

Questionable Child Pornography

Kenneth V. Lanning

(Retired FBI Agent)

CAC Consultants

Fredericksburg, VA

October 2015

Abstract: Society and most criminal justice professionals would prefer to believe that the criteria for determining if a visual image is legally child pornography are clear-cut and can be readily determined from what appears within the “four corners” of an image. Reality and case law seem to say otherwise. What is the precise legal difference between medical images, art, or innocent nudity involving children and what the law generally refers to as lascivious/lewd exhibition of the genitals? This article will discuss the legal criteria for child pornography and make recommendations for professional and objective investigation to properly assess and evaluate questionable visual images of children. Hopefully, following these recommendations will better protect children by reducing the possibility of the guilty escaping responsibility, the innocent having their reputations damaged, children being unnecessarily distressed, and investigators being successfully sued in lawsuits.

Adapted from

Child Molesters: A Behavioral Analysis (5th Ed.)

(2010) National Center for Missing & Exploited Children

Caution

This discussion is intended to be a civil and criminal justice analysis based on my more than 40 years experience conducting behavioral analysis and case consultation involving the investigation and prosecution of child pornography. I am not, however, an attorney and it is not intended to be a precise legal analysis with technical legal definitions. Although I have great confidence in the behavioral accuracy and reliability of the information set forth, its legal acceptance and application must be carefully evaluated based on departmental policy, rules of evidence, and current case law.

Introduction

The perceptions of many people and the definitions in the law concerning what is child pornography are often significantly different. Many perceive and assume that child pornography includes both words and images depicting prepubescent children (younger than 13-years-old) being sexually abused (*i.e.*, penetration, violence). Because perception and reality are not necessarily the same, it is essential for professionals dealing with the criminal justice system to have a clear understanding of the applicable legal definitions of *child pornography* and the criteria for evaluating it.

The legal definitions of what is considered *child pornography* can vary somewhat from state to state and under federal law. Interestingly, until the Child Pornography Prevention Act of 1996, the specific term *child pornography* was not included or defined in the federal statute. The functionally equivalent term of *sexually explicit visual depiction of a minor* was used. Under most legal definitions, child pornography usually involves a **visual depiction** (not the written word) of a **child** (a minor as defined by statute - usually including pubescent adolescents) engaged in **sexually explicit conduct** (not necessarily obscene, forced, or violent). There can be legal questions and complexities with each of these three elements. This discussion will address some of those questions only as they pertain to the last element of this definition. The focus here will be on investigative techniques to objectively evaluate questionable visual depictions of children to determine if they might in fact portray *sexually explicit conduct* as defined by the law and therefore constitute illegal child pornography.

One reason these types of child pornography cases are a continuing problem is the failure of many investigators or prosecutors to appreciate and address their reality. There is an understandable reluctance to admit that some visual depictions of children may or may not be child pornography depending on the totality of the facts. They prefer to believe that the criteria for determining if a visual image is legally child pornography are clear-cut and can be readily determined from what appears within the "four corners" of an image. Looking only at the visual depiction of the child, however, does not always resolve the issue. Many investigators simply are not aware of the need in some cases to prove the lascivious intent of the producer or collector and/or how to go about proving it. In *United States v. Hilton*, (1st Cir. 1999), the court states, "a jury must decide based on the totality of circumstances."

One reason these cases are not an even bigger problem is because the nature of the questionable images in many of these cases often does not fall within the investigative or prosecutorial discretion for child pornography cases. There may also be variations in investigative response depending on whether such questionable material is produced or just collected by a suspect. In addition, to avoid conducting investigation, some investigators or prosecutors simply claim such questionable images are not child pornography even though they might meet the legal threshold criteria and further investigation might prove it.

During my career I have consulted on numerous criminal and civil cases involving questionable child pornography and the difficulties they present. One case in particular helped formulate my thinking and analysis. Visual images of naked children were seized from a subject during an investigative search. The subject, through his defense attorney, then argued to the court that certain visual images seized were art and he had experts would so testify. He wanted these images returned to him with assurances from the government that they were not child pornography and he would not then be arrested when he regained possession of them. One of the prosecutors involved in the case believed the images in question were clearly and obviously child pornography based on what was depicted. He wanted to prosecute the subject and obviously not return them. Another prosecutor involved, however, did not believe these images were child pornography based on their content and therefore did not want to pursue prosecution. He wanted to return these images and prosecute the subject only for other images seized that were unquestionably sexually explicit. He was not, however, willing to legally stipulate the images to be returned were **not** child pornography.

I came to believe that the images in question in this case might be child pornography but only if a lascivious intent could be proven. I felt this could easily be done because I knew the background of this subject, his well-documented sexual interest in children, and the sexually explicit nature of other images he had. I believed that in the possession of this particular subject these images were child pornography. Would such context information be probative and legally admissible at a trial? Who was right? Were these images always child pornography based on what they depicted, never child pornography because they were not sexually explicit enough and had artistic value, or sometimes child pornography based on the total context of the case?

The sexual victimization of children involves varied and diverse dynamics. It can range from one-on-one intrafamilial abuse to multioffender/multivictim extrafamilial sex rings and from stranger abduction of toddlers to prostitution of teenagers. There are, therefore, no step-by-step, rigid investigative standards that are applicable to every case or circumstance. Investigative approaches and procedures have to be adjusted based on the dynamics of the case. Larger law enforcement agencies tend to have more specialized investigative units that deal with the different types of sexual victimization of children cases. One unit might investigate intrafamilial child abuse cases; another might investigate missing, abducted, or murdered children cases; and another might investigate extrafamilial sexual exploitation cases. Smaller law enforcement agencies tend to have investigators who are more generalists with varying degree of specialization and who might investigate a wider variety of cases. Offenders sometimes cross these investigative categories. For example, a father might produce and distribute child

pornography images of his own children or might molest other children in addition to his own. Investigators should be trained and prepared to address these complex realities.

