DEATH TO CHILD EROTICA: HOW MISLABELING THE EVIDENCE CAN RISK INACCURACY IN THE COURTROOM

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"Language is power, life and the instrument of culture, the instrument for domination and liberation."—Angela Carter

INTRODUCTION

Labels and language are both powerful and dangerous. Often, labels utilized by social literature and court opinions are the products of quick judicial pens or media sound bites. They can be of great assistance in illuminating complex legal, social, and psychological concepts. However, such terms can also be so inadequate and misleading that they distort the reality of the subject at hand and actually undermine positive social goals. "Child erotica" is a term currently used to describe images and materials which can sexually exploit children, but do not fit the legal definition of "child pornography" or "child abuse images." This term, "child erotica," must be eliminated from our vocabulary regarding child abuse images and child sexual exploitation. This Article explains why.

Just as the term "child pornography" has been replaced in many research circles with the preferred term of "child abuse images,"[1] the use of the term "child

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[1] The term "child abuse images" has been recognized as inadequate. *See, e.g.*, Ethel Quayle, *The Impact of Viewing on Offending Behavior*, *in* CHILD SEXUAL ABUSE AND THE INTERNET: TACKLING THE NEW FRONTIER 25, 26 (Martin C. Calder ed., 2004) ("Many professionals working in the area have expressed the belief that such terminology allows us to distance ourselves from the true nature of the material. A preferred term is abuse images."); JANIS WOLAK, DAVID FINKELHOR & KIMBERLY J. MITCHELL, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, CHILD-PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES: FINDINGS FROM THE NATIONAL JUVENILE ONLINE VICTIMIZATION STUDY at vii, n.1 (2005), http://www.missingkids.com/missingkids/servlet/ResourceServlet?LanguageCountry=en_US&PageId=2018 ("The term 'child pornography,' because it implies simply conventional pornography with child subjects, is an inappropriate term to describe the true nature and extent of sexually exploitive images of child victims."); SAVE THE CHILDREN EUR. GROUP, POSITION PAPER REGARDING ONLINE IMAGES OF SEXUAL ABUSE AND OTHER INTERNET-RELATED SEXUAL EXPLOITATION OF CHILDREN, at 5 (2005),

erotica" should be revisited and replaced. The term is troubling for three main reasons. First, the word choice itself, i.e., linking the word "child" with the word "erotica," is misleading. "Erotica" is a technical term with a specific connotation of art or literature. The label "child erotica" incorrectly suggests an artistic reference. Second, in so doing, it not only conveys an inaccurate impression of the material, but validates the exact material to which it refers. The term suggests an artistic or social *value* to the material which is not present.[2] Accordingly, the term also tends to normalize sexual commoditization of children by suggesting there are circumstances when the sexual objectification of children by adults is acceptable or even appropriate.

Third, this mislabeling is compounded by the courts. Its use is overbroad, referring not to art and literature, but to a very diverse collection of materials and objects. Courts, therefore, divorce the term "erotica" from its roots in art and literature and incorporate it into "child erotica." This latter term does not reference art, but material—no matter how sexually exploitive—that fails to meet the legal definition of child pornography.[3] Such an over generalization results in the suggestion that anything, regardless of how sexually exploitive, is not only legal speech, but elevated to art.

Such a misuse of the term has collateral legal consequences. When courts are reviewing evidence, they need precise labels to most effectively make determinations. This material is given an overly general label suggesting legitimacy. By grouping all legal material together under one label—"child erotica"—courts risk missing the relevance of some of the material as it relates to legal questions before them. Substantively, it can affect the legal analysis of evidence risking less than precise results.

Part I of this Article describes the material being examined and briefly outlines the legal landscape of child pornography and child abuse images. Part II reviews the non-legal history of the term's use. Part III discusses the aforementioned objections in detail. It traces the roots of the term as originally

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available at www.savethechildren.net/alliance/get_involved/report/position_internet_abuse.pdf ("There has been much international discussion about the correct terminology that should be used to describe the sexual abuse and exploitation of children recorded on film or photograph. The term 'child pornography' . . . has been criticized as it can be misinterpreted and undermine the seriousness of the abuse. It also tends to oversimplify what is a very complex social problem with many diverse factors . . . ."). Others find the disadvantages of the term "child abuse images" outweigh the advantages. These disadvantages include the recognition that not all child pornography images require a child to be sexually "abused," if one defines "abuse" as "sexual assault." If one understands "abuse" more broadly—i.e. that the image itself and the underlying sexual exploitation abuse the child then it appears "child abuse images" is a more accurate term. This debate highlights the reality that descriptive terms are superior to labels. When labels are necessary, the author prefers the internationally more accepted term "child abuse images," although it too has limitations. Child pornography remains the more common label in American statutes. The terms are used interchangeably throughout this article and both are imperfect.

[2] See discussion *infra* note 8 and Part II. While there may be some art which involves themes of children and sexuality, this is not the subject of this article. Instead this article focuses on clearly exploitive materials described herein.

[3] *E.g.*, United States v. Hudak, No. 02 CR. 853(JFK), 2003 WL 22170606, at *3 (S.D.N.Y. 2003).

intended. It then analyzes the use of the term in both social science and legal opinions, demonstrating the potential shortfalls of its current misuse. Part IV proposes more precise subcategories for material which is sexually exploitive of children, although not child pornography or child abuse images *per se*. Such precision in language will eliminate a perception that children can ever be treated as commodities and will assist courts and juries in understanding the material presented to them. Furthermore, First Amendment concerns are eliminated because such terms acknowledge the current legality of much of the material, but simply call for a more precise labeling, resulting in more accurate legal analysis.

I. THE REALITY OF THE TERM "CHILD EROTICA"

A. Child Pornography, Child Abuse Images, and "Child Erotica" — 21st Century Terms

In the United States, "child abuse images" are referred to as "child pornography" in federal statutes and many state statues.[4] Such images are unprotected speech and illegal.[5] While definitions of child pornography or child abuse images vary from state to state, the federal definition is typical, and generally defines this type of pornography or image as the visual depiction of minors engaged in sexually explicit conduct. Sexually explicit conduct includes children engaged in "i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; ii) bestiality; iii) masturbation; iv) sadistic or masochistic abuse; or v) lascivious exhibition of the genitals or pubic area of any person."[6] Therefore, a very sexually exploitive image, which happens to not include the specific acts listed, is not child pornography under this statute.

The distinction between child pornography/child abuse images, and so-called "child erotica" is critical as it, *inter alia*, distinguishes between unprotected and protected speech. The term "child erotica" is often used to refer to pictures of children which are sexually exploitive but not illegal.[7] Consequently, when analyzing the linguistic meaning of the term "erotica," the distinction between erotica and pornography is relevant to issues surrounding child pornography/child abuse images and "child erotica."

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[4] *See, e.g.*, 18 U.S.C. § 2256 (8) (2009); ALA. CODE § 15-20-21 (1975); 11 Del. Code §1109.

[5] *See, e.g.*, New York v. Ferber, 458 U.S. 747 (1982); Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002); United States v. Williams, 128 S. Ct. 1830, 1841 (2008).

[6] 18 U.S.C. § 2256(2) (2009). *But see* 18 U.S.C. § 2256(8)(C) (defining virtual child pornography as "[s]uch visual depiction [that] has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct . . . .") (2009).

[7] As will be discussed at length, this is not the *only* use of the term "child erotica." For now it is important to understand that the reference is often to legal material.

B. Material Falling Under the "Child Erotica" Label Is Not Art

The existence of material which indicates a sexual interest in children is not novel. As will be discussed at length *infra*, no mutually agreed upon definition of "child erotica" exists. However, for purposes of establishing a framework, a descriptive, non-exhaustive list of what has been referenced as "child erotica" will be outlined. As the reader will quickly see, the term has expanded to an unruly list.[8]

The term "child erotica" as used in criminal litigation includes, but is not limited to, sexually exploitive material—images, text, and video—of children that falls short of meeting the legal definition of obscenity or child pornography. Such material typically manifests in sexual images that do not portray the children actually engaged in sexually explicit conduct or obscene conduct, as defined by statute.

The availability of this material is increasing at an exponential pace. The Internet has allowed access to a whole new series of images that do not fit into the child pornography definition, but "nonetheless seem, at least at first observation, to exploit the sexuality of children for the benefit of both prurient web surfers and the operators of the websites on which they are displayed."[9]

> In parallel to the illegal images of child sexual abuse that are found on the Internet, there are thousands of images that are often referred to as 'child erotica.'
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> These so-called 'child erotica' websites manage to avoid legal sanctions in most countries by promoting themselves as 'artistic sites.' . . . 'soft child porn,' or 'posing pictures.' These sites often contain images of children posing half-dressed or naked with an emphasis on sexualizing the child either overtly or covertly. Other pictures found on the Internet provide evidence that some of the children exploited by child erotica sites have also been sexually abused for the purposes of illegal child pornography.

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[8] An area of controversy regarding "child erotica" includes images of artists such as Sally Mann and Jock Sturges, who portray children in "nudes . . . in poses that many people consider erotic." Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV., 921, 967 (2001) [hereinafter *Inverting*]. Indeed there has been some limited legal activity nationally and internationally regarding some of these artists. *See, e.g.*, Inverting, *supra*; James Bristol, *Free Expression in Motion Pictures: Childhood Sexuality and a Satisfied Society*, 25 CARDOZO ARTS & ENT. LAW J. 333 (2007).

A discussion of such pictures as art or sexual exploitation is beyond the scope of this article, which focuses on material clearly lacking any artistic qualities. As stated *infra* Part II, some pictures of minors with sensual themes may legitimately claim an artistic label depending upon the circumstances of their production and possession. These, however, are not the concern of this Article, which focuses on material provided for adult consumption and without an artistic purpose being labeled as art. For a discussion of works such as those of Jock Sturges and others, *see* Inverting, *supra*; Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. LAW REV. 209 (2001) [hereinafter *Perverse Law*].

[9] 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, 528 (2001) [hereinafter *Regulating Sexual Images*].

> Child erotica sites usually advertise legal images of children on the opening page with the promise of more 'hard core' child pornographic material available through payment via credit card.[10]

These items can include homemade images of children forced, coerced, or groomed to engage in other sexual acts;[11] images from so-called "child modeling" websites which are aimed at consumption not by talent agents, but by pedophiles;[12] pornography which uses young people over the age of minority, but portrays them as children—and may also offer them as "barely legal" images.[13] They can also include surreptitious surveillance videos of children,[14] or naturist or nudist photography,[15] claiming the label artistic.[16] All these share the characteristic of advocating and glorifying sexual relations between adults and small children.[17]

So-called child modeling websites provide a useful illustration of images available on the Internet, which appear designed to (a) artfully avoid child abuse images laws; and (b) produce images of young children, sexual in nature, for the consumption of adults with a sexual interest in children.[18] Much of this information is derived from the writings of Clay Calvert, who has studied child modeling sites. Law enforcement claims and at least some operators and users openly acknowledge that the users of these websites are not looking for models, but are adults with a sexual interest in children.[19]

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[10] SAVE THE CHILDREN EUR. GROUP, *supra* note 1, at 14-15 (2005) (identifying these materials as "the overlooked problems of child erotica").

[11] *E.g.*, United States. v. Green, No. 07-CR-0442 (PJS), 2008 WL 1805573, at *1 (D. Minn. Apr. 18. 2008) ("two partially naked photographs which prominently displayed each girl's genitalia").

[12] *E.g.*, *Regulating Sexual Images*, *supra* note 9, at 529; Clay Calvert, *The Perplexing Problems of Child Modeling Websites: Quasi-Child Pornography and Calls for New Legislation*, 40 CAL. W. L. REV. 231, 232 n. 2, 236-38, 239, 244 (2004) [hereinafter *Perplexing Problems*].

[13] *See, e.g.*, United States v. Presley, No. CR07-5058BHS, 2008 WL 189565, at *2 (W.D. Wash. Jan. 16, 2008).

[14] *E.g.*, United States v. Thomas, No. CR07-5058BHS, 2006 WL 140558, at *2 (D.Md. Jan. 13, 2006) (surreptitiously filmed "non pornographic footage of young girls talking in a stairwell and otherwise present on the grounds of an apartment complex . . . [zooming] in on their crotch areas . . . .").

[15] *E.g.*, United States. v. Lamb, 945 F. Supp. 441, 465 (N.D.N.Y. 1996) (citing United States v. Harvey, 991 F.2d 981 (2d Cir. 1993)).

[16] *E.g.*, United States. v. Flippon, 674 F. Supp. 536, 538 (E.D. Va. 1987) (using term "erotica for pedophiles"); *Regulating Sexual Images*, *supra* note 9, at 528. One additional challenge with this material is determining whether an image is what it claims to be, or actually a child abuse image or child exploitation image under the guise of a naturist or artistic photography. *See* United States v. Various Articles of Merchandise, 230 F.3d 649, 657 (3d Cir. 2000); *Regulating Sexual Images*, *supra* note 9, at 530.

[17] *See generally* SHARON COOPER, MEDICAL ANALYSIS OF CHILD PORNOGRAPHY, MEDICAL, LEGAL AND SOCIAL SCIENCE ASPECTS OF CHILD SEXUAL EXPLOITATION: A COMPREHENSIVE REVIEW OF PORNOGRAPHY, PROSTITUTION, AND INTERNET CRIMES 239-40 (2005).

[18] *Perplexing Problems*, *supra* note 12, at 236-37.

[19] *Selling Innocence* (NBC 6 News Miami television broadcast Oct. 8, 2001) (quoting producer of website featuring twelve year old "Little Amber" conceding "it gives the guys that do like young girls like that would be normally gawking at these teenagers in the mall, you know, an outlet to relieve themselves of their frustrations I guess"); *Perplexing Problems*, *supra* note 12, at 236-37; Dave Savini, *Selling Innocence*, 25 INVESTIGATIVE REP. & EDITORS J. 34, 34 (2002) (Documenting a convicted sex offender who downloaded such pictures, admitting that child modeling sites cater primarily to people like himself). Indeed, even the adult entertainment industry describes them as "pushing the envelope."

While legitimate websites may exist which display child models to potential advertisers in legitimate campaigns, such websites probably do not have the characteristics described below. These so-called "child modeling sites" typically start from an original website with suggestive images of children.[20] The original sites lead the consumer to several other sites with provocative names, which solicit an individual to pay a fee to join a site allowing him or her to see more explicit pictures which are promised to be regularly updated.[21] Such photos contain "children as young as seven years old . . . photographed in provocative poses, wearing skimpy bathing suits, lingerie, wet T-shirts," underwear or other revealing attire, thong underwear, French maid outfits, sheer clothing hoisted up, or apparently rolled in clay, or in typical juvenile behaviors.[22] Consider the following descriptions:

> The models, inevitably and invariably, are young girls. The photographs that one views at no cost from the teaser and preview sites . . . contain no nudity. The 'models' often are depicted, instead, in swimsuits, leotards and other skimpy attire . . . typically those websites contain 'member' sections where one must pay to view additional images.[23]

Calvert, reported visiting a jump station[24] called "Child Super Models."[25] This jump station provided a link to more than three so-called modeling sites and described itself as "a web site to promote models 7 thru [sic] 16 and there [sic] photographers."[26] Calvert observed not only that "[N]one of the links, however, appear to be those of professional modeling agencies that typically handle the portfolios of models." "Some clearly seem geared to appeal to a deviant web surfer's sexual appetite."[27]

Robert Richards and Clay Calvert, Untangling Child Pornography from the Adult Entertainment Industry, 44 CWLR 511, 535 (2008).

