minor (through any medium) without a direct or indirect purpose of marketing a product or service other than the minor.”¹⁸³ The 2002 bill, like the 2003 legislation, prohibited the employment of a minor “under 17 years old.”¹⁸⁴

Several observations are important here. First, there was no attempt made between 2002 and 2003 to lower the statutory age of the minor involved in such an alleged sexual exploitation. Such a reduction in age—one, perhaps, that defines a minor as one under the age of fourteen rather than one under age seventeen—would make the legislation, were it to become law, more likely be upheld as constitutional. Why? Because the lower the age at which a minor is defined, the more speech that is permitted to come out; images of fifteen and sixteen-year-old child models would be allowed because they would escape the reach of the statute. This, in turn, makes the law more narrowly tailored¹⁸⁵ and less overbroad¹⁸⁶ in serving its compelling goal of protecting minors from sexual exploitation.

In addition, there surely is a difference in the abilities of minors of different ages to understand the nature of the activity in which they are engaging. As the Court of Appeals for the Third Circuit observed in 2003 in considering the constitutionality of the Child Online Protection Act (COPA), which applied the exact same age cut-off for the definition of minor as that used in the 2002 and 2003 versions of the CMEPA, “The term ‘minor, as Congress has drafted it, thus applies in a literal sense to an infant, a five-year old, or a person just shy of age seventeen.”¹⁸⁷ The appellate court added that, in the context of the COPA, the under-age-seventeen definition of a minor “would not be tailored narrowly enough to satisfy strict scrutiny.”¹⁸⁸

Strict scrutiny is the standard of judicial review under which content-based laws like both the COPA and the CMEPA are analyzed by courts to determine whether the First Amendment right of free expression is violated.¹⁸⁹ Under this test, “[t]he government may . . . regulate the content of

182. H.R. 756, 108th Cong. § 3(a) (2003).

183. H.R. 4667 § 3(a).

184. *Id.*

185. “[A] content-based speech restriction” is constitutional “only if it satisfies strict scrutiny.” *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000). This means that a statute “must be *narrowly tailored* to promote a compelling Government interest.” *Id.* (emphasis added).

186. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002). “The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.” *Id.*

187. *A.C.L.U. v. Ashcroft*, 322 F.3d 240, 254 (3d Cir. 2003).

188. *Id.* at 255.

189. *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954, 958 (8th Cir.

constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.”¹⁹⁰

The 2003 version of the CMEPA, like its 2002 predecessor, also includes a gaping loophole under which operators of non-nude child modeling sites can slightly alter their content and thereby avoid criminal prosecution. In particular, the 2003 version of the CMEPA defines exploitive child modeling to mean “the use of a child under 17 years old for financial gain *without the purpose of marketing a product or service other than the image of the child.*”¹⁹¹ This appears to mean that if the operators of the Web sites were to actually sell the clothing the children model or have modeled, then, no matter how skimpy the underwear or swimsuit that may be worn, those operators would escape liability. It might be that simply placing links on the sites to the manufacturers of the clothes would be enough in order to escape prosecution.

Each provision of the CMEPA discussed so far is directed toward amending the Fair Labor Standards Act of 1938. The 2003 bill would also affect and amend federal statutes on child pornography, incorporating by reference some of the changes made to the labor laws. In particular, the CMEPA would amend 18 U.S.C. § 2252A to provide:

(a) In General. Except as provided in subsection (b), whoever, in or affecting interstate or foreign commerce, with the intent to make a financial gain thereby—displays or offers to provide the image of an individual engaged in exploitive child modeling (as defined in section 12(e) of the Fair Labor Standards Act of 1938) shall be fined under this title or imprisoned not more than 10 years, or both.

(b) Exception. This section does not apply to an image which, taken as a whole, has serious literary, artistic, political, or scientific value.¹⁹²

As with the amendments to the federal labor laws, the 2003 bill also incorporates an exception for images with serious literary, artistic, political or scientific value.¹⁹³ The 2002 version of the measure lacked such a free-speech safety valve.¹⁹⁴ The exemption certainly benefits free speech, but it

190. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

191. H.R. 756, 108th Cong. § 3(a) (2003) (emphasis added).

192. *Id.* § 4(a).