It could be effectively argued that child pornography requires a child to be victimized. A child had to be sexually exploited. Not all children depicted in illegal child pornography, however, have been physically sexually abused and current laws typically do not require that they be. Examples of children not abused but considered child-pornography victims under current federal law might include children surreptitiously photographed while undressing or bathing; sleeping children video recorded by the adult lying naked next to them; children unknowingly manipulated or tricked into posing nude or exhibiting their genitals; fully dressed children in the background of an image of adults lasciviously exhibiting their genitals; children in sexually explicit images they have created; and children old enough to legally consent to have sex with an adult but not to be in sexually explicit images. Depending on the use of the material, such children may not have been **abused** but all can be considered **exploited**. This assumes the use of generally accepted definitions of what legally constitutes child sexual abuse and not some emotionally inspired variation.

Arguing all images that legally constitute child pornography are *child-abuse images* can only be maintained by changing the generally understood definition of child abuse. Because some people think “pornography” is not an important issue does not justify changing from a term (*child pornography*) with 30+ years of case law to a term (*child-abuse images*) with no legal history and requiring an added burden of proof. The solution to this problem is to calmly and objectively explain that offenders who possess, receive, and distribute child pornography are a threat to children because they sexually exploit children by encouraging and validating the behavior of those who produce it. Inventing a new, confusing term makes no sense except to help a few individuals emotionally justify their efforts, distort the perception of what is legally child pornography, and make objectively evaluating the cases being discussed here more difficult.

Defining the Problem

In most child pornography cases, investigators and prosecutors are dealing with subjects who possess, access, receive, or distribute the images, but often are not the producers of the images. There is significant diversity in the images. Some of the images seized by law enforcement have repeatedly been seen by experienced investigators, and others have never been seen before. Some were produced years ago, and others seem to have been recently made. Some of the images portray children who have been identified in another investigation, but that fact may not be known in a current investigation. Some images portray children smiling and laughing, and other images portray children who appear to be suffering. Some images seem to portray children from other counties, and others images seem to portray children from the United States. Some images portray toddlers, and others portray teenagers. Some images appear to have been produced by the offender, and others appear to have only been received or downloaded. Many images are still photographs, but a growing number are moving images. As used in this

discussion, the term *photograph* generally may include any visual depiction such as negatives, prints, slides, movies, video recordings, and digital images.

According to federal law, the "sexually explicit conduct" depicted in child pornography means: actual or simulated sexual intercourse, including vaginal, oral, and anal; bestiality; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area of any person (18 U.S.C. § 2256). It should be noted that this definition states "of **any** person" (emphasis added) and not necessarily the lascivious exhibition of the genitals or pubic area of the child in the image. It is important to recognize that this definition is not inclusive of all behavior that could be sexually arousing or gratifying to a given individual. Legal definitions of sexually explicit conduct are not necessarily synonymous with behavioral definitions of sexual behavior. For example, visual images of children engaged in a wide variety of conduct depicting and appealing to specific paraphilic sexual interests (*e.g.*, getting an enema, wearing diapers, playing dead, urinating, defecating, wearing socks, exposing buttocks) may not meet legal definitions of sexually explicit conduct. As indicated above, current federal law recognizes certain commonly known sexual acts, but apparently chooses to specifically recognize only four (*i.e.*, sadism, masochism, bestiality, exhibitionism) of the many less known sexual paraphilias as constituting *sexually explicit conduct*.

I am not sure why the federal law chose to recognize only these four paraphilias as being part of the defined sexually explicit conduct. The only explanation I can think of is that no society can pass laws to deal with sexual behavior it is not prepared to admit goes on. Sexual activity involving things such as urination, defecation, and enemas is bizarre and unpleasant to contemplate or discuss. On the other hand, so is sexual intercourse with toddlers. In addition, a listing of all behaviors someone might find sexually arousing would be so long and varied it is essentially impossible to draft a law specifically addressing each of them.

Some have told me criminalizing the visual portrayal of questionable activity that most often does not involve sexual gratification would create a "thought police." They understandably would prefer to prove it is child pornography based only on the sexual activity depicted within the visual image. Federal law, however, does not now limit sexually explicit conduct to strict liability sexual behavior. By using terms such as **lascivious**, **bestiality**, **sadistic**, or **masochism abuse** in the context of sexually explicit conduct, the current federal law already strongly implies the need to make a judgment about the intent and context of the conduct that may not be clear from the visual image alone.

For example, if you leave out the need to prove that the sadistic or masochistic abuse mentioned in the federal statute was for the purpose of sexual gratification and just assume it from the image alone, all kinds of nonsexual images (*e.g.*, fighting, malnutrition, physical injuries) of children potentially become child pornography. In my opinion, if a prosecutor can prove beyond a reasonable doubt that a visual image of a child engaged in a wide variety of behavior (*e.g.*, pretending to be dead, tied-up, urinating, etc.) was created for the sexual gratification of an offender, the law should allow for its potential prosecution as child pornography. Proving this is often not as difficult as some think, but it can be unpleasant and distasteful.

Some grossly sexually explicit visual depictions of children are clearly and obviously **always** child pornography. The conduct portrayed is so sexually explicit that the visual depiction stands on its own. The fact that such images portray sexually explicit conduct can be determined from the image alone. This might include a photograph of a man inserting his erect penis in a very young girl's vagina (strict liability offense).

Some visual depictions of children, no matter the context or use, do not meet any minimum legal threshold set forth in the statute. They are **never** child pornography no matter how sexually arousing or gratifying to a given individual. This might include photographs of children fully dressed in clothing ads from store catalogs, video of children in television programs or commercials, or photographs of children's feet or shoes (*i.e.*, partialism, fetishism) that an offender collected for sexual arousal and/or paraphilic interest. Individuals with a sexual interest in children sometimes frequent playgrounds, youth athletic contests, child beauty pageants, county fairs, or child exercise classes with their camera (*i.e.*, 35mm, instant, video, digital) and take candid shots. Although offensive to most people, especially the parents/guardians of these children, this is usually not illegal and the resulting visual images are most likely not illegal child pornography. Such material might still be of significant evidentiary value.