[20] *Regulating Sexual Images*, *supra* note 9, at 531.

[21] *Id.* at 531-32.

[22] *E.g.*, Mike Brunker, *'Legal Child Porn' Comes Under Fire,* MSNBC NEWS (Mar. 28, 2002), *available at* http://www.msnbc.msn.com/id/3339966/; *Regulating Sexual Images*, *supra* note 9, at 531; *Perplexing Problems, supra* note 12, at 234 (quoting Savini, *supra* note 19, at 34).

[23] *Regulating Sexual Images*, *supra* note 9, at 531. The lack of nudity is not always the case. While the author of this description, Calvert, said he did not review these additional images due to legal concerns, the Department of Justice has, and charged some such site operators mentioned in the 2001 Calvert article with producing underlying child pornography. *See, e.g.*, Wendy Kock, *In Shadow of Net, War on Child Porn Rages*, USA TODAY, Oct. 17, 2006, at 13A. ("They set up 'modeling' sites featuring scantily clad young girls in seductive poses and contend such sites are legal because they do not show genitalia, but people operating such sites have been prosecuted."); Press Release, U.S. Attorney, Dist. Of Utah, Two Utahns Face Child Pornography Charges in Case Involving Child Modeling Websites, (Mar. 6, 2006), *available at* http://www.usdoj.gov/criminal/ceos/Press%20Releases/DUT%20Duhamel-Granere%20PR_030606.pdf; Robin Nolin, *Two Indicted Over Model Web Site Child Photos Were Obscene, U.S. Charges*, SOUTH FLORIDA SUN-SENTINEL, Nov. 29, 2006, at 4B.

[24] A jump station is a website which provides links to other websites. *See Regulating Sexual Images*, *supra* note 9, at 522.

[25] This site has since been closed and the owners indicted for the production of child abuse images. *Supra*, note 24.

[26] *Regulating Sexual Images*, *supra* note 9, at 531.

[27] *Regulating Sexual Images*, *supra* note 9, at 531-32; Savini, *supra* note 19, at 34.

Child modeling sites also often include online forums where viewers discuss and display their comments on the child's physical attributes and request other poses in sexualized garments.[28] "For additional fees, the girls will do custom shoots with clothes mailed to them by members.[29] Further, there were videos for sale featuring girls getting dressed for school or washing cars."[30] The mentioned sites include claims such as "The Hottest 13 to 17 Year Olds in the World;" "The Hottest Teen Models on the Net;" "German Dream Teens;" "in sometimes provocative poses, wearing bikinis, short skirts, or lingerie."[31] They have names such as "Lil' Amber," "Our Little Angels," "True Teen Babes," and "Lil Model."[32] They do not appear to be selling any clothing, simply the child herself. Some include nudity and claim to present the "sensuality of the girls" who are "16 and younger."

These sites have increased in number, which have increased in raciness and risqué qualities over the years. "[C]ompound[ing] the problem, the images posted on these sites are recycled and circulated, free of charge, between like-minded consumers."[33] Some of those operations cover many states. The children vary from those hoping to become wealthy models, those whose parents force them into this for money, and victims of abuse.[34]

As will be discussed at length, such material and items serve several purposes. This Article does not allege a causal link between "child erotica" and sexual assaults on children. It does not advocate that such a link supports making such material illegal. In fact, this Article does not assert such images are unprotected. However, it notes that research supports this conclusion that such images can encourage and assist sexual interest in children, and be used to groom children into believing sex with adults is appropriate.[35] Collectors of child abuse images often do not only possess child abuse images. Offenders' collections can often include both child abuse images and so-called "child erotica."[36] Therefore,

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[28] *Perplexing Problems*, *supra* note 12, at 232 n.2.

[29] *E.g.*, Brunker, *supra* note 22.

[30] Savini, *supra* note 19, at 34 ("The minors would talk to the camera during the video shoots, making it very intimate for customers paying up to $100 per video."); Brunker, *supra* n.22.

[31] *Regulating Sexual Images*, *supra* note 9, at 532; *Perplexing Problems*, *supra* note 12, at 244.

[32] *Regulating Sexual Images*, *supra* note 9, at 531; *Perplexing Problems*, *supra* note 12, at 233-34.

[33] Perplexing Problems, *supra* n.12 at 232, 240.

[34] *See* Savini, *supra* note 19, at 34; SAVE THE CHILDREN EUR. GROUP, *supra* note 1, at 14-15 *c.f.*; United States v. Martin, 291 F. App'x 765 (6th Cir. 2008) (describing an offender who portrayed himself as operating a modeling agency); United States. v. Cross, 928 F.2d 1030 (11th Cir. 1991) (same).

[35] MAX TAYLOR & ETHEL QUAYLE, CHILD PORNOGRAPHY: AN INTERNET CRIME (2003); ROBERTA L. SINCLAIR & DANIEL SUGAR, NAT'L CHILD EXPLOITATION COORDINATION CTR., INTERNET BASED SEXUAL EXPLOITATION OF CHILDREN AND YOUTH 36-37 (2005); KENNETH LANNING, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, CHILD MOLESTERS: A BEHAVIORAL ANALYSIS (4th ed. 2001).

[36] *See, e.g.*, LANNING, *supra* note 35; United States v. Duane, 533 F.3d 441, 443 (6th Cir. 2008) (agents located 3,728 "child erotica" images, 674 child abuse images, and 15 images of sadistic child abuse images); United States v. Kuloa, No. CR 08-00667 JMS, 2009 WL 749032, at *3 (D. Haw. Mar.

the known existence of one is an indication of the presence of the other. Moreover, producers of child abuse images can also produce as part of a series other sexually exploitive images of their victims which are not illegal.[37] The presence of so-called "child erotica," therefore, can possibly be an indicator of that child being victimized.

II. THE TERM "CHILD EROTICA" IS ACTUALLY AN ART AND LITERATURE TERM

A. Definitions

The use of the term "child erotica" began relatively recently in American jurisprudence. It seems to have first appeared in a published federal court opinion in 1988[38] and in a state supreme court opinion in 1990.[39] To analyze its origins, one must review each term individually.

1. Child

The legal meaning of child varies jurisdictionally. Many, but not all, federal criminal statutes consider a "minor" a person who "is under the age of 18 years."[40] However, some statutes differ.[41] On the state level, for sexual offenses against minors, the age of majority can vary both interjurisdictionally[42] and

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20, 2009) (defendant's computer contained 1,100 child abuse images files and 375 "child erotica" images).

[37] *See infra* notes 169-70.

[38] United States. v. Driscoll, 852 F.2d 84, 85 (3d Cir. 1988).

[39] Louisiana v. Byrd, 568 So. 2d 554, 560 (La. 1990) (valid warrant sought to seize child abuse images and "child erotica" without definition).

[40] 18 U.S.C. § 2256(1).

[41] *E.g.*, 18 U.S.C. § 3559(D) ("minor" means an individual who has not attained the age of 17 years); 20 U.S.C. § 6777(4) (same); 20 U.S.C. § 9134(C) (same); 47 U.S.C. § 151(G) (same); 47 U.S.C. § 231 (7) (same); 47 U.S.C. § 254(D) (same); 47 U.S.C. § 941(j)(2) ("minor" means person under 13 years of age); FED. R. EVID. 414 (d) ("child" is a person below 14).

[42] Many states define "child" or minor as one less than 17 years old. *See e.g.*, ALA. CODE §§ 13A-12-191, 192, 196, 197 (1975). Others define "minor" as a person under the age of 18. ARK. CODE ANN. § 5-27-302 (West 2009); CAL. PENAL CODE § 311.1-4 (West 2009); FLA. STAT. ANN. §§ 847.001, 847.0137 (West 2009); GA. CODE ANN. §§ 16-12-100-100.2 (West 2009) (defining a minor as less than 18 years old and a child as less than 16 years old); 720 ILL. COMP. STAT. 5/11-20.1 (West 2009); IOWA CODE ANN. § 728.1 (West 2009); LA. REV. STAT. ANN. § 14:81.1 (2009); ME. REV. STAT. ANN. tit. 17-A, § 282 (2009); MINN. STAT. ANN. § 617.246 (West 2009); OHIO REV. CODE ANN. § 2907.01 (West 2009); OKLA. STAT. ANN. tit. 21, §§ 1021.2, 1024.1 (West 2009); S.C. CODE ANN. §§ 16-15-335, 337 (2008); S.D. CODIFIED LAWS § 22-24A-2 (2009); TENN. CODE ANN. § 39-17-1002 (West 2009); UTAH CODE ANN. § 76-5A-2 (West 2009); VA. CODE ANN. § 18.2-370 (West 2009); WASH. REV. CODE ANN. § 9.68A.011 (West 2009); W. VA. CODE ANN. § 61-8C-1 (West 2009). Still others define "child" as a person less than 16 years old. *See, e.g.*, MD. CODE ANN., CRIM. LAW § 11-208 (2009); MONT. CODE ANN. § 45-5-625 (West 2009); N.H. REV. STAT. ANN. § 649-A:2 (2009); N.J. STAT. ANN. § 2C:24-4 (West 2009); N.C. GEN. STAT. ANN. § 14-190.6 (West 2009) (defining a minor as a person under the age of 16); VT. STAT. ANN. tit. 13, § 2821 (2009).

intrajurisdictionally[43] depending upon the crime. However, many states consider the relevant age for child abuse images/child pornography as a person less than 18.[44] The United Nations defines child as a person less than 18 years of age.[45]

2. Erotica

The term erotica does not have a uniform definition,[46] but does connote sexual passion within art or literature.[47] The adjective "erotic," which is not limited to art or literature, references sexual arousal. Erotica has been defined as "of, devoted to, or tending to arouse sexual love or desire . . . tending to excite sexual pleasure or desire . . . directed toward sexual gratification" as well as "dominated by sexual love or desire."[48] "In a more confined sense, this appellation has been conferred on a certain class of Greek and Latin authors, both in prose and poetry, of whose writings love form the principle theme."[49]

Unlike erotic, the term "erotica," which is the subject of this Article, is distinctly an art and literature term.[50] As a noun it transports this concept of sexual arousal to literature and art. It has been defined as "literature or art intended to

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[43] The implied definition of "Minor" or "Child" in the context of child exploitation can depend on the statute. *See, e.g.*, ALASKA STAT. § 11.61.123 (2009); CONN. GEN. STAT. ANN. § 53A-193 (West 2009); DEL. CODE. ANN. tit. 11, § 1103 (2009); HAW. REV. STAT. §§ 707-750, 707-752, 712-1210 (2009); IND. CODE ANN. § 35-42-4-4 (West 2009); KAN. STAT. ANN. § 21-3516 (2009); KY. REV. STAT. ANN. § 531-310 (West 2009); N.Y. PENAL LAW §§ 263.00, 263.05, 263.01-263.11, 263.15-263.16 (McKinney 2009); R.I. GEN. LAWS §§ 11-9-1, 11-9-2 (2009).

[44] Several states define "child" as a person less than 18 years old. ARIZ. REV. STAT. ANN. § 13-3551 (2009); COLO. REV. STAT. ANN. § 18-6-403 (West 2009); FLA. STAT. ANN. § 775.0874 (West 2009); IDAHO CODE ANN. § 18-1507 (2009); MASS. GEN. LAWS ANN. ch. 272, §§ 29A-29C (West 2009); MICH. COMP. LAWS ANN. § 750.145C (West 2009); MISS. CODE ANN. § 97-5-31 (West 2009); MO. ANN. STAT. § 573.010 (West 2009) (defining child as less than 14 years old, and a minor as less than 18 years old); NEB. REV. STAT. § 28-1463.02 (2009); NEV. REV. STAT. ANN. § 200.508 (West 2009) (possessing a visual depiction of a person under 16 engaged in sexual conduct is illegal); NEV. REV. STAT. ANN. § 200.730 (West 2009); N.M. STAT. ANN. § 30-6A-2 (West 2009); OR. REV. STAT. ANN. § 163.665 (West 2009); 18 PA. CONS. STAT. ANN. § 6312 (West 2009); TEX. PENAL CODE ANN. §§ 43-25, 43-26 (Vernon 2009); WIS. STAT. ANN. § 948.01 (West 2009); WYO. STAT. ANN. § 6-4-303 (2009).

[45] United Nations Convention on the Rights of the Child, G.A. Res. 44/25, ¶ 1, 44 U.N. GAOR, Supp. No. 49, at 167, U.N. Doc. A/44/49 (Nov. 20, 1989).

[46] The first report of the Commission on Obscenity used the term "erotica," but never defined it. *See generally*, NAT'L COMMISSION ON OBSCENITY AND PORNOGRAPHY, THE REPORT OF THE COMMISSION ON OBSCENITY & PORNOGRAPHY (1970) [hereinafter *1970 Commission Report*]; ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT at 200 (1986) [hereinafter *1986 Commission Report*] ("[A]lthough the [1970] Commission struggled mightily to agree on definitions of such basic terms as pornography and erotica, it never did so.").

[47] While this is to state the obvious, erotica is a word distinct from the adjective, erotic. Obviously the word erotic—meaning arousing sexual passion—is not limited to art or literature. The noun erotica, however, is a term of art and is the subject of this Article.

[48] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 772 (unabr., Phillip Babcock Gove ed., 2002) (1981); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 605 (4th ed. 2000); THE WORLD BOOK DICTIONARY 720(Clarence L. Thorndike & Robert K. Barnhart eds., 1990).

[49] THOMAS BRANDE, DICTIONARY OF SCIENCE, LITERATURE AND ART 415 (1842).

[50] *See e.g.*, PAUL RUTHERFORD, A WORLD MADE SEXY, FREUD TO MADONNA 25 (Univ. of Toronto Press Inc. 2007) (noting that much "erotica in the form of art or literature" is legitimate and distinct from pornography).

arouse sexual desire."[51] Similarly it has been referred to as "literary or artistic works of a predominantly libidinous nature."[52] It "is the name given to any artwork—written, pictorial or performed—that portrays sex explicitly, yet possesses enough value as to escape condemnation as pornography."[53]

This distinction between erotica and pornography is somewhat subjective and at times challenging.[54] In a legal context, the importance of the correct distinction may not be obvious because these are not legally defined terms. The most often discussed legal distinction is not between pornography and erotica, but between obscene speech and non-obscene speech.[55] This is a critical distinction because obscene speech is not protected by the First Amendment.[56] Conversely, it has been argued that what separates pornography from erotica is the intent of the creator.[57] Relevant to this distinction is the viewer's perception as the average or reasonable person. "The distinction between erotica and pornography rests on the manifest intention of the work, rather than the explicitness of the subject matter."[58] It is not only the intent of the creator, but the *primary* intent which is relevant. "[W]orks intended primarily to excite prurience are generally judged to be pornographic and

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[51] AMERICAN HERITAGE DICTIONARY, *supra* note 48, at 605; *see also* CHAMBERS 21ST CENTURY DICTIONARY (Mairi Robinson & George Davidson eds., 1996) (plural noun referring to erotic literature or pictures).