193. *Id.*

194. The corresponding and parallel portion of the 2002 version of the CMEPA relating to federal criminal laws on child pornography provided:

Whoever displays, in or affecting interstate or foreign commerce, the image of a child who has not attained the age of 17 years, with the intent to make a financial gain thereby, or offers, in or affecting interstate or foreign commerce, to provide an image of such a child with the intent to make a financial gain thereby, without a purpose of marketing a product or service other than an image of a child model, shall be fined under this title or imprisoned not more than 10 years, or both.

also would create the battle-of-the-experts scenario described above should it become law.¹⁹⁵

Today, the CMEPA of 2003 has gone nowhere. The last movement, of any kind, occurred in July 2003 when Rep. Frank LoBiondo, a New Jersey Republican, became the forty-eighth co-sponsor of the House bill. The Senate version has had even less action; it gained only one co-sponsor, Republican Sam Brownback of Kansas, who actually was an original co-sponsor with Jim Bunning, a Kentucky Republican, in February 2003. Given the fact that the 2002 version of the CMEPA also went nowhere but was put forth again in 2003, with the revisions described above, it seems apparent that yet another form of the bill will resurface in 2004. This is especially likely if the topic of non-nude child modeling Web sites gains the same type of media exposure on television programs like *The Oprah Winfrey Show*¹⁹⁶ and *48 Hours*¹⁹⁷ that it did in 2003. Should that indeed happen, the next section proposes a new theory and argument designed to justify and sustain the measure against judicial challenges were it to become law.

III. A MATTER OF PRIVACY: FINDING THE CONSTITUTIONAL FORCE TO COUNTER FREE EXPRESSION

The First Amendment protection of freedom of speech rightfully stands as the most formidable obstacle that any new law targeting the operation of, and images on, non-nude child modeling Web sites would face in a courtroom battle. The United States Supreme Court's rejection, in 2002, of a congressional expansion of federal child pornography laws to sweep up certain forms of so-called virtual child pornography makes this clear.¹⁹⁸ Expansion of the current laws to further encompass non-nude child modeling sites would face similar fights.

The key for judicial success of any measure regulating these sites is drafting legislation that satisfies the strict scrutiny,¹⁹⁹ overbreadth²⁰⁰ and void for vagueness²⁰¹ doctrines that are courts' frequent tools for analyzing laws that restrict speech otherwise protected by the First Amendment. The author's previous article in 2002 addressed these issues,²⁰² and that analysis holds true today, two years later.

195. See *supra* note 181 and accompanying text.

196. *Oprah*, *supra* note 4 and accompanying text.

197. *48 Hours*, *supra* note 4 and accompanying text.

198. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002).

199. See *supra* notes 189-190 and accompanying text.

200. See *supra* note 186.

201. This doctrine holds that a "law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted." ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 763 (1997).

202. Calvert, *Academic Privilege*, *supra* note 1, at 279-86. The author discussed issues of

What should now be added to the mix are justifications for regulation based on privacy concerns. Privacy is critical here in several ways. First, the term privacy, when considered in the constitutional sense embraced more than thirty years ago in *Roe v. Wade*,²⁰³ encompasses the principle of autonomous decision making and choice. Some of the minors who “choose” to participate in child modeling Web sites are, arguably, too young to appreciate and/or understand their actions and their choices. As Section I.C suggests, the increasingly sexualized culture in which young girls are raised today makes any choice to participate seem natural and normal.²⁰⁴ On the surface, from the perspective of the average thirteen-year-old girl, there appear to be no negative or harmful consequences; the downside of participation in activities of a sexual nature like non-nude child modeling for Web sites may not even crop up in the thought processes of very young girls. The girls, when their parents consent to their participation, are, in essence, denied their own freedom to choose because the ramifications of their actions down the road are kept cloaked by culture and their own inexperience. Knowing choice about their own sexual identity is determined for them by their parents.

That argument can also be taken from another perspective. Justice Kennedy wrote in 2003 in *Lawrence v. Texas*²⁰⁵ that “[l]iberty presumes an autonomy of self that includes freedom of thought.”²⁰⁶ But the freedom of thought of young girls today arguably is clouded and corrupted by the media-driven culture in which they grow up and by the parents who may see their children’s participation on a child modeling Web site as a way to make a quick buck off their kid’s innocence.

Adults are given, as Justice Kennedy wrote, by Supreme Court precedent, “the right to make certain decisions regarding *sexual conduct*.”²⁰⁷ Child modeling Web sites, of course, test the limits of federal child pornography laws that relate specifically to the *sexual conduct* of minors, not adults.²⁰⁸ Adolescent children are too young to appreciate the decisions that they make regarding their sexual conduct—statutory rape laws are testimony to this—and that their parents make for them when they consent to the participation in child modeling. If *Roe* “recognized the right of a woman to make certain fundamental decisions affecting her destiny,”²⁰⁹ then it is arguable that the very young women who participate in child modeling Web sites—sites that some people like Rep. Foley contend exploit their sexuality—cannot appreciate how that participation will affect their own destiny. They should not be

203. 410 U.S. 113 (1973).