Some visual depictions of children may or may not be child pornography depending on the defined legal threshold and the totality of facts. Such **sometimes** child pornography might include photographs of children naked or even in their underwear. Most people have photographs of children somewhere in their homes, and many people also possess photographs of naked children. Under most state statutes and the current federal law, pictures of children portraying simple nudity are not generally considered sexually explicit or obscene. The law usually requires at least what is called "lascivious" or "lewd" exhibition of the genitals or pubic area for the images to be considered sexually explicit and therefore to constitute child pornography. Under some state laws this lasciviousness might be referred to as "intended to elicit a sexual response," for "sexual stimulation," "sexual conduct," or in a "sexual context," but the concept is pretty much the same.

There can be additional definitional variations under state laws. For example, under some state laws (*e.g.*, Arizona and Virginia) exploitive exhibition of **rectal** areas for the "purpose of sexual stimulation of the viewer" or "lewd" exhibition of the **buttocks** is included. State child pornography laws (*e.g.*, Illinois, Texas, and Virginia) may also prohibit exhibition of specified portions of the **female breast** but again only if they are "lewd." Other state laws (*e.g.*, Arizona and Illinois) include images of children that portray **defecation** and **urination** but again only if they were "for the purpose of sexual stimulation of the viewer" or "within a sexual context." Under its definition of "sexually explicit" images of children, Virginia law even includes those depicting "flagellation or torture by or upon a person who is **nude or clad in undergarments, a mask or bizarre costume** (emphasis added)." Ohio law specifically includes use of minors in "nudity-oriented material." The Ohio statute seems to focus less on precisely defining the lewd or sexual intent included and more on defining the uses (*e.g.*, "proper purposes," "pursuing bona fide studies or research," "proper interest") and persons (*e.g.*, parents, librarians, physicians,

psychologists, teachers, etc.) excluded. This is a viable approach as long as the statute addresses both those having a professional or proper use for the material **and** using it professionally and properly. The most effective way to prove improper interest or use would still seem to be proving lewd or sexual intent. Under current federal law, images depicting the rectal area, buttocks, female breasts, defecation, or urination alone do not meet the federal definition threshold and therefore would rarely if ever be considered child pornography.

As stated, investigators, prosecutors, and others often prefer to make a decision about the nature of such visual depictions of children based only on looking at them. The difference, however, between simple nudity (*e.g.*, innocent family photographs, works of art, medical images) and the “lascivious” exhibition of the genitals often is not determined by the visual depiction alone but by the intent and total context. The difference between tying up a child as part of a game of “cowboys and Indians” or so a child cannot get away and doing so for sexual gratification (*i.e.*, sadomasochism, bondage) may also not be obvious only from the visual image of a tied up child.

I have come to believe that the very same visual image, assuming it meets the minimum legal threshold, can be both child pornography and not child pornography depending on the intent and total context. How then can an investigator evaluate the possible significance of photographs of naked children and other questionable photographs of children taken by or discovered in the possession of a suspected offender? In my experience, many investigators do not seem to know the answer to this question and believe the images always speak for themselves.

It is important to understand that the lewd, lascivious, or sexual intent often mentioned in child-pornography laws may **not** be in the child’s mind or even necessarily in the photographer’s, but can be in the mind of each producer, distributor, and collector of the material. Interpreting the meaning of concepts such as “lasciviousness” and “intent to elicit a sexual response” has been an ongoing problem for investigators, prosecutors, and the courts. The appellate courts seem to be in agreement that: (1) although the meaning of the term lascivious is less readily discernable than other types of defined sexually explicit conduct, it is not unconstitutionally vague or overbroad; (2) the terms “lewd” and “lascivious” are virtually interchangeable; (3) the standard for lascivious or sexually explicit is clearly less than that for obscenity; and (4) whether a given visual depiction is lascivious or intended to elicit a sexually response is a question of fact.

A major area of controversy focuses on the question of wherein does the lasciviousness or sexual intent in question lie. There appear to be only three possibilities. They are: (1) in the child portrayed, (2) in the photographer/producer, or (3) in the recipient/collector.

The often-cited criteria set forth in *United States v. Wiegand*, (9th Cir. 1987) and *United States v. Dost*, (S.D. Cal. 1986) are primarily an attempt by federal courts to determine this lascivious or sexual intent of the photographer by examining only the visual depictions themselves. Determining intent can be difficult if the photographer or the circumstances of production are unknown. The courts state, however, that this “analysis is qualitative and no single factor is dispositive.” The *Dost* criteria can be a starting point for investigative evaluation of images in question. They become more important if the facts concerning production are unknown. In a

case involving a known suspect who produced or took the photographs, however, the *Dost* factors become less important and the images **alone** are less significant as long as they meet the minimum threshold criteria set forth in the law.

The so-called *Dost* test is a six-factor guideline. The case involved nude or semi-nude photographs of females aged 10–14 years old. The undeveloped film containing the images was mailed to a photo processing company in Hollywood, CA. In order to better determine whether a visual depiction of a minor constitutes a "lascivious exhibition of the genitals or pubic area," the court developed the six criteria. Not all of the criteria need to be met, nor are other criteria necessarily excluded in this test. The six criteria are: 1) Whether the focal point of the visual depiction is on the child's genitalia or pubic area; 2) Whether the setting of the visual depiction is sexually suggestive, *i.e.*, in a place or pose generally associated with sexual activity; 3) Whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; 4) Whether the child is fully or partially clothed, or nude; 5) Whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; 6) Whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

The courts seem to be in clear agreement that the lasciviousness is not necessarily a characteristic of the child portrayed. For example, the appellate court in *Knox* concluded by stating that "we reject any contention, whether implied by the government or not, that the child subject must be shown to have engaged in the sexually explicit conduct with a lascivious intent." *United States v. Knox*, 32 F.3d 733 (3d Cir. 1994). In *Knox* the court states, "We adhere to the view that 'lasciviousness' is an inquiry that the finder of fact must make using the *Dost* factors and **any other relevant factors given the particularities of the case** (emphasis added), which does not involve an inquiry concerning the intent of the child subject." The court in *Knox* also mentions the defendant's handwritten descriptions on the outside of the film boxes as evidence that Knox was aware that the videotapes contained sexually oriented materials designed to sexually arouse a pedophile. The *Knox* decision even applied these lascivious exhibition criteria to the visual images of children depicting covered genitals or pubic area.