[52] 10 ENCYCLOPEDIA AMERICANA INTERNATIONAL EDITION 559 (Scholastic Library 2005) (1829).

[53] 7 ACADEMIC AMERICAN ENCYCLOPEDIA (Grolier Incorporated 1998). Another description notes that while no universal definition of erotica exists, erotica is "creative representation of sexual subject matter using literary, graphic, photographic, and film techniques." 7 THE BLACKWELL ENCYCLOPEDIA OF SOCIOLOGY 3540 (George Ritzer ed., Blackwell Publishing 2007).

[54] 1986 Commission Report, *supra* note 46, at 230 ("It seems clear to us that the term [erotica] as actually used is the mirror image of the broadly condemnatory use of 'pornography;' being employed to describe sexually explicit materials of which the user of the term approves.").

[55] The Supreme Court defined obscene speech in Miller v. California, 413 U.S. 15 (1973), and then later developed it further in Smith v. United States, 431 U.S. 291 (1977), and Pope v. Illinois, 481 U.S. 497 (1987), to include the following:

> 1.The average person, applying contemporary community standards, would find that the material taken as a whole appeals to the prurient interest;
> 2.The average person, applying contemporary community standards, would find that the material depicts or describes sexual conduct specifically defined by the applicable state law in a patently offensive way; and
> 3.A reasonable person would find, taking the material as a whole, that it lacks serious literary, artistic, political or scientific value.

Miller, 413 U.S. 15; *Smith,* 431 U.S. 291; *Pope*, 481 U.S. 497. All three elements of the test must be satisfied for the material to be considered obscene. *Miller*, 413 U.S. at 24-25; *Smith*, 431 U.S. at 300-02; *Pope*, 481 U.S. at 500-01.

[56] *Id.* No uniform definition of pornography exists. Neither the Commission Report (1970) nor the 1986 Commission Report felt they could offer a definition. 1986 Commission Report, *supra* note 46.

[57] That is not to say that in the art context the viewer is irrelevant. Indeed, others argue the viewer and the viewer's context is important. *E.g.*, LYNDA NEAD, THE FEMALE NUDE 86-91 (1992).

[58] ENCYCLOPEDIA AMERICANA, *supra* note 52, at 559. There have of course been those who attempt to distinguish between erotica and pornography outside the art realm. Gloria Steinem in a somewhat dated article covering a broad array of topics not at issue in this piece, wrestled with this distinction. *See* Gloria Steinem, *Erotica and Pornography: A Clear and Present Difference*, in TAKE BACK THE NIGHT 37 (Lederer, ed. 1980).

considered objectionable on moral, social, or aesthetic grounds."[59] Concededly, this distinction possesses a subjective quality.[60]

While subjectivity may play a role, it should not be overstated. The focus of the artistic—as opposed to legal—analysis arguably remains the creator's intention. In many cases "the artist's intention is used as the primary criterion. If the work is intended merely to titillate, it can be dismissed as trash; if the artist means to explore human sexuality, the work deserves to be called erotica."[61] Of course, the consumer plays a role. Pornography is consumed for its sexual content alone.[62] "Child erotica" therefore, linguistically would have to involve art or literature by an artist whose primary purpose is to explore human sensuality that may portray sexuality , but whose *primary purpose* is not to excite prurience toward the child. Yet, as will be discussed, this is not how the term is used.

a. Non-Legal History of Erotica

To fully understand the use of the term erotica and, therefore, "child erotica," one must briefly examine the history of both its use and "erotica" more generally. While "erotica" originates from the Greek word Eros—the Greek god of desire—the word is much younger than the material it connotes.[63] Some argue the term was coined in the 1950s "to designate something more elevated and exclusive than pornography."[64] Its origins have been attributed to being a "19th Century invention, devised by booksellers who wished to lend respectability to items that might be seized by the police" as obscene pornography.[65] It is "only in the recent 20th Century have artists self-consciously produced erotica, but the concept has been used to classify the relics of the past as well."[66]

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[59] ENCYCLOPEDIA AMERICANA, *supra* note 52, at 559. *See, e.g.*, RUTHERFORD, *supra* note 50; ACADEMIC AMERICAN ENCYCLOPEDIA, *supra* note 53. ("Works with artistic, social, or historical value are erotica; worthless ones are pornography."). BLACKWELL ENCYCLOPEDIA, *supra* note 53, at 3540 ("[P]ornography is designed to sexually arouse the producer and/or audience . . . .").

[60] ACADEMIC AMERICAN ENCYCLOPEDIA, *supra* note 53, at 234 ("The distinction is often a matter of taste and tastes change over time."). For example, many modern novels were originally deemed pornographic and now are considered erotic such as *Ulysses*, *Lord Chatterley's Lover*, and *Lolita.*

[61] *Id. See also* NEAD, *supra* note 57, at 106 (citing Peter Webb, *The Erotic Arts* (1975)) ("[M]ost people associate eroticism with love rather than sex alone and love has little or no part to play with pornography . . . . The difference between eroticism and pornography is the difference between celebratory and masturbatory sex.").

[62] Nead, *supra* note 57, at 92, 104 (discussing one view of pornography as "the explicit and illicit representation of sex and sexual bodies for the sole purpose of arousal.") (emphasis added). For an interesting discussion of cultural distinction and an argument that art and pornography are not entirely separate, but within a cultural continuum that distinguishes them, *see id.* at 87-109. *See also* Blackwell Encyclopedia, *supra* note 53, at 3540.

[63] ACADEMIC AMERICAN ENCYCLOPEDIA, *supra* note 53, at 234.

[64] BLACKWELL ENCYCLOPEDIA, *supra* note 53, at 3540.

[65] ACADEMIC AMERICAN ENCYCLOPEDIA, *supra* note 53, at 234.

[66] *Id.* For a discussion of the history of eroticism and the "sex museum" concept, as distinct from erotica, *see* RUTHERFORD, *supra* note 50.

The history of this material begins much earlier than the history of the term, extending even to ancient cultures. In the Ancient Middle or Far East, many cultures have a history of erotic art.[67] Love was not depicted romantically in Greek art until Hellenistic times.[68] Indeed, erotic Greek vase paintings extend in history as far back as the 5th Century, with a broad range of sexual acts depicted thereon.[69] For the Romans, erotic illustrations discovered in Pompeii seemed to be linked to fertility.[70] Indeed, "it is safest to assume that in Greco-Roman culture the sexual was not separated from other themes of representation as it is now."[71] The Middle Ages brought with them a change in erotic material. Christianity had less use for erotic art which not only did it not produce, but also sought to terminate.[72] When it did appear in Romanesque and Gothic cathedrals it communicated themes of vice, unchastity, and last judgment.[73] With the Renaissance came a rediscovery of ancient learning and a desire to imitate classical models, producing nude art with erotic qualities.[74] We again see a change in how love is presented in the 12th through 19th Centuries. "The erotic literature and art of the Renaissance were quite restrained," with artists "disguis[ing] their sensuality in a cloud of mythology and allegory."[75] Often sexual representation was "harnessed to satirical attacks on religious or political authority."[76]

Regarding child erotica, "prior to the 19th Century boys were more likely than any other human figure in works of art to be naked." After the 19th Century bodies of girls become the focus of some art.[77]

In the later 19th and early 20th Centuries, a transformation occurs and complex eroticism surfaces in a variety of forms: novels such as Henry Miller's *Tropic of Cancer,* visual art of Pablo Picasso's nudes, the films of Bernardo Bertucci—for example, *Last Tango in Paris*—and Federico Fellini.[78] Prior to this transformation,

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[67] In India a form of erotic mysticism, Tantrism, spread over the country in the 7th and 8th Centuries. ACADEMIC AMERICAN ENCYCLOPEDIA, *supra* note 53, at 234. It combined with other sexual practices leading to the production of erotic sculptures in temples. *Id.* In the 16th Century this evoked much Indian art and poetry centered on the god Krishna as a symbol of love that sanctifies sexual union. ENCYCLOPEDIA AMERICANA, *supra* note 52, at 559.

[68] ACADEMIC AMERICAN ENCYCLOPEDIA, *supra* note 53, at 234; Simon Wilson, *A Short History of Western Erotic Art, in* Robert Melville, EROTIC ART OF THE WEST 11 (1973).

[69] *Id.*

[70] ACADEMIC AMERICAN ENCYCLOPEDIA, *supra* note 53, at 234.

[71] BLACKWELL ENCYCLOPEDIA, *supra* note 53, at 3540.

[72] *Id.*; Wilson, *supra* note 68, at 13

[73] Wilson *supra* note 68, at 14.

[74] BLACKWELL ENCYCLOPEDIA, *supra* note 53, at 3540; Wilson, *supra* note 68, at 16.

[75] ENCYCLOPEDIA AMERICANA, *supra* note 52, at 559.

[76] BLACKWELL ENCYCLOPEDIA, *supra* note 53, at 3540.

[77] Bristol, *supra* note 8, at 337.

[78] ACADEMIC AMERICAN ENCYCLOPEDIA, *supra* note 53, at 234; ENCYCLOPEDIA AMERICANA, *supra* note 52, at 559.

> high artistic intentions continued to mask the presence of erotic elements in pictorial . . . art, while written works that treated sex explicitly were relegated to the closed shelf of the pornographic underground. In the 20th Century such distinctions broke down and a burgeoning inclusion of erotica developed in all art forms.[79]

3. Summary

Erotica, therefore, is a precise noun of fairly recent origin referencing art or literature. This particular type of art or literature may have sexual qualities, but its *primary* purpose is *not* to sexually arouse. Therefore, the proper implication of the term "child erotica" should reference only art or literature in which the child is the subject. While such material may contain sexual components, it would not have as a primary purpose to sexually arouse an interest in a child. As will be discussed *infra*, the term "child erotica" has grossly mislabeled material whose primary purpose *is* to sexually arouse a sexual interest in children.

III. THE REASONS TO CEASE MISUSE OF THE TERM ARE THREEFOLD

A. The Term Is Misleading

By linking together the terms "child" and "erotica," the label "child erotica" then claims to be itself a genre of art. This is misleading. Most of the material referenced with this label is material whose primary purpose is to arouse a sexual interest in children. Therefore, it is not related to either erotica or an artistic genre. While concededly some art may include sexual components and children,[80] such material is not the topic of this Article.[81]

The term has been misused to cover a broad array of materials, the vast majority of which are not art, but material whose *primary* purpose is to sexually titillate and arouse the adult consumer's sexual interest in children. Indeed the material at issue in this Article—such as images from child modeling sites and homemade surreptitious recordings of children, for example—exists and is consumed seemingly solely for that purpose.[82] Further, they meet the definition of

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[79] ACADEMIC AMERICAN ENCYCLOPEDIA, *supra* note 53, at 234. It is perhaps this breaking down of the art forms that contributed to the misuse of the term in legal opinions.

[80] Such art may include a novel with a plot and some sexually explicit scenes. For a discussion of the controversy as well as further examples of items possibly related to erotica and children, *see* United States v. Griesbach, 540 F.3d 654, 655 (7th Cir. 2008); Wilson, *supra* note 68, at 12.

[81] *See,* supra note 8.

[82] While this Article focuses on visual depictions of children, the same could be said of other items referred to as "child erotica" such as text on how to gain access to and sexually assault children without detection. *See supra* note 35.

exploitation in that the subjects are being used by another for that person's own benefit.[83]

Language matters. If, as Henry Hart states, a criminal conviction is the moral condemnation of the community, then clearly the courts act on behalf of the community.[84] Therefore, the language used by the courts on behalf of that community to reflect its values must be accurate. Indeed social science recognizes the implications of labels and language used by societal institutions to describe social ills as revelatory of what society values. "Research on actual speech supplies an understanding of how parties routinely and procedurally produce and experience forms of 'trouble' that may emerge as problems and deviance."[85] Imagine, for example, if courts referred to narcotics as "medicine." More on point, imagine if courts referred to legal, although socially undesirable activity, with positive terminology: emotional abuse being referred to as "negative allocution," or bigoted language being referred to as "racially diverse dialog." Such labels would be inappropriate because they connote a social value which the material neither deserves nor possesses.

The same is true when courts allot an artistic term to images which are related to child exploitation. Just as there is a movement away from the term child pornography to the term of child abuse images in research circles, there needs to be a movement away from the term "child erotica." The aforementioned movement arose from a belief that "child pornography was misleading and suggested an innocuous version of adult pornography. This term allowed the public to distance themselves from the images and to ignore the victimization of the child involved.[86]

"Conceptualisations of child [abuse images] that equate it with obscenity necessarily focus on an 'end' product and ignore the children as victims. Early [research] suggests that there is a blatant disregard for the dehumanising experiences encountered by children in the production of all such material . . . ."[87] Such is true, although to a lesser degree, with so-called "child erotica" images of child exploitation which do not meet the legal definition of child pornography/ child abuse images, yet exploit children in production.[88]

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[83] BLACK'S LAW DICTIONARY 619 (8th ed. 2004) (defining exploitation as the act of taking unjust advantage of another for one's own benefit). *See also id.* at 1407 (defining sexual exploitation as "the use of a person, especially a child, in prostitution, pornography, *or other sexually manipulative activity* that has caused or could cause serious emotional injury.") (emphasis added).

[84] Hart M. Henry, *The Aims of Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958).

[85] Douglas W. Maynard, *Language, Interaction, and Social Problems*, 35 SOCIAL PROBLEMS 311, 318 (1988).

[86] *See supra* note 1. "Child abuse images" has weaknesses as well. The movement is not uniform. Some argue no term is adequate and we should educate on the meaning of the legal term "child pornography" rather than develop a new, imperfect one whose disadvantages outweigh its advantages. Electronic correspondence from Kenneth Lanning, to Mary G. Leary, Associate Prof. of Law, Catholic University of America, Columbus School of Law (Aug. 26, 2009 and Oct. 8, 2009) (on file with author); *see also* Kenneth Lanning, CHILD MOLESTERS: A BEHAVORIAL ANALYSIS 5th Ed. (forthcoming 2010).

[87] Max Taylor et al., *Typology of Paedophile Picture Collections*, 74 THE POLICE J. 97, 103 (2001).

[88] Some have cited this as a reason to regulate all nude photography of children. This group argues

Therefore, courts, on behalf of the community, should not refer to sexually exploitive material or items used to validate offenders or groom children with an *art* term. This is misleading.

