NOTES

THE POTENTIAL LIABILITY OF FEDERAL LAW-ENFORCEMENT AGENTS ENGAGED IN UNDERCOVER CHILD PORNOGRAPHY INVESTIGATIONS

HOWARD ANGLIN*

In the course of enforcing laws against child pornography, law enforcement agents often engage in undercover operations that involve mailing child pornography to suspected consumers. In this Note, Howard Anglin argues that Congress and the Supreme and circuit courts have clearly established that children portrayed in pornography are harmed every time the pornographic images are viewed. The current law enforcement practice of mailing child pornography therefore injures children each time it is carried out. Under the doctrine formulated in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, *this injury is actionable by the children involved and may lead to monetary damage awards against the agents who choose to send pornography to criminal suspects. Thus, law enforcement agencies should alter their practices to avoid Bivens liability and adhere to Congressional admonitions not to injure the innocent in order to catch the guilty.*

INTRODUCTION

"Governmental 'investigation' involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction."[1]

—Judge Henry J. Friendly

Sex crimes against children occupy a place of particular horror and fascination in the public imagination.[2] Appealing simultaneously to the most paternal and prurient human instincts, child pornography

* This is not an ambitious Note, but I have enjoyed writing it as an exercise in legal analysis and investigation. Thanks are due to Professor Amy Adler for her counsel, to Adav Noti for his invaluable editorial work, and to Travis J. Tu, Sunny Gulati and the rest of the New York University Law Review staff who had a hand in various stages of the Note's development. Above all, I would like to thank Andrea for her patience and support."

1 United States v. Archer, 486 F.2d 670, 677 (2d Cir. 1973).

2 Although child pornography laws in the United States are of recent provenance, the crime is now considered one of the most heinous a person can commit. See Amy Adler, The Perverse Law of Child Pornography, 101 Colum. L. Rev. 209, 210-11 (2001) (describing "remarkably recent invention" of child pornography laws and their subsequent "dramatic expansion" to combat "national emergency" of child sexual abuse).

has become a target of our society's unequivocal condemnation.[3] The enforcement of the laws against child pornography is accorded almost unparalleled deference by the Supreme Court of the United States, which has held that the compelling state interest in limiting child pornography justifies carving out a categorical exception to the First Amendment.[4] By contrast, no such exception exists for adult pornography, which the Court has found deserving of First Amendment protection as long as the pornography is not obscene.[5]

Federal courts have cited two main reasons for treating child pornography differently from adult pornography: The production of child pornography usually involves child sexual abuse, and the dissemination of the material constitutes a separate and continuing harm against the children depicted in it.[6] This second justification for banning child pornography casts doubt on the legitimacy of the widespread law enforcement tactic of mailing actual child pornography to suspected pedophiles in undercover operations. If, as courts have held, the children depicted in child pornography are victimized anew each time it changes hands,[7] this practice inflicts further injuries on the children portrayed in the images. Therefore, this Note argues that the practice of distributing child pornography in undercover opera-

---

[3] Because of the substantial connection between the consumption of child pornography and child sexual abuse, its consumers are counted among the most wretched of criminals. See Amy Adler, Inverting the First Amendment, 149 U. Pa. L. Rev. 921, 934 & n.59 (2001) (compiling list of terms, including "monster," and "predator," commonly used to describe such people); see also Ashcroft v. Free Speech Coalition, 122 S.Ct. 1389, 1399 (2002) ("The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people.").

[4] See New York v. Ferber, 458 U.S. 747, 764 (1982) ("[I]t is permissible to consider [child pornography] as without the protection of the First Amendment."). The categorical exemption from constitutional protection of material that normally would fall within the reach of the First Amendment is extremely rare. For an account of the classic categories of speech that do not merit First Amendment protection, see Free Speech Coalition, 122 S.Ct. at 1399 ("The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children."); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (cataloguing "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem"). See generally Geoffrey R. Stone, Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U. Chi. L. Rev. 81 (1978) (analyzing categories of speech outside scope of First Amendment protection).

[5] The Court recently affirmed this principle in Reno v. ACLU, 521 U.S. 844, 874 (1997) ("In evaluating the free speech rights of adults, we have made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment.'") (quoting Sable Comm. of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)). For a limited discussion of the constitutional definition of obscenity, see infra note 53.

[6] See infra note 54 and accompanying text.

[7] See infra note 59 and accompanying text.

tions exposes federal agents to potential civil liability and undermines the integrity of the criminal justice system.

Although the ability of agents to use undercover tactics to apprehend consumers of child pornography is important for the enforcement of child pornography statutes, a growing line of recent cases raises some troubling questions about the use of actual pictures and videos of abused children as bait in such operations. Drawing on the reasoning of Supreme Court cases that have upheld child pornography statutes,[8] seven circuit courts have concluded that the children depicted in child pornography are victimized directly every time their images are mailed or received, whether or not the children are aware of the act.[9] This victimization violates the depicted children's constitutional right to privacy and may also violate the children's Fifth Amendment right to due process.[10]

This conclusion is important because it allows for the possibility that children depicted in child pornography mailed to suspected pedophiles in undercover law enforcement operations may be able to sue the agents who mailed it for violating their constitutional rights under the doctrine laid out in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[11] That case opened the door for civil lawsuits by injured citizens against government officers who, in the course of their law enforcement duties, violate citizens' constitutional rights.[12] The circumstances under which such a civil claim may succeed were clarified recently by the Supreme Court in *County of Sacramento v. Lewis*[13] and by the Fifth Circuit in *Brown v. Nationsbank Corp.*,[14] which applied the reasoning of *Lewis* to constitutional violations against innocent third parties during an undercover FBI operation.[15]

Although no lawsuits have yet been filed against federal agents engaged in undercover child pornography investigations, this Note argues that such a lawsuit could be successful. In order to reach this

---

[8] The two most frequently cited Supreme Court precedents in this area are Ferber, 458 U.S. at 747 and Osborne v. Ohio, 495 U.S. 103 (1990). See infra Part II.A.