The lasciviousness of the photographer/producer is the area where the appellate courts have focused much of their attention and decisions. It appears that evidence that the creator of the image intended to elicit a sexual response in the viewer greatly increases the likelihood that the material in question will be found to be lascivious or sexually explicit. Therefore cases in which the suspect is the producer of the images in question are usually easier to resolve if investigators understand how to prove the lascivious or sexual intent.

It is the possible lasciviousness in the recipient/collector of child pornography where there is the greatest controversy and confusion. This is especially problematic in view of the fact that possession of child pornography is a federal offense and the defendant in most child pornography prosecutions is not the photographer/producer of the material. Can any behavior of the recipient/collector indicate or change the lasciviousness or sexual nature of existing images?

For these recipient/collectors how, when, where, why, and with what they obtained their photographs could be important. The fact the suspect knowingly purchased, traded, exchanged, or downloaded the photographs in a sexually explicit context, setting, or online site is significant. This is more easily determined in online-computer cases. The fact the offender used false pretenses or theft to obtain the photographs could also be significant. Investigators and prosecutors must be aware of and consider possible legal distinctions between child pornography cases involving producers and those involving only collectors.

To synopsise this controversy, consider this set of hypothetical facts based on several actual cases. A mother and father innocently photograph their naked 1-year-old daughter getting out of the bathtub, they take the film/memory card to the store to be developed/printed, and they then put the resulting photograph in the family album with all the other photographs of their child's life. Under these circumstances, in their family album or in a digital display frame, this photograph showing the child's genitals clearly is not and should not be considered child pornography.

Unknown to the parents, however, a pedophile working at the store made an extra print of that photograph, took it home, and put it in one of his photo albums and on his computer containing hundreds of other similar photographs of naked little girls he had previously stolen after they were turned in for developing. Printed in big letters on the cover of this album and on the computer file folder are the words "Hot Lolita." In the album and on the computer, below the photograph of this naked 1-year-old, is a caption indicating how sexually aroused he gets when he looks at this picture. Above this photograph, outside the image and by modifying the digital image, he has added a "balloon," with words indicating the child wants to have sex with him. There are also semen stains on the pages of the album and near the computer. He has modified some of the other photographs by cropping out the children's faces or adding sexual characteristics/activity with a marker or pen. Is this image now child pornography? The law seems to be uncertain about this point and may need to be clarified.

Can the exact same picture of the naked 1-year-old girl getting out of the tub that was an innocent nude in her family's album or on their computer now be considered child pornography in the possession of this individual? Can it be child pornography if the original photographer/producer did not intend to elicit a sexual response in the viewer? Do we evaluate the potential lascivious nature of it by looking only at the picture? Does the theft of the photograph, the surrounding materials in the albums, or the modifications to the picture play a role in this decision? Is lascivious interest on the part of the collector of no importance? These are factors investigators and prosecutors should consider when reviewing these images.

In *United States v. Cross*, (11th Cir. 1991), the appellate court, in affirming the conviction of an offender, stated that the photographs qualified as 'lewd' within the meaning of the federal child pornography statute even though children were not portrayed as sexually coy or inviting and the photographs only displayed preadolescent girls standing fully nude from frontal view. The court found that **correspondence** with the codefendant was of considerable probative value in proving the defendant's intent to create child pornography. Interestingly, in *Cross* the individual who

with a sexual or lewd intent produced the child pornography using a clever ruse was not even the photographer who took the pictures. Evidence indicated the photographer did not have a sexual intent. Without knowing the total facts of this case, which cannot be ascertained by just looking at the photographs, most prosecutors and professional interveners who have only seen these images consider them to be "innocent nudes."

Investigation

Cases involving questionable child pornography come to the attention of law enforcement in a variety of ways. Law enforcement may encounter such images during the course of ongoing investigations, including proactive online investigations. Child Protective Services (CPS) may discover and refer cases involving such images. Civilians and Internet Service Providers may make reports based on questionable images they come across online. Under federal law, providers of electronic communication service or remote computing service to the public are required to report to law enforcement whenever they obtain knowledge of "facts or circumstances" indicating an apparent violation of enumerated federal statutes relating to child pornography.

Cases often result from referrals to law enforcement by commercial photo-processing companies. Although digital cameras have pretty much eliminated film and the need for developing, many people still use commercial companies to have prints and enlargements made. In several states such companies are mandatory reporters of suspected child pornography. In most states such reporting is encouraged. Employee of commercial photo-processing companies may not have been legally trained concerning the laws on child pornography. Based on their common sense, experience, and likely lack of bias, however, their reason to believe that certain photographs are questionable or out of the ordinary for what they usually see can be a good starting point for further investigation. Their opinion that certain photographs were not typical of those generally dropped off by their customers can be a factor in the evaluation process.

How then should law enforcement respond? Again, what is the difference between simple nudity and art, and what the law describes as lascivious exhibition of the genitals or pubic area or intended to elicit a sexual response? In my experience, the answer often is not only or even primarily in the images. In a case involving a suspect who took the photographs, the images by themselves are even less significant. It seems like a waste of time to attempt to determine if a questionable photograph meeting the minimum legal threshold is child pornography **only** by staring at it and applying the *Dost* criteria when details concerning its production are potentially available and knowable. If some one has to ask if an image in question is child pornography, the answer almost always is, "I do not know, tell me more about it."

It is inappropriate and wrong for **any** professional intervener, based **only** on viewing images that meet the legal threshold criteria (*i.e.*, genitals/pubic area visible) or the uncorroborated explanation of the photographer/producer, to decide such material is or is **not** child pornography. It may be appropriate and correct, however, for investigators and prosecutors, based **only** on

viewing such images, to state that the material does not meet their investigative or prosecutive criteria.