B. This Misleading Label Is Also Validating

It is misleading to label material, such as "child modeling" pictures on the aforementioned websites, homemade surreptitious videos, or publications like *Barely Legal* as art. It is also damaging to suggest these possess an elevated social value. Such a label validates the material by elevating all to which it refers as something possessing social value, like art.

Recently, there has been a growing recognition of the normalization of the sexual objectification and sexualization of children.[89] According to the American Psychological Association ("APA"), this sexualization, as opposed to healthy sexuality, occurs *inter alia*, when "a person's value comes only from his or her sexual appeal or behavior, to the exclusion of other characteristics; . . . [or] a person is sexually objectified—that is, made into a thing for other's sexual use, rather than seen as a person with the capacity for independent action . . . ."[90] The APA reviewed over 300 studies and found an increase in societal messages contributing to the sexualization of girls[91] and the negative impact on girls and society at large. Courts must refuse to participate in a social phenomenon that endorses this commoditization by suggesting it is ever appropriate, let alone of elevated social value, to display a child for the sexual consumption of adults. Use of the term "child erotica" does just this.

It has been recognized that there is "an elusive and controversial line between free expression and exploitation within the realm of child sexuality."[92] Therefore, the more precise language used, the clearer the line is between what might be art and what might be child exploitation paraphernalia or child exploitation images.

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that such images decrease taboos concerning exploitive behavior toward children making them "more acceptable as objects of abuse, neglect, mistreatment, especially sexual abuse and exploitation." L. Steven Grasz & Patrick J. Pfaltzgraff, *Child Pornography and Child Nudity: Why and How States May Constitutionally Regulate the Production, Possession, and Distribution of Nude Visual Depictions of Children*, 71 TEMP. L. REV. 609, 625 (1998). The Supreme Court, however, has made clear that nudity alone is an insufficient basis for prohibition. *See e.g.* New York v. Ferber, 458 U.S. 747, 766 n.18 (1982).

89 *E.g.*, Report of APA Task Force on Sexualization of Girls, American Psychological Association, Washington, D.C. (2007) *available at* http://www.apa.org/pi/wpo/sexualizationrep.pdf [hereinafter *APA Report*]; DIANE LEVIN AND JEAN KILBOURNE, SO SEXY SO SOON (2008).

90 APA Report, *supra* note 87, at 2.

91 *Id.* This is supported by another study of male undergraduates who reported an unexpectedly high (21%) sexual attraction to children. John Briere & Marsha Runtz, *University Males' Sexual Interest in Children: Predicting Potential Indices of "Pedophilia in a Non-ForensicSample,* 13 CHILD ABUSE & NEGLECT 65, 65-75 (1989); *see also* Kathy Smiljanich & John Bierer, *Self Respect and Sexual Interest in Children: Sex Differences and Psychosocial Correlations In A University Sample*, 11 VIOLENCE AND VICTIMS, 39, 39-50 (1996).

92 Bristol, *supra* note 8, at 335.

C. These Problems Are Compounded When Courts Incorporate and Over Generalize the Misleading and Validating Label to Describe What Could Be Important Evidence

Unlike with adult pornography, the distinction between child abuse images/child pornography and so-called "child erotica" is critically important. It means the difference between protected and unprotected speech. Depictions of children need not be obscene to lose First Amendment protection. Child abuse images/child pornography is a separate category of unprotected speech.[93] Therefore non-obscene depictions that do not meet the legal definition of child pornography, which include so-called "child erotica," are protected and legal. That is not to say, however, that materials in a child exploitation case which are not child abuse images/child pornography are unimportant.

To the contrary, this material, depending upon what it is, can be of extreme significance in child sexual exploitation investigations and trials.[94] For example, whether there is probable cause to search a location may turn on the nature and quality of other items known to be in a suspect's possession. Similarly, at trial, material which establishes a sexual interest in children may be relevant to the mens rea of the crime charged. For example, many child sexual exploitation crimes require the defendant to act at least "knowingly."[95] Therefore, the nature and quality of other material in a suspect's possession may be relevant to the question of whether he *knew* the nature of the illegal material.[96] The presence of sexually explicit material regarding children may also be relevant to other issues, including but not limited, to assessing a suspect's dangerousness, his predisposition in a claim of entrapment, and the extent of his interest in children.[97] "[Such] can be

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[93] *See* New York v. Ferber, 458 U.S. 747 (1982); United States v. Williams, 128 S.Ct. 1830, 1841 (2008).

[94] Child pornography or child abuse images are defined differently from jurisdiction to jurisdiction. The federal definition considers child pornography as the depiction of children, engaged in "sexually explicit conduct." 18 U.S.C. § 2256(8) (2003). Sexually explicit conduct includes children engaged in "actual or simulated i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; ii) bestiality; iii) masturbation; iv) sadistic or masochistic abuse; or v) lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. § 2256(2)(A) (2003). Therefore, a very sexually explicit image which happens not to include the specific sexual acts listed, is not child pornography or illegal. Note that virtual child abuse images defined differently. 18 U.S.C. § 2256(2)(B).

[95] *E.g.*, 18 U.S.C. § 2252(a)(4)(B) (*mens rea* requirement of "knowingly possessing or knowingly accessing visual depictions of a minor engaged in sexually explicit conduct"); ALA. CODE §13A-12-191-192, 196-197 (2009); ALASKA STAT. §11.61.123 (2009); CAL. PENAL CODE § 311.11(A) (2009); DEL. CODE ANN. tit. 1.11, § 1108-1109, 1111 (2009); IND. CODE §§ 35-42-4-4, 35-49-3-2, 35-49-3-3 (2009); CONN. GEN. STAT. ANN §531-196(b) (West 2009) (having general knowledge of the character and content of any material); IOWA CODE § 728.1(2) (2009) (being aware of the character of the matter); OKLA. STAT. §1021.2-1021.3; OR. REV. STAT. §§163.684; 163.686-689 (2009); 18 PA. CON. STAT. § 6312 (2009).

[96] Knowingly means an awareness of the sexually explicit nature of the material and the age of the performers. United States v. X Citment Video, Inc., 531 U.S. 64 (1994).

[97] *E.g.*, U.S. v. Thomas, No. CRIM. CCB-03-0150, 2006 WL 140558, at *1 (D. Md. Jan. 13, 2008); U.S. v. Byrd, 31 F.3d 1329, 1334-35 (5th Cir. 1994); U.S. v. Lamb, 945 F. Supp. 441, 463 (N.D.N.Y.

valuable as evidence of intent and/or as a source of intelligence. The finding of collateral material may also influence bail, a guilty plea, and the sentence eventually imposed on the offender."[98] Therefore, defining and accurately labeling all material found connected to an investigation of child sexual exploitation is critical.

Notwithstanding the importance of precision in descriptions and labeling, courts in the United States have mislabeled important evidence, transforming the label of "child erotica" into an amorphous concept with no ties to art or literature. In so doing, courts have extended a mantel of legitimacy and legal irrelevance to a body of potentially important material, thereby risking inaccurate results.

1. History of Supreme Court Use of the Terms Erotica and "Child Erotica"

The use of the term "erotica"—and "child erotica" for that matter—in criminal jurisprudence is a relatively modern concept. The Supreme Court has offered little guidance in the form of definitions in the area of pornography and exploitation, and its use of the word "erotica" is no exception. While the distinction between obscene and non-obscene speech has been assigned a definition of sorts in Supreme Court jurisprudence, "'pornography' unmoored from any particular statute has never received a precise legal definition from the Supreme Court or . . . the federal code."[99] In the seminal obscenity case, *Miller v. California*, the Supreme Court does not define pornography, although it quotes from Webster's Third New International Dictionary definition of pornography as a reference.[100] In so doing, the Court uses the term "erotic," without using "erotica."[101] However, this appears not to be an attempt to precisely define pornography, but merely to note the material at issue in *Miller* was pornography and not obscene.[102] Indeed, it appears that the first time any federal court used the term "erotic" in a published opinion was in 1934 and the Supreme Court did so in 1957, both failing to define the word.[103]

1996) (child erotica properly the subject of search because "relevant to the questions of defendant's predisposition or lack of mistake.").

[98] ROBERT R. HAZELWOOD & LANNING, *Collateral Materials in Sexual Crimes*, *in* PRACTICAL ASPECTS OF RAPE INVESTIGATION 223 (Robert R. Hazelwood & Ann W. Burgess eds., 3d ed. 2001) (referring to "collateral material" which includes "child erotica"). *See infra* Part III.C.3.

[99] United States v. Loy, 237 F.3d 251, 263 (3d Cir. 2001).

[100] Miller v. California, 413 U.S. 15, 20, n.2 (1973) ("Pornography derives from the Greek (porne, harlot, and graphos, writing). The word now means '1: a description of prostitutes or prostitution 2: a depiction (as in writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement.'").

[101] *Id.*\

[102] Farrell v. Burke, 449 F.3d 470, 489 (2d Cir. 2006).

[103] Roth v. United States, 354 U.S. 476, 496, 500, 513 (1957); United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705, 707 (1934).

Notwithstanding this lack of definition, courts have had to distinguish between protected and unprotected speech. Even prior to *Miller*, states successfully regulated obscene speech and the United States Supreme Court affirmed such convictions.[104] In such cases the government alleged obscenity not so much based upon the item standing on its own, but "in the context of these circumstances of production, sale, and publicity."[105] For example in *Ginzburg v. United States*, the Court addressed distributing mail as harmful to minors.[106] The Court considered the fact that the items[107] were sought to be mailed from towns whose names were based on "prurient appeal" such as Intercourse, Pennsylvania; Blue Ball, Pennsylvania; and Middlesex, New Jersey.[108] Due to the deliberate representation of the publications as obscene,[109] the Court found these items properly regulated.[110] Therefore, these initial inroads into distinguishing obscene speech related, to some degree, on the intent of the creator. Currently, however, the Court applies the *Miller* test to distinguish obscene speech from other speech, the test focuses on the average person applying contemporary community standards.[111]

Specifically regarding "child erotica," there is an equally uninformative history. The first published federal court opinion in which the term appears to have been used was *United States v. Driscoll*.[112] The term was used in reference to the defendant "who was identified as a person who had previously ordered child erotica."[113] The term was not defined.[114]

The Supreme Court and the United States Congress have been equally uninstructive regarding so-called "child erotica." This is demonstrated in the Court's rulings on child nudity, an area not currently directly federally regulated. In *Massachusetts v. Oakes*, the Supreme Court had an opportunity to rule on whether a state could regulate child nudity.[115] The statute at issue prohibited, *inter alia*,

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[104] *See* DAVID TUBBS, FREEDOM'S ORPHANS 140 (2003).

[105] Ginzburg v. United States, 383 U.S. 463, 465 (1966).

[106] *Id.* at 471.

[107] The items at issue included a publication, *EROS*, a hardcover art magazine with photo essays on love, sex, and sexual relations; *Liaison*, a "biweekly newsletter keeping sex an art," which an expert did find entirely without merit; and the book *A Housewife's Handbook on Selective Promiscuity*, which is described as a sexual autobiography from age 3 to 36. *Id.* at 465.

[108] *Id.* at 467.

[109] *Id.* at 470.

[110] As will be discussed *infra* Part IV, courts have also considered the viewpoint of the creator in determining if certain images are lascivious displays of genitals and, therefore, child abuse images. *E.g.*, United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff'd sub nom.*, United States v. Wiegand, 812 F. 2d 1239 (9th Cir. 1987) (noting that the sixth factor in determining lascivious exhibition is "whether the visual depiction is intended or designed to elicit a sexual response in the viewer."). For a thorough discussion of the various viewpoints child abuse images law incorporates *see* Perverse Law, *supra* note 8, at 263-65.

[111] *See, supra* n.56, *e.g.*, Ashcroft v. ACLU, 535 U.S. 564, 570 (2002).

[112] United States v Driscoll, 852 F.2d 84 (3d Cir. 1988).

[113] *Id.* at 85; Ronald Krotoszynski, *Childproofing the Internet*, 41 BRANDEIS L.J. 447 (2003) ("The Supreme Court's approach to children and erotica has been janus-faced.").

[114] Krotoszynski, *supra* note 113.

[115] Massachusetts v. Oakes, 491 U.S. 576 (1989).

causing or encouraging minors to pose or be exhibited in a state of nudity or act that depicts, describes, or represents sexual conduct.[116] However, the plurality opinion avoided that issue by declaring it moot due to the Massachusetts legislature's subsequent statutory amendment to include the element of lascivious intent.[117] Justice Scalia's partial concurrence and dissent, however, suggests support for the regulation of nude photographs of children because "[i]t is not unreasonable . . . for a State to regard parents using (or permitting the use) of their children as nude models, or other adults' use of consenting minors, as a form of child exploitation."[118] Conversely, the Court has declared that "nudity alone is not enough to make material legally obscene under *Miller* standards."[119] The Court, although addressing sexually exploitive images of children, neither used nor defined "child erotica."[120]

2. Lower Courts Utilize the Term "Child Erotica" in an Overbroad Manner

While the approach of lower courts is distinct from the Supreme Court, it can be argued it is equally vague. Lower courts seem to use the term in one of two ways: (1) either explicitly defining the term incorrectly or (2) implicitly defining the term by labeling certain non- artistic items as "child erotica." Both are damaging.

When courts have chosen to define the term "child erotica," they have done so poorly, divorcing it from art and literature and over generalizing it to encompass too broad a reference. Often courts follow the example of the Southern District of New York and define "child erotica" as "images of nude children that do not rise to the level of pornography."[121] The Ninth Circuit similarly described "child erotica" as "images that are not themselves child pornography, but still fuel [one's] sexual fantasies involving children."[122] Other Federal courts have defined such images as "innocent pictures of children arousing only in the minds of certain viewers."[123]

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116 MASS. GEN. LAWS, ch. 272, § 29A (Supp. 1988); *Oakes*, 491 US at 583.

117 *Oakes*, 491 U.S. at 582-85 (1989).

118 *Id.* at 589, n.2 (Scalia, J., dissenting in part, concurring in part); *See also* Grasz, *supra* note 87; Inventing, *supra* note 8, at 948.

119 *E.g.*, Jenkins v. Georgia, 418 U.S. 153, 161 (1974).

120 *See id.* The opinion does quote the statute which uses the word "erotica." *Id* at 155 n.1.

121 *E.g.*, United States v. Hudak, No. 02-CR.853 (JFK), 2003 WL 22170606, at *1 (S.D.N.Y. 2003). In said case, stemming from a national investigation referred to as the Candyman investigation, an early affiant incorrectly averred that members of a certain newsgroup automatically received suggestive emails, some which he classified as so-called "child erotica." *Id.* This description is repeated in several other cases stemming from the flawed Candyman affidavit. *See, e.g.*, United States v. Correas, 419 F.3d 151, 152 (2d Cir. 2005) (what is left of the affidavit is not enough for probable cause); United States v. Perez, 247 F. Supp. 2d 459 (S.D.N.Y. 2003) (no probable cause remains once the warrant is stripped of incorrect language); United States v. Fontecchio, No. 07-14060-CR, 2007 WL 4199599, at *2 (S.D.F.L. 2007).