204. See *supra* Part I.C.

205. 123 S. Ct. 2472 (2003).

206. *Id.* at 2475.

207. *Id.* at 2477 (emphasis added).

208. See 18 U.S.C. § 2256(2)(A) (2003) (describing “sexually explicit conduct” that constitutes child pornography).

209. *Lawrence*, 123 S. Ct. at 2477.

made to participate by their parents because their opportunity of freedom to choose at a later time how to use (or not use) their sexuality will be denied.

In addition to constitutional privacy concerns, the public policy behind the common law privacy tort of public disclosure of private facts²¹⁰ also should play an important role when it comes to finding interests that potentially outweigh or trump First Amendment concerns. Under this tort, an actionable privacy invasion occurs if publicity is given to a private fact that would be highly offensive and objectionable to a reasonable person, and the fact in question is not of legitimate public concern.²¹¹

In the case of child modeling Web sites, the images that appear on them involve private facts; they often focus on what many would consider private parts and areas of young girls' bodies—areas that, even in today's skin-baring times, typically would not be in public view but for the photographs in question. The images also clearly are not of legitimate public concern. They are not at all newsworthy.²¹² Instead, their publication to a mass audience on the World Wide Web is, arguably, highly offensive to a reasonable person who believes that the sexuality of the children in the images is being exploited for profit.

In summary, this Part of the article has laid the groundwork for an argument that the privacy interests of minors—both constitutional and tort—provide a crucial rebuttal to First Amendment concerns of freedom of expression. This is not, however, an endorsement of this argument. As is argued in the Conclusion, the best tack now may not be the creation of new laws to deal with child modeling Web sites, but the better enforcement of the laws already on the books.

CONCLUSION

It is clear today that “the exploitation of children on the Internet is a vast and growing problem.”²¹³ Witness, for instance, the arrest of fifteen New Jersey residents in January 2004, each of whom was charged with downloading child pornography.²¹⁴ Or consider Operation Pin, a new global law enforce-

210. This tort is sometimes referred to as “public disclosure of private embarrassing facts.” ROBERT D. SACK & SANDRA S. BARON, 1 *LIBEL, SLANDER & RELATED PROBLEMS* § 12.4 (3d ed. 2003).

211. *Shulman v. Group W. Prods., Inc.*, 955 P.2d 469, 478 (Cal. 1998).

212. Newsworthiness is used interchangeably with the term legitimate public concern, and it is important because “a private facts claim cannot succeed unless the court is convinced that the disclosures were not newsworthy.” JOHN D. ZELEZNY, *COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS, & THE MODERN MEDIA* 185 (4th ed. 2004).

213. Jerry Seper, *County Sheriff Honored for Anti-Pedophile Work*, WASH. TIMES, Oct. 8, 2003, at B02. This statement was made by Sheriff Mike Brown of Bedford County, Virginia, who investigates sexual predators of children online. *Id.*

214. Neil Graves & Andy Geller, *Kid-Porn Ring; Minister, Doc Among 15 Nabbed in New Jersey*, N.Y. POST, Jan. 16, 2004, at 19; Ronald Smothers, *Fifteen Arrested in New Jersey in Child Pornography Inquiry*, N.Y. TIMES, Jan. 16, 2004, at B2.

ment initiative by law enforcement officials in the United States, Britain and Australia that “uses fake sites and chat rooms to crack down on adults who seek to purchase child pornography online.”²¹⁵ There’s also the now well-established problem of computer chatting in which sexual predators use the Internet to meet children for sex.²¹⁶ The Internet, in fact, “has brought sexual predators into homes via chat rooms[.]”²¹⁷ And the data is clear that “[s]ince 1996, the first year of an FBI crackdown on child pornography and other Internet crimes against children, the number of federal cases has soared from 113 to 2,370” in 2002.²¹⁸

What definitely is *not* clear, however, is whether non-nude child modeling Web sites necessarily constitute the online sexual exploitation of children and, furthermore, whether they even violate child pornography laws. As the case of James Grady indicates,²¹⁹ prosecutors applying current child pornography and sexual exploitation laws to nab the operators of these sites may face difficult and frustrating battles in attempting to gain convictions.