In order to properly evaluate this “sometimes” child pornography, investigators and prosecutors must have facts and details. To prove intent beyond a reasonable doubt, an investigator should gather evidence regarding the following: determining and documenting context; searching for and evaluating other images; obtaining and verifying explanations; investigating background of suspect; reviewing computer/non-computer non-image material; interviewing victims and witnesses; and finding and recognizing child erotica and other collateral evidence. This obviously can take time and effort that may or may not be justified considering limited resources. One dilemma is courts sometimes rule that the context material so valuable in evaluating the images in question is inadmissible because its prejudicial value unfairly outweighs its probative value.

As I define the term, *child erotica* can be considered to be any material, relating to children, that serves a sexual purpose for a given individual. It is a broader, more encompassing, and more subjective term than *child pornography*. It includes things such as fantasy writings, letters, diaries, books, sexual aids, souvenirs, toys, costumes, drawings, and nonsexually explicit visual images. Unlike what many investigators believe, what could be *child erotica* is **not** limited only to visual images of naked children that are not sexually explicit enough to be child pornography. The search for child erotica, therefore, cannot be limited to photographs or image files on a computer.

This type of material is usually not illegal to possess or distribute. It must be evaluated in the context in which it is found using good judgment and common sense. Child erotica can be useful in proving an offender’s activity with a child or collection of visual images of children was for sexual gratification. It can be part of the context used to evaluate child pornography (*i.e.*, shed light on the distinction between innocent nudity or art and lascivious exhibition of the genitals). Once correctly identified, child erotica can be invaluable in evaluating and proving intent. In some cases, it might include finding text files or paper documents in which the suspect describes his sexual fantasies and even discusses producing or collecting the visual images in question for his sexual stimulation.

To evaluate and determine lascivious sexual intent of questionable images, investigators should consider how they were **produced/obtained** (abuse, deception, trickery, unusual focus, sequence, theft, computer download site), **saved** (amount, location, labels, packaging, volume, modifications, notations, items before and after, computer file name, arrangement, accessibility by children), or **used** (to lower inhibitions of or arouse victims, to pander, to solicit, to trade, to sell). These criteria can also be used to help evaluate potential *child erotica*. Assuming it meets the minimum legal criteria or threshold, potential child pornography must always be evaluated in the total context in which it is discovered and must be objectively investigated.

The evaluation criteria for visual images produced by a suspect may be different from those for visual images received or downloaded. A suspect could have in his collection both images he

produced and images he obtained from others. To avoid wasting investigative efforts, investigators should discuss with legal advisors and prosecutors whether any identified activities (*e.g.*, how collected, alterations, notations, editing, splicing, etc.) by a recipient/collector that modify or amplify the original intent of the photographer/producer of images can be considered in evaluating the legal status of any images in question.

Evaluating cases involving parents or guardians of the children in the images is usually more difficult and complex than cases involving those who are acquaintances or strangers to the children. The standard for what might be inappropriate or significant behavior with children is different for parents. That parental relationship and interaction must be considered. That said, as of the end of 2012 the Child Victim Identification Program (CVIP) database maintained by the National Center for Missing & Exploited Children (NCMEC) indicates 21% of the children identified in child pornography had their images produced by parents or guardians and another 37% by relatives, neighbors, and family friends.

Investigative factors that should carry little or any weight in this evaluation are things like: a given individual finds images to be personally offensive; a given individual is or is not sexually aroused by the images; the images violate community standards; the belief it is harmful for children to be photographed in the nude; or the children in the images enjoyed or consented to the activity.

Many of the facts and details needed to evaluate images are best obtained from executing a valid search warrant or obtaining consent to search. The execution of the search warrant and the subsequent search should be viewed simply as **one** step in an investigation. Obviously there must be probable cause or consent to conduct such a search. Because context is potentially so important, investigators should carefully observe and meticulously document for future reference how the suspect saved photographs and where they recovered them.

It may take a considerable amount of time to properly evaluate seized material, especially if it is on a computer. Since the mid-1990s, cases involving the use of computers and the Internet in the sexual exploitation of children have exploded. Many investigators today sometimes fail to look beyond a located computer and search for child pornography and collateral evidence **not** on a computer or digital-memory storage device.

Investigators should make every effort to determine the circumstances under which recovered photographs were produced in order to evaluate their investigative significance as child pornography. If questionable images meet the legal threshold set forth in the law, how they were produced/collected could help prove the sexual intent required. Any image that can be linked to abuse or exploitation has a greater chance of being found sexually explicit by the courts.

Although the images may sometimes look the same, an offender's collection of photographs of children is generally distinct from those innocently taken and saved by most parents and relatives. Those with a sexual interest in children are more likely to use trickery, bribery, or seduction to take their photographs of children. Offenders sometimes photograph children under

false pretenses, such as leading them or their parents to believe that modeling or acting jobs might result or that the activity is just part of family fun and games. Sometimes they even hide themselves or just their camera and surreptitiously photograph or video record children. Offenders using such techniques could include parents.

The sequence in which photographs were taken, which can sometimes be determined from the negatives or digital image numbers, can be an important part of the evaluation. With digital images, electronically stored information (ESI), and so-called “hash values” may provide useful information for investigative evaluation. If videos are located, they must be listened to as well as observed to evaluate their significance. Photographs must be carefully examined and evaluated in the context they are found.

Many offenders take and collect photographs of children who are completely unknown to them. They take these pictures at swimming meets, wrestling matches, child beauty pageants, parks, beaches, parades, rock concerts, county fairs, and other events open to the public. These photographs are usually of children of a preferred age and gender. Offenders are also more likely to take and possess photographs focusing on certain parts of a child’s anatomy of particular sexual interest to a certain offender. In some photographs the children may be involved in strange or bizarre behavior, such as pretending to be dead or simulating unusual sex acts.

Prosecutors must ensure jurors understand the offender's collection of photographs of naked children is not the same as those saved by many normal parents/guardians and relatives. Those without a sexual interest in children are more likely to be overt, honest, and open about taking their photographs, storing them, and sharing them with friends and family. They are also more likely to be totally cooperative in the investigation. Because photographs are well-taken and have artistic value or merit does not preclude the possibility they are sexually explicit. Because someone is a professional photographer or artist does not preclude the possibility that he or she has a sexual interest in children.