122 United States v. Gourde, 440 F.3d 1065, 1068 (9th Cir. 2006).

123 United States v. Christie, 570 F. Supp. 2d 657, 687 (D.N.J. 2008) (citing United States v. Williams, 444 F.3d 1286, 1304 (11th Cir. 2006), *rev'd on other grounds* 128 S.Ct. 1830 (2008)); Farrell

Such a simplistic view is flawed. While British researcher Max Taylor acknowledges this limited American lens, he notes a "whole range of . . . photograph[y] (and other material as well)" exists.[124] This exemplifies the American oversimplification that sexual material is either child pornography or clearly non-pornographic.[125]

More often, however, lower courts use the term without definition, in an overbroad manner. Courts simply label everything—whether images, text, commercial or homemade material, etc.—that falls short of meeting the legal definition of child pornography or child abuse images as "child erotica." Such a label has been assigned to varied material such as the following: pictures of nude children collected and purchased from a commercial child abuse images website by a convicted sex offender;[126] "sexual imagery of young females touted as 'barely 18' and 'the youngest girls allowed by law;'"[127] *Playboy* magazine;[128] a videotape of a nudist beach focused on the breasts and genitals of prepubescent girls;[129] images from so-called "child modeling" sites;[130] a Disney children's exercise video paused at certain points during children exercising;[131] surreptitiously filmed children focusing on the crotch area;[132] nude pictures of six-year-old child abuse victims with genitals prominently displayed;[133] and even mainstream media.[134] The term also has not been limited to visual depictions. Many affidavits and courts have identified objects used to groom or validate a sexual interest in children[135] as

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v. Burke 449 F.3d 470, 489 (2d Cir. 2006) ("The distinction between erotica and porn[ography] is precisely a distinction of values.").

124 Taylor, *supra* note 87, at 97.

125 For a description of such material as existing along a continuum, *see* Taylor, *supra* note 87, at 99-103.

126 *E.g.*, United States v. Chanley, No. 2:07-CR-0150RCJRJJ, 2008 WL 763253 (D. Nev. 2008).

127 *E.g.*, United States v. Presley, No. CR07-5058BHS, 2008 WL 189565, at *2 (W.D. Wash. 2008); see also United States v. Lamb, 945 F. Supp. 441, 465 (N.D.N.Y 1996) (citing United States v. Harvey, 991 F.2d 981 (2d Cir. 1993)).

128 *E.g.*, Waterman v. Verniero, 12 F. Supp. 2d 364, 371 (D.N.J 1998), *rev'd on other grounds*, Waterman v. Farmer, 183 F.3d 208, 220 (3d Cir. 1999) (holding statute at issue in Waterman did not violate prisoners' constitutional rights).

129 *E.g.*, United States v. Lamb, 945 F. Supp. 441, 465 (N.D.N.Y 1996) (citing Harvey at 984); United States v. Thomas, No. CRIM. CCB-03-0150, 2006 WL 140558, at *3 n.11(D. Md. Jan. 13, 2006) (expert defines "child erotica" as "nudist and naturalistic pictures of naked children").

130 *E.g.*, Connecticut v. Kaminski, 940 A.2d 844 (Conn. App. Ct. 2008).

131 *E.g.*, United States v. Dodge, 983 F.2d 1069 (6th Cir. 1993).

132 *Thomas*, 2006 WL 140558, at *2.

133 United States v. Green, No. 07-CR-0442PJS, 2008 WL 1805573, at *1 (D. Minn. April 18, 2008). *See also,* United States v. Chanley, No. 2:07-CR-0150RCJRJJ, 2008 WL 763253, at *1 (D. Nev. March 19, 2008) (ten pictures of a male child under age of ten lying on a bed dressed only in underwear).

134 *E.g.*, Rabidue v. Osceda Ref. Co., 584 F. Supp. 419 (E.D. Mich. 1984).

135 *E.g.*, U.S. v. Carlson, 230 F. Supp. 2d 686, 689 (S.D. Tex. 2000) (child erotica as defined as "items [a defendant] could use to entice children to visit or trust him – books about children, or pedophiles. toys, dolls, etc.").

well as "drawings, sketches, written descriptions/stories and/or journals" as "child erotica."[136]

An art and literature term existed; courts adopted it without definition, and it has been applied by courts without reflection to describe one of two categories of material. The result has been use of the term to over broadly include material in child sexual exploitation cases which did not meet the legal definition of child pornography or child abuse images. The legal consequences of this approach include an oversimplified analysis.

3. Likely Origins of Courts Misuse of the Term "Child Erotica"

Attorneys are fond of saying "a little knowledge of the law is a dangerous thing." Apparently the same is true for "a little knowledge of behavioral science." It seems that witnesses and courts have applied this concept to the collections of sexual offenders by labeling it shorthand "child erotica" and morphing the implication of the term to reflect an inaccurate meaning.

Although the term appears to have been utilized beyond its artistic reference by behavioralists, they explicitly discouraged translating this use into a legal definition. Nonetheless, courts then borrowed this use and over generalized it further. Kenneth Lanning of the Federal Bureau of Investigation ("FBI") provides some significant early writing about sexual offenders' behaviors. Lanning documented observations he and others had made after decades of working in the Behavioral Science Unit of the FBI. At the time of the first publication of the important piece, *Child Molesters: A Behavioral Analysis*, there was little such information regarding the behaviors of child abuse offenders. Within this piece, Lanning discusses the behavior of many offenders to collect various items including both child pornography, and other items.[137]

In describing this behavior, Lanning offers some explicitly non-legal definitions for both "child pornography" and "child erotica." "Child pornography can be behaviorally, *not* legally, defined as the sexually explicit reproduction of a child's image and includes sexually explicit photographs, negatives, slides, magazines, movies, videotapes, and computer disks."[138] Notably, Lanning explicitly rejects utilizing this as a legal definition. Second, while Lanning utilizes

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[136] United States v. Rockot, Criminal No. 97-33, 2007 WL 2464477 *2, n.2 (W.D. Pa. Aug. 27, 2007).

[137] LANNING, *supra* note 35. The first edition was published in 1986, with subsequent editions in 1987, 1992, and 2001. Because the piece was originally published in the 1980's and focused on sexual offenders, some terms may appear outdated. A fifth edition is forthcoming. Lanning and his early work has been characterized as one of the most significant contributions to examining this population. However, it is acknowledged that the work lacks empirical data. Taylor, *supra* note 87, at 97. It is important to recognize the context of this piece. It specifically is focused on characteristics of "child molesters" and the "pedophile," not just on the phenomenon of collecting child abuse images.

[138] LANNING, *supra* note 35, at 62 (emphasis in original).

the term "child erotica," he does so in a much more detailed manner than is apparent in jurisprudence.

He distinguishes the collection of these items from the collection of other items, which he initially labels "child erotica." Lanning subtly directs the reader to more precise language. He defines "child erotica" as "a broader, more encompassing, and more subjective term than child pornography,"[139] stating it can be defined as "any material relating to children that serves the sexual purpose for a given individual."[140] Of critical but often overlooked importance, however, is that while Lanning offers that as a *possible* definition, he also offers the term "pedophile paraphernalia" as a better label for this material.[141]

Also overlooked is Lanning's recognition that the label "child erotica" is insufficient itself, and must be sub-categorized further.[142] The first sub-category is "published material relating to children" which includes "books, magazines, articles, or videotapes dealing" with numerous topics including "erotic novels" as well as "sex education," "man-boy love," "sexual abuse," "incest," as well as more neutral material such as "catalogs" and books describing "investigative techniques" for such cases.[143] Lanning separately categorizes "unpublished material relating to children."[144] This category includes personal items such as "letters," "diaries," "adult pornography," "fantasy writings," "pedophile manuals," directions on where to meet children, "ledgers," and "financial records" of paying victims."[145] A third category of material includes "pictures, photos, and videotapes of children."[146] This refers to "photography, art, sex" books, "candid shots" of children, ads with children, and photographs that have been cut and pasted into collections.[147] "[S]ome pedophiles cut out pictures of children from magazines and put them in albums as if they were photographs."[148]

As important as these initial labels, but often overlooked, is Lanning's further discussion of the reasons some offenders compile such collections. Acknowledging that there are "as many reasons as there are offenders," he opines these items may serve to reinforce compulsive fantasies regarding children or to

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139 LANNING, *supra* note 35, at 65; *see also* David Oswell, *When Images Matter: Internet Child Pornography, Forms of Observation and Ethics of the Virtual*, 9 J. INFO., COMM. & SOC'Y 244 (2006).

140 LANNING, *supra* note 35, at 65; HAZLEWOOD ET AL., *supra* note 107, at 66.

141 LANNING, *supra* note 35, at 66.

142 *Id.*.

143 *Id.*

144 *Id.* at 67.

145 *Id.*

146 *Id.* at 68.

147 *Id.*

148 *Id.*; *see also* Dennis Howitt, *Pornography and the Pedophile: Is It Crimogenic?*, 68 BRIT J. MED. PSYCHOL. 15, 21 (1995) (documenting the use of a collection of ordinary pictures of children as a sexual stimulus and concluding there is no causal connection between pornography and pedophilia). Lanning has two additional categories of such collections less relevant here. These include "souvenirs and trophies" of items from previous victims, as well as "miscellaneous" items used in grooming victims. LANNING, *supra* note 35, at 68-69.

validate behaviors of the offender.[149] Concerning the academic items in a collection, their possession may serve to help an offender "understand and justify their own behavior."[150] Recent scholarship supports this, noting that child erotica images "may be highly suggestive and may ultimately serve the purpose of a fantasy source for a collector."[151] Lanning notes that child pornography and erotica are used at times as currency for exchange among pedophiles or less frequently for "profit."[152] More often such offenders utilize these images for both sexual arousal and to lower children's inhibitions to engage in sexual contact because children are influenced by what they see in books.[153]

However, since Lanning's original development of the term, two events have occurred. First, "many investigators began using the term . . . to exclusively describe visual images of naked children that were not considered to be pornographic."[154] Additionally, other investigators also seemed to misuse the term to represent *anything* not illegal.[155] Second, having recognized that Hazelwood applied similar concepts to sexual offenders who victimize adults, Lanning agreed a better term for such evidence was "collateral evidence."[156] Such material is defined as "items that do not directly associate the offender with a crime, but give authorities information pertaining to an individual's sexual preferences, interests, or sexual hobbies."[157] Lanning and Hazelwood subcategorize collateral evidence into four smaller categories: erotica, educational, introspective, and intelligence.[158]

Lanning has been recognized as one of the most significant contributors to our understanding of child sex offenders. His work was not intended to be empirical research. While a perceived weakness of the writings is its lack of empirical data, such is being developed today and tends to support his conclusions.[159]

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149 LANNING, *supra* note 35, at 69.

150 *Id.*

151 COOPER, *supra* note 17, at 239.

152 LANNING, *supra* note 35, at 71.

153 LANNING, *supra* note 35, at 70 ("Children accept what they see in books and many pedophiles have used sex education books to prove to children that sexual behavior is acceptable."); *see also, e.g.*, Child Pornography Protection Act of 1996, Pub. L. No. 104-208, 100 Stat. 3009 (1996) (emphasizing how child abuse images create a continual cycle of abuse, explaining that "child pornography is often used as part of a method of seducing other children into sexual activity," and that children who are "reluctant . . . can sometimes be convinced" to cooperate once they are shown the images of other children participating in sexual activity).

154 HAZELWOOD ET AL., *supra* note 98, at 223.

155 *See supra* Part III.C.

156 HAZELWOOD ET AL., *supra* note 98, at 223; LANNING, *supra* note 35, at 66.

157 HAZELWOOD ET AL., *supra* note 98, at 223.

158 *Id.* at 224.

159 Taylor, *supra* note 87, at 97. Lanning was specifically focused on acquaintance molesters. *Id.* Since 1986, the child abuse images industry has exploded via the Internet into a multibillion dollar international industry. *Lanning, supra* note 35, at 63. Consequently, when considering child abuse images possession one must acknowledge those who collect it can vary greatly. For examples of diverse offenders, *see* WOLAK, *supra* note 1; *see also* LANNING, *supra* note 35, at 79, 89.

> However, Lanning introduces the important distinction between child abuse images (the sexually explicit reproduction of a child's image) and child erotica (any material relating to children that serves a sexual purpose for a given individual). The significance of this distinction is to emphasize the potential sexual qualities of a whole range of kinds of photography (and other material as well) not all of which may meet the obscenity criteria.[160]

Lanning's important work described significant behavior of offenders which includes the collection of sexually exploitive material and objects used to facilitate crimes against children.[161] While Lanning did use the term "child erotica" to group these items, he used much more precise language *and* specifically cautioned against treating these insights as a legal definition.[162] Nonetheless, witnesses and courts have borrowed part of this behavioralist term and morphed it into a legal term. Furthermore, they then ignored *other* more accurate labels offered by Lanning which lack artistic overtones such as "collateral material" or "pedophile paraphernalia." The result is problematic.

4. This Overbroad Use Risks Significant Collateral Legal Consequences

When courts mis-categorize such material they risk numerous negative collateral effects. Because the forum is a court of law, such ramifications of inaccurate labels are significant. In short, courts divide images and material in sexual exploitation cases into two categories: "child erotica" and "child pornography/child abuse images." This results in oversimplification. By assigning such diverse material as pictures of clothed children, sex education texts, police investigation manuals, guidance on how to molest children, or exploitive child modeling pictures a common label, courts engage in an oversimplified and flawed analysis.[163] They equalize all such material as: *not* child abuse images/child pornography, *not* illegal, and, here is the flaw, *not* relevant to the legal questions. Yet, the legal significance among different pieces of such material is not equal. Some of the aforementioned examples may be highly relevant, but by regarding images as solely in one of two camps—illegal child abuse images or legal child erotica—courts oversimplify a necessarily nuanced analysis. "When the significance of a photograph is determined by a legal definition, necessarily photographs that fall outside that definition tend either to be ignored or not evaluated because they may be seen as secondary or incidental to the main focus of the prosecution."[164]

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[160] Taylor, *supra* note 87, at 97. Note this reference to obscenity is to the British concept which connotes illegal child abuse images.

[161] *Id.*

[162] Lanning supra n.35 at 66.

[163] *See supra* notes 127-37 for more examples.

[164] Taylor, *supra* note 87, at 99.