This article also has illustrated the cultural forces that may be facilitating the growth of child modeling Web sites and that, concomitantly, may be hindering the prosecution of their operators. It seems clear that popular culture, which sexualizes young teen girls to the point where movies like *Thirteen*²²⁰ appear non-shocking, provides a perfect breeding ground for these Web sites. If society’s mores have changed such that such sexualization is acceptable, then a jury is less likely to be offended by, or even question the propriety of, the images. The child modeling Web sites, when seen in this light, may be just another target in the culture wars.

If one accepts the privacy argument articulated in Part III, however, then there still may be a chance of finding a statutory angle for regulating and restricting the content found on non-nude child modeling sites. But the First Amendment concerns should not be dismissed too easily. As Justice Anthony Kennedy observed in striking down the CPPA just two years ago, we have long been interested in “teenage sexual activity”²²¹ and that “[a]rt and literature express the vital interest we all have in the formative years we our-

215. Michael Schrage, *We Can Trap More Crooks With a Net Full of Honey*, WASH. POST, Jan. 11, 2004, at B01.

216. Lou Grieco, *These Surfers Want to Block the Waves*, DAYTON DAILY NEWS (Ohio), Jan. 13, 2004, at B2.

217. Tim Doulin, *Online Predators Find Boon, Bust*, COLUMBUS DISPATCH, Nov. 28, 2003, at 1B.

218. Stephen Hudak, *Police Troll Net in Underage-Sex Stings*, PLAIN DEALER (Cleveland), Nov. 16, 2003, at A1.

219. See *supra* notes 102-138 and accompanying text.

220. See Tom Russo, *Girl, You’ll Be A Woman Soon; Turning the Lens on Female Characters Caught Between Youth and Adulthood*, BOSTON GLOBE, Jan. 25, 2004, at N18 (describing the 2003-produced movie as providing an “unflinching look at two girls growing up too fast in LA . . .”).

221. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 247 (2002).

selves once knew. . . ."²²² The non-nude child modeling Web sites targeted by politicians like Rep. Foley certainly appeal to teen sexuality, but they do not even include or encompass sexual activity. The serious-artistic-value exemption placed into the 2003 version of the CMEPA thus may prove to be an exception that swallows the general rule against the sites.

Perhaps the best solution, then, is not to adopt any new laws to address non-nude child modeling Web sites. Rather, the optimal answer may be to let the operators of those sites push the envelope too far until they actually cross the boundary from protected artistic expression to child pornography under extant child exploitation laws. The successful prosecution in the *Cummings* case, as described in Part IB, demonstrates that there is, indeed, such an endpoint on how far the sites can go today within the context of current state and federal statutes.

The crucial opinion for other courts to follow, if current federal laws are to place effective parameters on non-nude child modeling Web sites, is *United States v. Knox*.²²³ That is the case in which the United States Court of Appeals for the Third Circuit held that a lascivious exhibition of the genitals or pubic area may exist even though a minor is wearing underwear or a swimsuit. While *Knox* dealt with videotapes of minors rather than still images, its reasoning holds the key for punishing those who go too far in exploiting the sexuality of minors on non-nude child modeling sites.

It is instructive and important to note here that James Grady, the man described in Part IB who was acquitted of criminal charges in Colorado, actually was well aware of the *Knox* opinion and, in fact, used it to define the limits on the type of photographs he took for the TrueTeenBabes Web site. In a January 2004 correspondence with the author, Grady wrote that his "guidance for the outfits and posing is based very clearly on the law. 18 U.S.C. § 2256 defines what is illegal. The *Knox* and *Ferber* cases clearly provide guidance."²²⁴ He added that "[b]y the way, those cases and others were found by the police in my desk. I clearly knew the law and the limits—much better than they did."²²⁵

Perhaps, indeed, Grady knows something that many law enforcement officials and maybe even some politicians do not understand—current federal legislation *does* have the potential to regulate non-nude child modeling sites. Although the path of legislative inaction is a better choice than drafting new laws that are unnecessary and/or that are almost certain to be declared unconstitutional, it is doubtful that the issue of non-nude child modeling

222. *Id.* at 248.

223. 32 F.3d 733 (3d Cir. 1994). *See supra* notes 59-61 and accompanying text.

224. E-mail from Jim Grady, *supra* note 14. Grady is referring to *New York v. Ferber*, 458 U.S. 747 (1982), the seminal United States Supreme Court opinion which held that the distribution of child pornography is not protected by the First Amendment.

225. E-mail from Jim Grady, *supra* note 14.

2004] THE PERPLEXING PROBLEM OF CHILD MODELING WEB SITES 263

Web sites will soon fade away. The sites simply provide too easy of a target for politicians, looking for a ready mark in a culture they believe has fallen into disarray.