Investigators should consider factors such as the location where the images were found, labels on the images, package markings, modifications, and computer file/folder names. Volume is also a significant factor here. Offenders are more likely to have large numbers of photographs of children. They are more likely to have their photographs carefully organized, cataloged, and mounted in binders, albums, or computer folders. These may even be photographs they cut out of magazines, catalogs, or newspapers or download online. Sometimes sexually explicit captions are written or typed above, below, or on the pictures.

Photographs are frequently labeled with the children’s names and ages and the dates taken. Sometimes they are also marked with the children’s addresses, physical descriptions, and even the sexual acts they performed. Offenders are also more likely to have enlargements or carefully arranged groupings of these photographs – even arranged on the wall as a kind of shrine to children. Such behavior by parents and family members would be far less significant.

Those with a sexual interest in children often use their photographs to help seduce and lower the inhibitions of children. Some material may be placed where child victims will have easy access to it. Pictures of naked children could be used to convince children to remove their clothing. Investigators should attempt to determine how the offender used such material in his interaction with children. In addition investigators should attempt to determine if the offender sold, traded, or pandered this material. The way the photographs were advertised or traded is important in evaluating their significance. Computer catalogs, text messages, and e-mail messages (*i.e.*, child erotica) provide invaluable insight into the context of how the images were used.

When caught with possible child pornography, individuals come up with a wide variety of responses. Some deny any knowledge and ask for their lawyer. Most, however, provide a vast array of explanations and excuses. They claim they did not know they had it or did not know it was child pornography. Some claim to have no sexual interest in the material. Some claim that as law enforcement officers, lawyers, doctors, therapists, researchers, etc. they had a professional use for the material. Others claim they are artists and that the images in question are works of art. Some claim the images are part of their nudist, naturist lifestyle or were innocent bath time or family fun photos.

Obviously, in some cases such assertions could be legitimate and valid. However, investigators should never just blindly accept any explanations provided. It is their job to listen and obtain details; assess and evaluate; and independently corroborate if possible. Are the corroborated facts consistent with the claims of innocence? For example, the test for those claiming professional use should be twofold. Do they have a professional use for the material and were they using it professionally? Both standards must be met in order to seriously consider the claim.

Most sex offenders will admit only what they can rationalize and that which has been discovered. If investigators do not confront the suspect with all available evidence, the suspect might be more likely to at least minimize his acts rather than totally deny them. Many sex offenders admit their acts but deny the intent. Investigators should consider initial noncustodial (*i.e.*, no arrest), non-confrontational interviews of the suspect at home or work. A tougher, more confrontational or challenging approach can always be tried if deemed necessary.

Investigators must remember that producers and collectors of child pornography may or may not be child molesters. Research studies have been conducted at the Federal Corrections Facility in Butner, North Carolina. These studies found a significantly high percentage of inmates convicted of violating federal, child-pornography laws admitted during a treatment program to previously undetected acts of “hands-on” sexual molestations of children. Other research and unpublished anecdotal evidence based on actual cases investigated by law enforcement seems to suggest a very wide range of child-pornography collectors are, were, or may have been active molesters. This research and anecdotal evidence has some real limitations, and while some portion of child-pornography collectors may not be sexually molesting children, many are.

A major point to consider in any child pornography investigation should be that the harm and seriousness of offenders should not be determined only by whether or not they have sexually molested children. Whatever the percentage, it is simply wrong to say those who produce or "only" collect child pornography and have not in the past or will not in the future engage in contact sex offenses with children are not a threat to or do not harm children. The child pornography by itself does harm. The possibility that a child-pornography producer or collector also has or is molesting children should always be aggressively investigated.

A difficult and complex problem in child pornography cases is how to handle the visual images during the investigation. Child pornography is the permanent record of the sexual abuse or exploitation of an actual child. It is essentially contraband and its mere possession is a federal offense. Only law enforcement and prosecutors can legally possess it if they have a professional use for it and use it professionally. There is even legal controversy over whether it can be turned over to defense attorneys and their experts during a prosecution. Its use and handling in professional training and during investigations needs to be carefully considered. One method to address some of these concerns might be to modify or redact sensitive parts of the image for certain training or investigative purposes to protect the children involved.

In evaluating possible offenders, it is also important not to assume that someone does not have a sexual interest in children simply by virtue of the fact that he is nice, never been arrested, actively practices his faith, works hard, is kind to animals, helps abused children, reports finding child pornography on the Internet to law enforcement, and/or searches for missing children. Many individuals do not recognize or accept the sexual victimization of a child by a respected member of society because they cannot believe a man who is good and spiritual and who tries to help children could be a sex offender. Some offenders seem to have an overwhelming need to convince, primarily themselves, that the sexual behavior they engage in is: not really sex; not understood or remembered by the child and therefore not harmful; an expression of love and caring; and/or something to which they are entitled because of all the good they do. The fact that someone truly cares about the welfare of children certainly does not mean he is a sex offender, but in and of itself it does not mean he is not. Thinking of offenders as "monsters," "perverts," and "predators," or referring to them as such, is usually counter-productive in an objective investigation.

Investigators must also understand that doing a background investigation means more than obtaining the date and place of birth and credit and criminal checks. School, juvenile, military, medical, driving, employment, bank, sex-offender and child-abuse registry, sex-offender assessment, computer, and prior investigative records can all be valuable sources of information about an alleged offender. Careful analysis of data, both images and text, and browsing history on the offender's seized computer may also reveal valuable background information and insights. Relatives, friends, associates, and current and former sex partners can be identified and interviewed. Indicators and counter indicators must be identified and evaluated. Evidence (*e.g.*, prior conviction) that the suspect has a general sexual interest in children should be a factor in proving the intent of the images in question. If and how evidence of such interest can be used in legal proceedings should be discussed with a legal advisor or prosecutor.