The significance of how material is labeled will be of growing importance as more prosecutions occur and legal issues continue to arise. There are several risks of dividing the material into absolutist categories.

a. Courts Ignore Growing Awareness of the Significance of Such Material

One might wonder why it matters, if at all, that a body of material is mislabeled by society and then by the courts. It matters because so-called "child erotica" is often intertwined with child abuse images and *can be* indicative of illegal activity.[165]

The presence of "child erotica" can indicate the presence of child abuse images because non-pornographic sexual images of children are often included in child abuse image collections.[166] One study found that 79% of child abuse image possessors "also have what might be termed 'soft core' images of nude or semi-nude minors, but [only] 1% possessed such images alone. Furthermore, some of those with only soft core images also have sexually victimized children."[167] In short, child abuse images and less severe sexual images of children not infrequently go hand-in-hand.

The significant implications of this relationship varies depending upon whether the person who has the images is a producer or a collector of child abuse images. Child abuse image producers often create what are known as child pornography series. These are a sequence of photos, often involving the same victim or series of victims.[168]

> These images are collected and traded with the same passion as those who collect baseball cards. 'Collectors' try to get each image available in a particular child's 'series' and refer to them by name: 'the Amy series,' 'the

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[165] The argument here is not that child erotica causes child abuse images or their underlying child abuse. This is a relevance assertion similar to the claim that the possession of mirrors, razors, cutting agents, and several hundred plastic bags can be indicative of narcotics. This is merely the observation that child erotica often is not found alone and can similarly suggest the presence of child abuse images.

[166] *See generally* COOPER, *supra* note 17, at 239-40; *see also* 1986 Commission Report, *supra* note 46, at 609 ("'Preferential' abusers collect child abuse images and/or child erotica almost as a matter of course."); *Id.* at 616; United States v. Duane, 533 F.3d 441, 443 (6th Cir. 2008) (finding by agents of 3,728 images of "child erotica," 674 images of child abuse images, and 15 images of sadistic child abuse images); United States v. Davenport, 519 F.3d 940, 942 (9th Cir. 2008) (revealing by forensic analysis of 496 images and 334 videos containing child pornography, "child erotica' or other "images of interest."); United States v. Johnson, 495 F.3d 536 (7th Cir. 2007) (finding "3,700 images of child pornography and child erotica"); United States v. Adkins, 169 F. App'x 961, 967 (6th Cir. 2006) ("[Preferential offenders] typically keep collections of child pornography or 'child erotica.'").

[167] WOLAK, *supra* note 1, at 5-6.

[168] *See, e.g.*, United States v. Brown, 862 F.2d 1033, 1035 (3d Cir. 1988) (describing the child pornography series "Teen Sex"); United States v. Griesbach, 540 F.3d 654, 655-57 (7th Cir. 2008) (describing the "Chelsea" child pornography series); United States v. Parmelee, 319 F.3d 583, 586 n.3 *1-*2(3rd Cir. 2003) (describing child pornography series "Young Bondage"); United States v. Clark, No. 08-1808, 2009 WL 1931172 (3d Cir. July 7, 2009).

> Susie series,' 'the Billy series.' In such series, not all the photos are pornographic.[169]

Child abuse image collectors, in collecting these series, can also collect other sexual images of children. Therefore, the presence of some pieces of a series can suggest the presence of the remaining illegal pieces.

> They [preferential sex offenders] typically collect things such as books, magazines, articles, newspapers, photographs, negatives, slides, movies, albums, digital images, drawings, audiotapes, videotapes and equipment, personal letters, diaries, clothing, sexual aids, souvenirs, toys, games, lists, paintings, ledgers, photographic and computer equipment all relating to their preferences in a sexual, scientific, or social way. Not all preferential sex offenders collect all these items, and their collections can vary significantly in size and scope.[170]

Therefore, not only can such material suggest the presence of illegal images, which is relevant to a search warrant request, but it also provides important information regarding a suspect's *mens rea* and state of mind, which can be relevant to a trial. "Collections of child pornography are not accidental; they result from deliberate choices by an individual to acquire sexual material. However, it is important to note that the sexual or erotic nature of the images lie in both objective qualities of the material . . . and in the mind of the collector."[171]

As stated, child abuse image producers can create sexually explicit images of children in addition to the child abuse images in their series. Furthermore, as noted by the Seventh Circuit:

> child abusers create souvenirs of their molestation which, in a vacuum are not illegal, but may indicate or be evidence of a sexual interest in children. Such material is relevant in many investigations and should not be ignored. [If] the suspect is discovered to possess one image in [a child abuse images] series, the inference that he is a consumer of pornographic images and possesses such images found in this or some other pornographic series is strong.[172]

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[169] Carolyn Atwell Davis, Dir. Of Legislative Affairs, Nat'l Ctr. for Missing and Exploited Children, Testimony of Carolyn Atwell Davis to the Maryland Senate Judicial Proceeding Committee (March 7, 2007), *available at* http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=3084; *see also Greisbach,* 540 F.3d at 656-57.

[170] LANNING, *supra* note 35, at 23 ("When they collect pornography and related paraphernalia, it usually focuses the themes of their paraphilic preferences. Their fantasy-driven behavior tends to focus not only on general victim characteristics and their entitlement to sex, but also on their paraphilic preferences including specific victim preferences, their relationship to the victim (*i.e.*, teacher, rescuer, mentor), and their detailed scenario (*i.e.*, education, rescue, journey).") (citing HAZELWOOD ET AL., *supra* note 98).

[171] Taylor, *supra* note 87, at 99.

[172] *Griesbach*, 540 F.3d at 656-57. Furthermore, if a suspect is a collector or producer of child abuse images, there is growing research as to the implications of collecting activity and directly affecting children. Although no causal connection has been irrefutably proven between the possession

The concern around so-called "child erotica" is complex as they are often together and can indicate a sexual interest in children. Moreover, "child erotica" is on the rise, "[t]he recent trend of producing and distributing materials that contain nude visual depictions of children which skirt the fine line between constitutionally protected works of art and unconstitutional child [abuse images] is alarming."[173]

While more research must be done, these findings suggest the significance of the presence of non pornographic sexual images of children can have significance in an investigation and/or prosecution. However, by not being precise in identifying and describing material in a suspect's possession, law enforcement and the courts are over-generalizing and, therefore, misinforming.

b. Courts Incorrectly Assume That Legal Material Is Legally Irrelevant

When the material is given an innocuous label, the tendency is to think the material itself innocuous and, therefore, of no evidentiary significance. This is not necessarily true with sexually explicit images of children. This misplaced assumption can be detrimental to the truth finding process.

(1) Such Material Can Be Relevant to the Probable Cause Analysis

The dissent in *United States v. Martin* reflects the oversimplified thinking that legal material must not be relevant evidence.[174] The dissent would have granted a petition to rehear a denied motion to suppress evidence obtained through a warrant based upon the defendant's membership in a "girls 12-16" e-group.[175] The affidavit noted this e-group had a welcome message discussing posting pictures and video. In so doing, the dissent characterized the material with the over-generalized term "child erotica," emphasizing said material as legal. It would have granted the petition for rehearing in part because the evidence of the group could mean "*simply* child erotica, which while distasteful, is not illegal."[176] In other words, because this material was *legal*, the dissent asserted it was neither

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of child abuse images and direct child molestation, some research suggests the collection of such is not without a correlation. Michael C. Seto, James M. Cantor & Ray Blanchard, *Child Pornography Offenses Are a Valid Diagnostic Indicator of Pedophilia*, 115 J. OF ABNORMAL PSYCHOL. 610, 613 (2006) (child abuse image possession may be a "stronger indicator of pedophilia than is [previously] sexually offending against a child."); Michael L. Bourke & Andres E. Hernandez, *The "Butner Study" Redux: A Report of the Incident of Hands-on Child Victimization by Child Pornography Offenders*, 24 J. FAM VIOLENCE 183, 183 (2009) ("Internet offenders in our sample were significantly more likely than not to have sexually abused a child via a hands-on act."); *but see* Jerome Endrass et al., *The Consumption of Internet Child Pornography and Violent Sex Offending*, 9 BMC PSYCHIATRY 43 (2009). A study of child abuse images offenders found 55% either sexually victimized children or attempted to do so by soliciting an undercover officer. WOLAK, *supra* note 1, at viii, 16. This is not to say that possession of "child erotica" means one is a child sexual offender.

173 Grasz, *supra* note 87, at 634.

174 United States v. Martin, 426 F.3d 83 (2d Cir. 2005).

175 E-groups are groups that offer services such as chat, posts, and bulletin boards to subscribing members. MONIQUE M. FERRARO & EOGHAN CASEY, INVESTIGATING CHILD EXPLOITATION AND PORNOGRAPHY: THE INTERNET, THE LAW AND FORENSIC SCIENCE 24 (Elsevier Academic Press, 2005).

176 *Martin*, 426 F.3d at 90 (Pooler, J., dissenting) (emphasis added).

problematic nor relevant, claiming that no probable cause likely existed. This position is misplaced.

Labeling, rather than describing, confuses the evidence. All so-called "child erotica" is not equal and, depending on the content, some may be highly relevant evidence and some not. It must matter whether the material is an innocuous picture of a child taking a bath, or a homemade collection of pictures of hundreds of nude children. Lanning and Hazelwood remind us that there is a distinction among material.

> In a child sexual abuse case, possession of an album filled with pictures of the suspect's own fully dressed children probably has no significance. However, possession of fifteen photo albums of fully dressed children who are not related to the suspect may be very significant. Possession of his own child's underwear may not be significant, whereas a suitcase containing other children's underwear would be quite significant.[177]

The implication of a position that all so-called "child erotica" is the same and legal is that such material can never constitute probable cause. Other courts have made similar statements regarding material that is not a child abuse image, treating it as legal and, therefore, of minimal relevance. In one case a defendant argued "that while some might find it incredibly disturbing that he would be aroused by arguably innocent photos of children, those photos *cannot constitute the child pornography necessary for the issuance of a search warrant* if they do not meet the statutory definition of child pornography."[178] Although the court denied the defendant's motion to suppress on other grounds, it did *not* reject the argument that probable cause cannot be based on "child erotica." Indeed the court stated, "[The defendant] might have had *a legitimate* argument regarding these images if they were the sole basis upon which the warrant was based."[179] In one case, police had previously seized, under plain view, from the suspect's bedroom, eight pictures of naked pre-pubescent girls originating from a website "http://www.little-virgins.com."[180] While the court upheld the subsequent search warrant on other grounds, it stated, "[p]ossession of child erotica, such as eight 8x10 photographs found in [the defendant's master bedroom is not itself illegal *and might not alone be sufficient to provide probable cause* to believe that [the defendant possessed child pornography."[181] Similarly, the Fifth Circuit characterized a defendant's

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[177] HAZELWOOD ET AL., *supra* note 98, at 224.

[178] United States v. Christie, 570 F. Supp. 2d 657, 687 (D.N.J. 2008) (emphasis added).

[179] *Id.* at 687-88 (emphasis added).

[180] United States v. Hansel, No. 06-CR-102-LRR, 2006 WL 3004000 at *2 (N.D. Iowa Oct. 20, 2006), *aff'd*, 2008 WL 1913886 (8th Cir. 2008) (emphasis added)

[181] *Hansel*, 2006 WL 3004000 at *11; *see also* United States v. Brown, No. 00-CR-112-C, 2001 WL 34373161 at *10 (W.D. Wis. Mar. 16, 2001) (magistrate rejected defendant's challenge to the warrant authorizing seizure of "child erotica" since the material is lawful, because "[i]t is clear that the warrant is aimed at child pornography, and that any references to 'child erotica' must be interpreted in that context.").

argument that the search warrant based on three pictures of material conservatively called "child erotica" lacked probable cause "surely would have held the interest of a jury."[182]

Just because a piece of evidence is *legal* it should not ordinarily mean it is irrelevant. Indeed, a scale, 1000 small clear baggies, mirrors, and cutting agents, are all legal. However, such items may still contribute to probable cause to search for narcotics.[183] Indeed, a contrary view is not the law.

Material need not be illegal to constitute probable cause. The Supreme Court has rejected such a claim by the Ninth Circuit that some of the evidence that forms reasonable suspicion or probable cause must be "ongoing criminal behavior," as "not in keeping with . . . our decisions."[184] Additionally, although First Amendment concerns do play a role in Fourth Amendment analysis, the role they play is not to prevent speech from use at trial. Rather, when police want to seize material presumptively protected by the First Amendment, the items must be described with increased particularity. In other words, First Amendment rights can be protected by close adherence to Fourth Amendment requirements.[185] However, the assessment of probable cause is the same when First Amendment concerns are present.[186] That assessment is whether a fair probability exists that contraband or evidence will be found in the location to be searched.[187] That is a commonsense, practical analysis allowing reasonable inferences from the evidence.[188] This

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[182] United States v. Rochelle, 205 F. App'x. 296, 297 (5th Cir. 2006) (although the Court seemed to favor this argument, it noted that defendant waived it at trial. The Court then framed the issue as whether police acted in good faith when execution implicitly invalid warrant.).

[183] *E.g.*, United States v. McManaman, No. CR08-4025-MWB, 2008 WL 2704557 (N.D. Iowa Jul. 3, 2008) ("Concluding that the evidence of the drug paraphernalia found on defendant's person, when combined with his drug history, would have provided probable cause for the officers to obtain a warrant to search his residence."); United States v. Hernandez-Leon, 379 F. 3d 1024, 1028 (8th Cir. 2004)(discovery of drugs or drug paraphernalia is significant on issue of probable cause). United States v. Chapman, 196 F. Supp. 2d 1279, 1283, 1287 (M.D. Ga. 2002) (sufficient probable cause to search vehicle despite the fact that no drugs were found on the defendant's person or in plain view in the vehicle and the officers did not have any specific information that there were drugs contained in the vehicle), but defendant possessed $8,000 in cash, his vehicle had Florida license plates, he was inconsistent in his statements, and narcotics found in house defendant had previously left.

[184] United States v. Sokolow, 490 U.S. 1, 6, 8 (1989).

[185] United States v. Hall, 142 F.3d 988, 996 (7th Cir. 1998); *see also* Zurcher v. The Stanford Daily, 436 U.S. 547, 564 (1978) ("Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.'"). For discussion, *see* Daniel Solove, *The First Amendment As Criminal Procedure*, 82 N.Y.U. L. REV. 112, 128-29, 132 (2007) (arguing for an integration of the First Amendment into criminal procedure when the Fourth Amendment does not apply).

[186] New York v. P. J. Video, Inc., 475 U.S. 868, 868 (1986) ("[A]n application for a warrant authorizing the seizure of materials presumptively protected by the First Amendment should be evaluated under the same standard of probable cause used to review warrant applications generally."); United States v. Brunette, 256 F.3d 14, 17 (1st Cir. 2001); United States v. Gourde, 440 F.3d 1065, 1070 (9th Cir. 2006) (defendant's status as a member of a child pornography website manifested his intention or desire to obtain illegal images retrievable from his computer if he downloaded them).

[187] *E.g.*, United States v. Grubbs, 547 U.S. 90, 95 (2006); *Sokolow*, 490 U.S. at 7; Illinois v. Gates, 462 U.S. 213, 246 (1983).

[188] *Gates*, 462 U.S. at 246.

standard *can* be met with material *other* than illegal material, even protected material. "Indeed *Terry* itself involved a 'series of acts, each of them perhaps innocent' if viewed separately, 'but which taken together warranted further investigation.'"[189] The law is clear that "innocent behavior will frequently provide the basis for a showing of probable cause," and that "[i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion attached to particular types of noncriminal acts."[190] However, by labeling some material which under certain circumstances has a degree of suspicion attached to it as "child erotica," courts suggest the material is above suspicion. The label obfuscates the legal issue, as probable cause can be found based on legal material, *if* it indicates a fair probability evidence will be found.

(2) Such Material Can Be Relevant to an Evidentiary Admissibility Analysis

The effect of this generalization is manifested in procedural contexts other than the probable cause analysis as well. A federal trial court found all child erotica seized through a search warrant in a child abuse images case likely inadmissible.[191] It did so, noting that, even if the defendant asserted a claim of mistake, for his purchase of child abuse images, evidence including material such as film and television scenes of children, magazines of nude pictures of children, depictions of explicit sexual behavior by non-minors was "probably inadmissible."[192] In a case in which the defendant was charged with enticing and transporting a minor across state lines, he also possessed what the court labeled as "child erotica."[193] The court denied the admission of evidence labeled "child erotica" as evidence of the crimes charged.[194] Similarly, a federal trial court found that "simulated child pornography and child erotica" were likely inadmissible in the government's case in chief.[195] It stated, "if the entrapment defense will not be pursued at trial, the need to present pre-disposition evidence evaporates, and the simulated child pornography and child erotica may well be inadmissible."[196]

Such misconceptions of "child erotica" as not probative or relevant have even lead to troubling results. For example, the Western District of Pennsylvania ordered the return of four videotapes of "child erotica" to a convicted child sexual

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189 *Sokolow*, 490 U.S. at 9-10 (quoting Terry v. Ohio, 392 U.S. 1, 22 (1968)).

190 *Gates*, 462 U.S. at 243-44, n.13.

191 United States v. Flippen, 674 F. Supp. 536 (E.D. Va. 1987).

192 *Id.* at 542 (emphasis added).

193 United States v. Brand, No. S1 04 CR. 194 (PKL), 2005 WL 77055, at *3 (S.D.N.Y. Jan. 14, 2005).

194 *Brand*, 2005 WL 77055, at *3. The court did admit the evidence under Federal Rule of Evidence Rule 404(b) as evidence of other acts. *Id.* at *4.

195 United States v. Lamb, 945 F. Supp. 441, 465 (N.D.N.Y. 1996).

196 *Id.*

abuser because "they are not contraband."[197] Similarly, when a convicted child sex offender posted fifteen files on a Yahoo! newsgroup[198] of "visible skin," at least three of which were described by an affiant as a prepubescent female posing by a body of water with her top pulled up or entirely naked, such evidence might indicate the presence of the possession of child abuse images. However, not only did the court disagree, it stated following the *Dost* test that "there are *no clear indicators* that [these] are anything more than lawful art shots or erotica."[199] Again, the clear suggestion being that *all* items short of child pornography are protected speech, and art, and, therefore are irrelevant to a criminal inquiry.[200]

(3) Law Enforcement's Role in this Over -Generalization

Clearly the problem of over-generalization is not only with the courts. Law enforcement witnesses share in the misnomer. As discussed, police witnesses have defined so-called child erotica in a legal context very broadly to include "items a person may collect such as children's underwear, just pictures of young children that are clothed . . . that may have some sexual satisfaction to the individual that the collection belongs to."[201] Witnesses have also testified that all pictures of "nude

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[197] United States v. Rockot, Criminal No. 97-33, 2007 WL 2464477, at *2 (W.D. Pa. Aug. 27, 2007).

[198] A newsgroup is "[a]n area on a computer network, especially the Internet, devoted to the discussion of a specified topic." Answers.com, http://www.answers.com/topic/newsgroup (last visited Oct. 23, 2009). *See also* Telecoms Advice, http://www.telecomsadvice.org.uk/glossary/n.html#165 (last visited Oct. 23, 2009) ("The discussion areas of the internet, part of a system called Usenet."); Web Basics, http://www.classzone.com/research/pages/basics/res13.htm (last visited Oct. 23, 2009) ("A Newsgroup is a discussion that takes place online, devoted to a particular topic. The discussion takes the form of electronic messages called "postings" that anyone with a newsreader (standard with most browsers) can post or read. There are over 10,000 newsgroups in existence, covering every imaginable topic.").

[199] United States v. Griesbach, No. 07-CR-44-C, 2007 WL 1804338, at *4 (W.D. Wis. June 7, 2007) (emphasis added).

[200] For sentencing purposes, the production of so-called "child erotica" no matter how exploitive, does not constitute sexual abuse or exploitation under USSG § 2G2.2(b)(5). That section provides for an offense level increase "[i]f the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor." *Id. See* United States v. Fiorella, 602 F. Supp. 2d 1057, 1067 n.4 (N.D. Iowa 2009) ("probable that [d]efendant . . . only took 'child erotica' of K.G. [defendant's prepubescent daughter] . . . . Production of child erotica does not constitute sexual abuse or exploitation under this guideline."). One could argue that the fact that these items could be used as evidence in a criminal trial could implicate a "chilling effect" which "occurs when individuals seeking to engage in activity protected by the First Amendment are deterred from doing so by governmental regulation not specifically directed at that activity." Frederick Shauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*, 55 B.U. L. REV. 685, 692-93 (1978) (emphasis removed). However, there is no governmental regulation proposed. Conceivably, a person could be chilled from possessing "child erotica" because it could be used against him at criminal trial. However, the triggering event for that scenario would be criminal charges. It is hard to imagine that a person would commit illegal activity but be deterred from legal activity because the legal activity could be used against him. Of course, innocent persons could be charged. However, such evidence is only admissible if found to be relevant and not prejudicial. Furthermore, such a chilling effect argument would be limitless because evidence of innocent conduct is always admissible *if relevant* and not prejudicial.

[201] United States v. Caldwell, 181 F.3d 104, 104 n.1 (6th Cir. 1999) (accepting this definition and finding harmless error in that the lay witness testified the material at issue in the case was child erotica).

minor girls" are so-called "child erotica," regardless the context.[202] Similarly, a child sex offender brought a fourteen-year old to his apartment and took pictures of the victim in a shirt and thong underwear posed in such a way to expose her buttocks.[203] He then showed the victim images of other children on the web site "Lil'Amber.com."[204] The police testified and the court characterized all this material as "child erotica."[205] They even have suggested that a special form of erotica exists for pedophiles.[206] Prosecutors in *United States v. Griesbach* not only labeled pictures of naked posing prepubescent girls as "child erotica" but conceded—that as such, probable cause could not be based on them.[207] The concern with these examples is not that this material is actually illegal child pornography. Rather, it is that this material is given an artistic label, suggesting social value and lack of relevance. Presumably this is the result of an insufficient understanding and an incomplete summary of part of Lanning's work.

(4) Such Mislabeling Risks Inaccurate Results

When courts engage in this mislabeling, they elevate this material to an undeserving level suggesting that all such pictures have an artistic value.[208] An illustrative example is *United States v. Green* where the defendant challenged his sentence after pleading guilty to one count of receipt of child pornography.[209] At sentencing, the government sought an increase in sentence based on the accusation that the defendant rubbed the genitalia of four six-year old girls.[210] The prosecution offered his possession of pictures of two of these girls partially naked and prominently displaying their genitals on his own camera as evidence of this uncharged conduct.[211] The sentencing court found that the defendant did sexually abuse one of these girls.[212] Both the government and the pre-sentence report did not contest that said pictures were lawful because they "did not meet the definition of child pornography."[213] However, they both labeled such pictures as "child

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202 United States v. Brand, No. S1 04 CR. 194 (PKL), 2005 WL 94849, at *1 (S.D.N.Y. Jan. 14, 2005).

203 Connecticut v. Kaminski, 940 A.2d 844, 846 (Conn. App. Ct. 2008).

204 *Id.* at 847.

205 *Id.* at 847, 852. Although the court used this term, it did have further information from the affiant that child erotica is used to groom victims of child sexual exploitation that allowed it to uphold the warrant. *Id.*

206 United States v. Flippen, 674 F. Supp 536, 538 (E.D. Va. 1987) (police testifying that the magazine *Jeunes et Naturals* [Young and Natural] was "erotica for pedophiles.").

207 United States v. Griesbach, 540 F.3d 654, 655-56 (7th Cir. 2008).

208 *E.g.*, United States v. Brand, No. S1 04 CR. 194 (PKL), 2005 WL 77055, at *1 n.1 (S.D.N.Y. Jan. 14, 2005).

209 United States v. Green, No. 07-CR-0442 (PJS), 2008 WL 1805573 (D. Minn. Apr. 18, 2008).

210 *Id.* at *2-*3.

211 *Id.* at *3.

212 *Id.* at *4. The court also expressed dismay with the prosecution's failure to adequately present sufficient evidence, which it likely had, to prove these serious allegations.

213 *See id.*

erotica." The suggestion that the defendant possessed nude pictures on his camera of a sexual abuse victim which prominently displayed her genitalia as legal *art*, is problematic.[214]

Yet this is repeated throughout the case law. A Nebraska district court labeled a registered child sex offender's documents that included his writings about sitting next to children on a trip; his picture collection; his pictures of children purchased from a paid web site; and his pictures of 10 boys lying in bed in underwear as "child erotica."[215] A Maryland district court denied the request to detain a defendant who was arrested after a controlled delivery to his home and a subsequent search which yielded 16,000 child abuse images.[216] In so ruling, the court characterized as "child erotica" "non-pornographic footage of young girls talking in a stairwell, but camera zooms in on their crotch area[s]."[217]

All said items indeed may not meet the definition of child pornography or child abuse images, and may be considered as protected, unregulated speech. However, to elevate them to the status of art is a powerful statement on behalf of society. It is one thing to construct a societal order in which the presumption is that expression is protected speech. In this order it is accepted that much speech, even socially harmful speech, cannot be prohibited. However, it is quite another to hold up such marginally valuable expression as a form of *art*. To do so elevates a category of "not illegal" to a category of "art" or literature. This is problematic when said category suggests not only that there is an art form of sexualizing children, but that said art form risks sexual exploitation of children through homemade surreptitiously created film of children's crotch areas, or photographs of child victims kept as souvenirs of sexual crimes.[218] This compromises the recognized compelling state interest to protect the physical and psychological well being of our youth.[219] *A fortiori*, then the compelling interest of the government to protect children within sexually exploitive images short of pornography remains as well. That is not to suggest courts protect these children by making the images illegal, but rather, that they at least refrain from elevating and validating a misleading label.

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[214] *See Green*, 2008 WL 1805573; *see also* United States v. Caldwell, 181 F.3d 104 (6th Cir. 1999) (ruling that a jury needed an expert to testify that items located in a small room with a collection the size of a "small pickup load" of child abuse images, adult pornography, and so called "child erotica" were indeed child erotica because only an expert could say someone received sexual satisfaction from the image).

[215] United States v. Chanley, No. 2:07-cr-0150-RCJ-RJJ, 2008 WL 763253, at *1-*2 (D. Nev. Mar. 19, 2008).

[216] United States v. Thomas, No. CRIM. CCB-03-0150, 2006 WL 140558, at *2 (D. Md. 2006).

[217] *Id.*

[218] *See Id.* at *2.

[219] New York v. Ferber, 458 U.S. 747, 757 (1982); Osborne v. Ohio, 495 U.S. 103, 109 (1990). While the court's initial recognition of the need to protect children from exposure to sexualized images has waned, this state interest has not. Ronald Krotoszinki, *Childproofing the Internet*, 41 BRANDEIS L.J. 447 (2003); *but see* Reno v. ACLU, 521 U.S. 844 (1997); Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

Not only is this interest compromised but *courts* now contribute to the normalization of sexualization of children. Subcultures, not unexpectedly, do not refer to child abuse images as child abuse images. Rather, they have utilized the term "miniature erotica."[220] No doubt the choice of this art and literature term is not accidental. Such a term certainly validates the creator and possessor of such material as not an abuser, but one who appreciates a misunderstood artistic form. Our courts should not adopt such an approach.

This is not to suggest that courts routinely use the phrase incorrectly. There have been cases in which the courts have used accurate terms to describe material or have used the term child erotica correctly.[221] Such cases are often older. One reason for this may be that the modern material appearing in cases is far from any level of art.[222]

There are additional negative consequences. Such a view of material as either illegal or legal ignores the reality, that child exploitation is a crime without borders.

> The online distribution and accessing of indecent images of children is a global issue. The child victims may be abused in one country, the images of their sexual abuse uploaded to the internet in a different country, that website operated from another country, hosted on networks in yet another and the content accessible anywhere in the world.[223]

Therefore, what constitutes child abuse images in one jurisdiction may not in another.[224] "Given the international qualities of the distribution of child pornography using the Internet, this raises among other things the need to improve the harmonization of laws between states in the development of common policing strategies."[225] Therefore, by narrowly categorizing material as illegal or legal, one ignores the reality that such labels are irrelevant in other jurisdictions. Consequently, images discarded in the United States may be appropriately regulated in other jurisdictions and should not be ignored.

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[220] United States v. Byrd, 31 F.3d 1329, 1332 (5th Cir. 1994); State v. Byrd, 568 So.2d 554, 557 (La. 1990).

[221] "Erotica in ancient times may well be a recognized segment of the field of archeology . . . ." United States v. One Unbound Volume, 128 F. Supp. 280, 281 (D. Md. 1955) (finding a portfolio of prints depicting ancient vases of erotic design as obscene).

[222] In an analogous situation, the Seventh Circuit questioned the propriety of a judicial determination of what is erotic, noting "[t]he practical effect of letting judges play art critic and sensor would be to enforce conventional notions of 'educated taste,' and thus allow highly educated people to consume erotica but forbid *hoi polloi* to do the same." Miller v. Civil City of South Bend, 904 F.2d 1081, 1098 (7th Cir. 1990) (emphasis in original). Indeed, the solution may not be to deregulate all sexual material regarding children. Rather, it may be to more accurately describe the material which is at issue.

[223] INTERNET WATCH FOUNDATION, 2008 ANNUAL CHARITY REPORT 9 (2009), http://www.iwf.org.uk/documents/20090423_iwf_ar_2008_pdf_version.pdf.

[224] *See generally* COOPER, *supra* note 17, at 239-40.

[225] Taylor, *supra* note 87, at 99.

IV. THE SOLUTION IS PRECISION: A NEW LANGUAGE PARADIGM

Cases involving child sexual exploitation ask fact finders to understand the significance of facts and events occurring in a world completely foreign to them. In both pretrial probable cause determinations and trial evidentiary admissibility decisions, fact finders must evaluate evidence and determine its relevance and importance. To do so they must accurately *understand* the significance of a piece of evidence. Fact finders and appellate courts are not aided in this endeavor by using misleading labels. They need precise language characterizing the material at issue. Doing so will add clarity to our understanding of child sexual exploitation and lead to more accurate results.