Some sex offenders tend to engage in highly predictable and recognizable behavior patterns. Need-driven behavior often leads to almost bewildering mistakes. They do things like using their computer at work to download child pornography, bringing their film or memory card with child pornography on it to a facility to be developed or printed using their correct name and address, appearing in child-pornography images they are making, maintaining incriminating evidence knowing investigators might soon search his home or computer, consenting to the search knowing they possess child pornography, and agreeing to be interviewed without his attorney. Defense attorneys might even argue some of this type of behavior indicates their clients are innocent, lack criminal intent, or are not criminally responsible. Why else would an intelligent individual do something so obviously stupid? Such behavior does not necessarily mean the offender is stupid, insane, or not criminally responsible. Another plausible explanation is that the behavior is part of a long-term and persistent pattern common in some sex offenders, including the need to rationalize and justify their behavior.

If an investigation determines that a suspect has continued access to the children identified in the photographs or to other children, time becomes a problem and the safety of the children becomes the most important focus of the investigation. In an investigation involving the individual who took the photographs, the details concerning how they were produced is even more important. To do this in a fair, objective, thorough, and reliable manner takes time and effort. As stated, it is not a matter of just asking the suspect and then rejecting or accepting whatever he says. Therefore, a way must be found to protect the children from any victimization while the investigation continues. This can be a complex and difficult process especially if the suspected offender is the parent or guardian of children either in the images or not. Those who sexually victimize the children of others may also victimize their own.

The standard in some states for exigent removal of children from parents or guardians without a warrant might be danger of severe or imminent **bodily injury**. Such a standard reflects an ignorance concerning the nature of child pornography and should be modified. A standard that also includes imminent abuse involving sexual exploitation such as photographing for sexual purposes is more appropriate. Whatever the removal standard, investigators should be aware of it and prepared to respond appropriately. Coordinating with CPS can be an effective way to increase the likelihood of compliance with existing and proper protective standards.

It is commonly accepted that child sexual victimization is a complex problem requiring the efforts and coordination of many agencies and disciplines. No one agency or discipline possesses the personnel, resources, training, skills, or legal mandate to effectively address every aspect of child maltreatment. In this context law enforcement interacts with a variety of professions and agencies during the investigation process. For example some offenders cross jurisdictional boundaries, and many violate a variety of state and federal laws when exploiting children. This often will mean working with other local, state, and federal law-enforcement agencies in multijurisdictional investigative teams and with prosecutors, social services, and victim assistance in multidisciplinary teams. This can be done as part of informal networking or a formal task force.

Forensically interviewing and medically evaluating children identified in the images is another important consideration. It must be remembered, however, that children in child pornography, especially very young children, may not believe or realize they have been sexually exploited. Contrary to what many people say and believe, under current law it is possible to create child pornography without sexually abusing or molesting children. Some children might even be compliant or non-disclosing victims who may not be ready or willing to talk about it. Because children are compliant does not mean they are not legally victims. Some forensic interviewers might have limited experience interviewing children only suspected of being victims and who have made no prior disclosures.

There are many possible reasons why children may conceal the truth about images in question; including the possibility they realized there was some trouble with the photographs, they were embarrassed by them, they were confused, or they were told not to talk about them. When the children portrayed in child-pornography or child-erotica images are identified and located, care and thought must be given to how and if they will be confronted with this information. Some children may not even know they had been photographed. Others are so embarrassed and ashamed they may claim they were drugged or asleep or may vehemently deny the images actually portray them. Whether to confront the children with the actual images is a complex issue that will not be discussed here. Federal law now gives children identified in child pornography the right to be notified each time images portraying them are recovered in an investigation or used in a prosecution. Victims or their guardians can opt out of this notification (The Justice for All Act of 2004 (H.R. 5107, Pub. L. No. 108-405)). In any case these identified children need to be protected as the investigation continues.

Interviewing very young children is complex and many police departments today use specially trained forensic interviewers for this part of the investigation. Children may have to be transported to a Child Advocacy Center or similar facility. This may be a brief temporary step to be done to further the investigation while protecting the children. CPS workers may be available to provide assistance in this process.

Whenever possible, all children suspected of having been sexually victimized should be afforded a medical examination by trained and competent medical personnel. The primary purpose of this examination is to assess potential injury, assess the need for treatment, and reassure the patient. A secondary purpose is to determine the presence of any corroborating evidence of acute or chronic trauma. The activity typically involved in lascivious exhibition images, however, is often unlikely to result in any medical findings.

The lack of medical findings may mean little concerning whether the children were victimized or are at risk of further sexual exploitation or other abuse. Many acts of child sexual victimization do not leave any physical injuries that can be identified by a medical examination. In addition young children's injuries can heal rapidly. The activity typically involved in sexually exploitive exhibition images is also unlikely to result in any medical findings. Thus lack of medical corroboration does not mean a child was not sexually victimized. Such examinations usually include simply visually examining the genital and rectal area with a lighted magnifying device

called a colposcope. Nothing invasive or painful happens. The primary purpose of these examinations is to assess potential injury, assess the need for treatment, and reassure the patient.

Children who have been sexually victimized oftentimes do not exhibit any psychological or behavioral indicators, which would suggest to a third-party that they had been victimized. Many of the so-called behavioral symptoms of child sexual victimization are actually symptoms of trauma, stress, and anxiety that could be caused by other events in the child's life. And almost every one of the so-called behavioral indicators of sexual victimization can be seen in nonabused children. In addition, children who do not realize that they have been sexually victimized or exploited are unlikely to exhibit psychological or behavioral indicators.

Summary

The essence of court decisions such as *Dost*, *Wiegand*, *Cross*, *Hilton*, and *Knox* seems to be that the visual images in question must be evaluated in context on a case-by-case basis. When the totality of circumstances is known, I have rarely seen a case where there was any doubt whether a visual depiction of a child was simple nudity (*i.e.*, innocent family photograph, work of art, medical research, image for sex therapy) or lascivious exhibition of the genitals. Those claiming there is a doubt are often attempting to cover up sexual exploitation of children by creating a smokescreen to confuse the issue. I know of no investigators or prosecutors in the United States with so little work that they would use child-pornography laws to try and convict true professionals who use this material in a professional way or ordinary parents who simply have innocent photographs of their nude, young children.