As discussed, the term "child erotica" has been used to describe a vast array of materials. This term is a misnomer for much material and should be replaced with actual descriptions of the material, or when necessary, more precise labels.

A. Abandoning the Categorizing Normative for A Descriptive Normative

If evidence is inaccurately labeled for fact finders, it is given an inaccurate amount of weight and risks an inaccurate result. Because of such misleading labels, "[i]t has been found that the full significance of these and other materials [including "child erotica"] is not recognized by investigators, prosecutors [or others.]"[226] The details of the images or materials are what aid the fact finder in conceptualizing the evidence on a continuum to aid in determining guilt or innocence.

Indeed, the 1986 Commission, in its nearly 2,000 page report concluded as much.[227] "[I]n light of the tendency to use the term 'erotica' as a conclusion rather than a description, we again choose to avoid the term whenever possible, preferring to rely on careful description rather than terms that obscure more than advance rational consideration of difficult issues."[228] Therefore, parties and courts should favor the use of descriptive terms, instead of labels.

When one looks to cases in which courts evaluate items descriptively, without labels, their assessments appear more focused and more accurate.[229] For example, in *United States v. Rhea*, the prosecution sought to admit evidence of four

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226 HAZELWOOD ET AL., *supra* note 98, at 221.

227 1986 Commission Report, *supra* note 46, at 231.

228 *Id.*

229 *See, e.g.*, United States v. Dornhoffer, 859 F.2d 1195 (4th Cir. 1998) (seizure of notebook and other material made by defendant, three books, and several magazines admissible); United States v. Cochran, 806 F. Supp. 560 (W.D. Pa. 1992) (warrant requesting seizure of films depicting nudity, adult pornography, and sexual tools was overbroad because material of no evidentiary value); United States v. Mann, 26 M.J. 1 (1988) (magazines depicting naked father and daughter playing, and naked children sexually touching and arousing older individuals admissible in sexual assault case).

books in the defendant's trial for raping his stepdaughter.[230] In so doing the court did not simply label the books as "child erotica." To the contrary, the trial and appellate courts described the material in detail, stated where it was located in the home, and included lengthy descriptive excerpts from counsel's arguments.[231] This descriptive approach lead to the trial court denying admission of one book, but admitting three.[232] This decision was affirmed.[233] These opinions do not simply label the material as child abuse images or "child erotica." Rather, they describe explicitly what the images depict. In so doing, they accurately place the material on a continuum, thereby accurately assessing its relevance. This system is superior to inaccurate labels such as "child erotica."

Consequently, courts should follow this lead and more precisely analyze such images with meaningful descriptions, not meaningless labels. Such descriptions would replace a term "child erotica" with, for example, a description such as: "nude, pre-pubescent girls posing with blouse lifted," or a "series of pictures of children apparently below age 15 in various states of undress, displaying their breasts and undergarments." Such descriptions achieve more precise definitions of the material. Such precision allows for the fact finder to more truly understand the implications of such images and to make appropriate decisions regarding relevance to the legal issue at hand. Therefore, the problem of over-generalization is avoided.[234]

B. When Labels are Necessary

While a descriptive norm is preferred, in some instances, general labels can create a framework for discussion. As noted, this material consists of a broad array of material. Rather that appropriating it all with the value laden term of "child erotica," it should have a more neutral label. The umbrella term to refer to all this evidence should follow the definition offered by Hazelwood and Lanning's "*Collateral Materials*." Such material is defined as "items which do not directly associate the offender with a crime, but give authorities information pertaining to an individual's sexual preferences, interests, or sexual 'hobbies.'"[235] Specificity is needed to distinguish among the types of collateral materials. The first distinction should be between items used by sexual offenders to groom, validate and facilitate their crimes and sexually exploitive *images*. These two categories can and should be divided as follows.

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230 United States v. Rhea, 33 M.J. 413, 420 (1991) (denying the admission of *Lust's What the Doctor Ordered*, but admitting three other books—*Uncle Freddie's Little Playmates, Fifteen and Hot for Her Uncle*, and *Sexual Cruelty, Girls Who are Raped*—as relevant to motive).

231 *Id.*

232 *Id.* at 420-21.

233 *Id.*, 33 M.J. at 420-23.

234 Indeed this is the idea behind requiring increased particularly in warrants when what is to be seized is presumptively protected. United States v Hall, 142 F. 3d 988, 996 (7th Cir. 1998).

235 HAZELWOOD ET AL., *supra* note 98.

1. Items: Child Exploitation Paraphernalia

Items used by offenders to groom children, to collect remembrances of victims, or to validate their own behavior belong in one category. As such, Lanning has previously offered an alternative label for such items: "pedophile paraphernalia." The use of the term pedophile was relevant to the subject of this original paper analyzing child sex offenders. However, pedophile is a specific diagnosis.[236] Attaching it to an evidentiary label might suggest the need to prove the defendant has such a condition. Moreover, not all those who exploit children are pedophiles.[237] To avoid such confusion, such a diagnostic word should be eschewed. However, the use of the term "*child exploitation paraphernalia*" should begin. This term refers to items and materials used by an offender to groom, memorialize, facilitate, or validate their sexual interest in and or activity with, children. It is clear that many child sex offenders use such items to validate their behavior and groom children. Therefore, this label seems all the more accurate and should be utilized.

2. Visual Depictions: Child Exploitation Images

The images in an offender's possession that are not child abuse images, may indeed be legal.[238] However, they may also be key pieces of evidence in furthering an investigation, determining if a possessor has directly victimized other children, as well as understanding the mental state of the offender. All of which are relevant investigatory and legal questions.

No doubt that at times the distinction between child abuse images and non child abuse images is significant. While such categories may serve a law enforcement purpose, they "do[] little to progress our understanding and add little to our knowledge of the psychological qualities of offenders."[239]

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236 Pedophilia is a recognized diagnosis for people over 16 "characterized by either intense sexually arousing fantasies, urges, or behaviors involving sexual activity with a prepubescent child" who is at least five years younger than the individual. DSM-IV §3022.

237 *E.g., Lanning, supra* note 35 at 19.

238 Calls to regulate such images have occurred both nationally and internationally. *See, e.g.*, SAVE THE CHILDREN EUR. GROUP, *supra* note 1, at 14-15. This source states that:

> 'Child Erotica' or 'Posing Pictures' challenge the general debate about censorship on the Internet. This is likely to be the reason why international definitions of illegal child pornography (from both Interpol and Council of Europe) do not include this kind of material. This legal vacuum means the trading of 'child erotica' remains a legal activity in most countries . . . . Sex offenders who have been convicted of downloading illegal images of child sexual abuse will often have other images that can be described as child erotica or even pictures of children posing with clothes on. This highlights the complexity of the issue which relates to the collecting of images of children.

Id. Legislation has also been proposed in the United States, but failed to proceed to a vote. *See, e.g.*, Child Modeling Exploitation Prevention Act (CMEPA) of 2002, H.R. 4667, 107th Cong. (2002); CMEPA of 2003, H.R. 756, 108th Cong. (2003); CMEPA of 2003, S. 404, 108th Cong., (2003); CMEPA of 2005, H.R. 1142, 109th Cong. (2005).

239 Taylor, *supra* note 96, at 97.

Taylor and his colleagues research the nature of child abuse images and images within offenders' collections for the COPINE—Combating Pedophile Information Networks in Europe—project. In so doing, they focus less on the user directly, and more on the collections themselves and their implications for a rational sentencing scheme.[240] They propose an end to merely objectively reviewing pictures that are either images of abuse or not—and, therefore, by default, "child erotica." Rather, through their work at COPINE, they have implemented an alternative way of addressing sexual pictures of children. This method emphasizes a "psychological approach to pictures attractive to adults with a sexual interest in children."[241]

> The kinds of pictures that can be identified range from pictures of clothed children through nakedness and explicit erotic posing to pictures of a sexual assault on the child . . . . Any particular example of a photograph attractive to an adult with a sexual interest in children, therefore, can be located along such a continuum of explicit or deliberate sexual victimisation. This continuum ranges from everyday and perhaps accidental pictures involving either no overt erotic content or minimal content (such as showing a child's pants or underwear) at one extreme to pictures showing actual rape and penetration of a child, or other gross acts of obscenity, at the other.[242]

This approach shifts the relevant analysis of child abuse images from one "predicated not so much on the relation between image and scene of abuse, but between user and collector of images."[243] The pictures are placed not in one of two categories, but one of multiple levels.[244] Notably, lower levels constitute what American courts label as "child erotica."[245]

While attempting to adopt a multiple level system of categorizing pictures is valuable for the work of COPINE, such is not a workable framework for American legal analysis. No doubt it would lead to the need for expert testimony and collateral litigation. However, this internationally recognized approach, although

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[240] *Id.* at 99.

[241] *Id.* at 100.

[242] *Id.*

[243] *Id.*

[244] These categories start at the lowest category of "indicative" images which are non-erotic and non-sexualized pictures of children in various circumstances, but what makes them indicative of an interest in children is their context or organization. Taylor, *supra* note 96, at 101. This spectrum continues to images which are sadistic/bestiality images. *Id.*

[245] *Id.* Taylor distinguishes these levels into Nudist—naked or semi-naked children in setting from legitimate sources; Erotica—surreptitious pictures of children in safe environments playing naked or with underwear; Posing—deliberately posed pictures of children with or without clothes, but amounts, context, and organization suggest a sexual interest in children; Erotic Posing—deliberately posed pictures of fully or partially naked children in sexualized or provocative poses. *Id.* The remaining levels meet the American federal definition of child pornography in most jurisdictions. They include—Explicit Erotic Posing;—Explicit Sexual Activity;—Assault; and—Gross Assault. *Id.*

not flawless, supports the *concept* of embracing a more specific structure of categorizing sexual images of children.

Notwithstanding the stated preference for descriptives, a label for the category of non-pornographic sexual images of children is still needed.[246] Two problems remain with "child erotica": legitimization and incorrect suggestion of artistic value. Therefore, this Article proposes the label of "images of child sexual exploitation" apply to such depictions. Surely it is sexually exploitive to have surreptitious images of children in a context that suggest a sexual interest in children. Similarly posed pictures of children suggesting a sexual interest in them can also be exploitive. While these materials will remain under current law legal to possess, at least their labels will not suggest the presence of art where none exists. Furthermore, such a term mirrors the, albeit imperfect, term "child abuse images."

The remaining question is what will become of the actual art which legitimately involves sexuality and children? Children and sexuality themselves are not problematic. They are a part of human existence which is explored amply in literature, film, or visual art. It is the sexual objectification of children as sexual objects for adult consumption which is problematic. Therefore, with regard to the actual artistic material examining such a subject these may remain—as they are currently referred to—as erotica, so long as they are not obscene. Indeed the term itself, when accurate, is appropriate.

One might object that such an approach which evaluates images more precisely, necessarily involves a subjective analysis. Such is indeed the case, but no different than our current system. For example, in assessing child pornography, the law calls on the fact finder often to explore whether a depiction is a "lascivious display of genitals." However, the term lascivious, even if defined, remains ambiguous and will inevitably have some element of subjectivity.[247] Similarly, the obscenity test itself contains a level of subjectivity. [248] Jurors are asked to make subjective evaluations frequently and this alone should not bar precision.

Moreover, this Article does not suggest altering the status of this material as legal. While the First Amendment precludes regulation of protected speech, it does not preclude considering it as evidence.[249] This Article does advocate recognizing

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246 Europeans also use the term "child erotica" or the alternative "posing pictures." SAVE THE CHILDREN EUR. GROUP, *supra* note 1, at 10.

247 In *Knox*, lascivious describes the viewpoint of the photographer: "to arouse or satisfy the sexual cravings of a voyeur." United States v. Knox, 32 F.3d 733, 747 (1994). The Ninth Circuit in *Weigand* stated lascivious should be interpreted from the point of view of the audience of the filmmaker "or likeminded pedophiles." United States v. Weigand, 812 F.2d. 1239 (9th Cir. 1987). Another district court suggested considering the motive of the photographer and the intended response of the viewer. Bristol, *supra* note 7, at 337; *Knox*, 32 F.3d at 747; *Weigand*, 812 F.2d 9th Cir. 1239 (1987).

248 United States v. Mr. A., 756 F. Supp. 326, 329 (E.D. Mich. 1991); *see also* Oswell, *supra* note 139.

249 *Cf.* Miller v. California, 413 U.S. 15 (1973) (obscene speech can be regulated). For example, although the defendant has the First Amendment right to say he dislikes a person, the First Amendment does not preclude admission of evidence of such a prior statement into a murder trial.

the possible evidentiary value of all images within an offender's collection. Social science research supports such a specific analysis. For example, the COPINE system:

> quite deliberately includes pictures that do not fall within any legal definition of child pornography and, given this, it is important to stress that collections of photographs of children per se are not in themselves indicative of anything inappropriate. *It is the context of these photographs and the way in which they are organised or stored or the principal themes illustrated that may give rise to concern.*[250]

Here the courtroom relevance of these images comports with the social science research. The legal questions surrounding images such as these often address their significance. In the context of a motion to suppress, the question is whether their existence indicates to the rational fact finder a probability that evidence or contraband will be at a given location to be searched. In the context of a motion to admit or exclude such evidence at trial, the question is whether the admissibility of such material is more probative than prejudicial and relates to an issue in dispute in the case most often such as motive, state of mind, intent, character, or knowledge.[251] Indeed, this insight is the very reason that Taylor advocates for a more precise approach to the images.[252]

The very reasons social research considers context and subjective analysis of such images—whether child abuse images or short of child abuse images—are the same reasons as within the law. Therefore, considering them, but labeling them more accurately is demanded. "Child exploitation images" is a more precise term. Adopting an approach consistent with the relevance of the term is important.

CONCLUSION

Language matters. Children matter. The term "child erotica" must be replaced. It is illegal to transact in child abuse images. The presence of child exploitation images or child exploitation paraphernalia can be legally relevant in a child pornography prosecution regarding procedural and substantive legal issues. Such material should not be glorified as art when it is not. It should be described in detail to allow fact-finders to make accurate assessments. When labels are required, it should appropriately be labeled as child exploitation paraphernalia or, child sexual exploitation images. This increased accuracy will lead to accurate analysis.

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250 Taylor, *supra* note 9, at 102 (emphasis added).

251 FED. R. EVID. 403, 404(b).

252 Taylor, *supra* note 96, at 102 ("The extent to which a photograph may be sexualized and fantasized over lays not so much in its objective content but in the use to which the picture might be put .... [I]t is the context, rather than the explicit content of such photographs, therefore, that is significant, and the emphasis on the context in understanding child abuse images cannot be overstressed. This is also relevant to considerations of portrayals of children and child nudity in artistic settings.").