The fact that specified areas of the body or acts are depicted does not automatically make an image child pornography, but it may be all that is legally required if there is an intent to sexually stimulate the viewer. Individuals can be sexually stimulated even by images of focusing on children's specific body parts or children fully dressed, but those would less likely to be child pornography because they do not meet the threshold criteria specified in the laws. Depending on the facts of the case, however, such non-qualifying images could be considered *child erotica* or collateral evidence.

A significant number of American families take innocent pictures of their children naked or partially naked. It is impossible to know with certainty the typical or "normal" quantity and nature of such images. The courts have provided criteria referred to as the *Dost* factors as a legal aide in distinguishing between innocent nudity/activity and possible lascivious or sexual intent by examining the visual depictions themselves. Determining intent can be difficult if the photographer or the circumstances of production are unknown. The *Dost* factors as set forth include subjective terms such as "focal point," "sexually suggestive," "unnatural pose," "partial nudity," and "coyness." At least one of the factors, "whether the visual depiction is intended or designed to elicit a sexual response in the viewer," most likely cannot be determined from the image alone. The courts state, however, that this "analysis is qualitative and no single factor is dispositive."

Any opinion based **only** on viewing such questionable photographs that they are not child pornography or that no further investigation is necessary would be inappropriate and unprofessional. Even if some people viewing them think they are innocent and endearing does not mean they are not child pornography. Professional and experienced interveners understand that there are individuals who can be sexually stimulated by such images. If the images meet the legal threshold criteria, it is the intent of the photographer/producer that matters most.

In investigating and objectively evaluating cases, investigators need to be aware of certain behavior patterns. Nice people without arrest records who live in nice houses sexually victimize children all the time. Child pornographers have repeatedly turned in images to be commercially developed using their correct names and addresses. Sexually explicit images are often buried among other images in the hope they will not be discovered in an automated and large-scale printing process. Many people with a sexual interest in children work in the child advocacy field, often to rationalize their sexual interests. They are often not properly screened and monitored. The best data we have indicates that 21% of the children identified in child pornography had their images produced by parents or guardians.

In addition, offenders creating sexually explicit images of children often use trickery and deception, turning the activity into fun and games. They sometimes take advantage of commonplace events such as changing clothing or bathing. The children are manipulated into participating by encouraging their natural tendencies to want attention and perform for the camera. Many individuals with a sexual interest in children enjoy taking candid pictures in which children inadvertently expose their genital or rectal areas. They often do not bluntly and obviously direct young children into sexual poses. The images in question often do not show children being forced into the activity. Children can also be manipulated into contact sexual activity in the same way. If there is any sexual intent, young children are most likely unaware of it. Very rarely are the young children posing or exhibiting to elicit a sexual response. It is the photographer who must have that intent. Therefore it is highly likely that children victimized in this way would otherwise be happy and exhibit no behavioral indicators of sexual abuse. Because the children in question appear to be or are happy certainly does not mean they were sexually victimized, but it does not necessarily mean they were not.

An important step in the investigation would be to interview those who took the images if known. If there are multiple suspects, they should at first be interviewed separately. It is common practice for those who sexually victimize children to admit a known or obvious act but then deny any sexual intent or purpose. No competent investigator should ever simply accept a given explanation. A reasonable investigator would never blindly accept alleged explanations; they must be assessed, evaluated, and corroborated.

Therefore, the next step would be to attempt to corroborate or challenge any alleged explanations. To do this, various pertinent locations may need to be searched and identified children may need to be interviewed and possibly medically evaluated.

After a search and seizure of a location is completed, potential evidence has to be evaluated. At that point, it may be unknown whether and to what extent a suspect possessed additional child pornography or sexually exploitative images. Additionally, evidence that I refer to as *child erotica* could be within the material seized, especially in digital format on a computer or disk. Child erotica can be useful in proving an offender's activity with a child or collection of visual images of children was for sexual gratification. It can be part of the context used to evaluate child pornography (*i.e.*, shed light on the distinction between innocent nudity or art and lascivious exhibition of the genitals). Once correctly recognized, child erotica can be invaluable in evaluating and proving intent. Identified children need to be protected while a thorough and objective investigation is conducted.

The initial investigation in these cases should be based on reasonable suspicion that the images in question meet the threshold criteria set forth in the applicable statute. As corroborative evidence is developed, additional resources and efforts can be applied. Early contact should be made with appropriate prosecutors to insure that if proven the case fits within their prosecutive discretion. In the absence of proof that questionable visual images of children meet the elements set forth under the law, such questionable images would not legally be child pornography. Not investigating these cases potentially could bring more criticism and problems for a department than investigating and discovering there was no sexual intent. The insights and investigative recommendations set forth here are intended to better protect children by reducing the possibility of the guilty escaping responsibility, the innocent having their reputations damaged, children being unnecessarily distressed, and investigators being successfully sued in lawsuits.

Some Recommendations

In my opinion, in order to protect more sexually exploited children and improve the investigative response to questionable child pornography, the criminal justice system should identify and implement better ways to:

- Expand the often too narrow statutory definitions of sexually explicit conduct typically set forth in child pornography laws in order to include a wider range of unusual but well-documented sexual behavior (*e.g.*, necrophilia, coprophilia, infantilism, fetishism, etc.);
- Expand current definitions of "producing" child pornography to include activities by a recipient/collector that clearly modify (*e.g.*, how collected, modifications, notations, editing, splicing, etc.) the original intent of the photographer/producer of the image;
- Improve the legal admissibility, as more probative than unfairly prejudicial, of context information and evidence (*e.g.*, how taken, how saved, how used) to determine whether questionable images (*e.g.*, images of naked children) are in fact sexually explicit and therefore child pornography;
- Avoid the use of emotional and personal definitions of child pornography including the term *child-abuse images*;
- Better educate professionals concerning the definition of and proper use of the term *child erotica*;

- Encourage more prosecutors when declining prosecution to clearly differentiate between images that do not fall within their prosecutive discretion priorities and images that are not child pornography;
- Encourage more prosecutors to set forth and communicate clear and consistent criteria (*e.g.*, quantity, quality, activity, age, format, etc.) for images that fall within their prosecutorial discretion.