[9] The crime of mailing or receiving child pornography is criminalized federally by 18 U.S.C. § 2252(a) (2002). Seven out of the eight circuit courts that have addressed the issue have held, in the context of deciding appeals of sentencing decisions, that the children depicted in child pornography are the direct and primary victims of its dissemination. See infra Part II.B.

[10] For an elaboration of why this harm is a constitutional violation, see infra Part I.B.

[11] 403 U.S. 388 (1971) (holding that plaintiff may sue federal agents for money damages if agents have allegedly violated one or more of plaintiff's constitutional rights).

[12] See id. at 397.

[13] 523 U.S. 833 (1998).

[14] 188 F.3d 579 (5th Cir. 1999).

[15] See infra Part II.B.

conclusion, this Note brings together three related but distinct lines of cases: Supreme Court and circuit court decisions providing civil relief to innocent third parties whose rights have been violated by law enforcement agents; Supreme Court cases upholding child pornography statutes; and circuit court decisions that have relied on the latter line of Supreme Court decisions, as well as other evidence, to conclude that depicted children are revictimized by the distribution of child pornography.

Part I of this Note examines what the government can and cannot do to innocent third parties in the course of carrying out its law enforcement duties. Part I.A recounts Congress's documented concern with abuses of authority by officers engaged in undercover investigations, while Part I.B looks at recent applications of the *Bivens* doctrine to claims by innocent third parties who have been injured by law enforcement officers.

Part II builds on the framework laid out in Part I by providing the background law necessary to analyze a hypothetical *Bivens* claim brought on behalf of a child whose image is used by law enforcement officers in an undercover investigation. Part II.A describes the history of child pornography laws and explores the reasons why they were upheld by the Supreme Court in the face of First Amendment concerns. Part II.B then focuses on the specific question of whether or not the children depicted in child pornography are victimized in fact by the acts of mailing, receiving, or possessing child pornography. This Part concludes by highlighting a growing consensus within the federal courts of appeals that the depicted children are so victimized.

Part III sets out the facts of an actual undercover child pornography investigation and then analyzes a hypothetical civil suit against the law enforcement officers who carried out the investigation brought by the children whose images were used as bait. The Note determines that a child depicted in the pornographic images mailed to the target of a sting should prevail on a *Bivens* claim against the officers involved. The Note further argues that, even if no such claims are actually brought against law enforcement officers, the fact that, if brought, *Bivens* suits could succeed indicates that undercover child pornography investigators may be engaging in inappropriate conduct of a kind explicitly disapproved of by Congress. Accordingly, Part III suggests possible changes to current law enforcement methods.

I
THE LIMITATIONS ON UNDERCOVER FEDERAL LAW-ENFORCEMENT ACTIVITY

The limitations on federal law-enforcement agents' actions against third parties during undercover operations have never been established clearly. The threat of injury to innocent third parties is not addressed directly in the Attorney General's Guidelines on Undercover Operations,[16] and, until recently, few cases had considered the matter in any detail. The issue has, however, been the subject of a lengthy congressional investigation, and several recent cases have held that there is a legal remedy available to third-party victims of undercover police activity.[17]

A. Congress's Warning Against the Dangers of Undercover Operations

Congress has recognized that the criminal justice system should, whenever possible, avoid harming innocent persons. In the wake of the infamous Abscam operation,[18] both the House and the Senate conducted comprehensive reviews of the history and practice of FBI undercover investigations and found serious flaws.[19] Congress's opinion, as expressed in the House Report, was that "the requirements

---

16 See Undercover and Sensitive Operations Unit, Attorney General's Guidelines on FBI Undercover Operations, http://www.usdoj.gov/ag/readingroom/undercover.htm (revised Nov. 13, 1992) [hereinafter FBI Guidelines].

17 See infra Parts I.A and I.B.

18 Named after Abdul Enterprises, a fictitious corporation set up by the FBI, "Abscam" is often cited as the paradigmatic undercover operation by both critics and supporters of undercover investigations. See, e.g., Irvin B. Nathan, ABSCAM: A Fair and Effective Method for Fighting Public Corruption, in ABSCAM Ethics: Moral Issues and Deception in Law Enforcement 1 (Gerald M. Caplan ed., 1983) (defending Abscam); Bill Winter, Probing the Probers: Does Abscam Go Too Far?, 68 A.B.A. J. 1347, 1347-50 (1982) (describing inadequate supervision of untrustworthy informants). Abscam began as an attempt to recover stolen art and securities on Long Island and ended up as a wide-ranging investigation of political corruption that resulted in the criminal conviction of "several highly placed local, state and national government officials," including members of Congress. United States v. Kelly, 707 F.2d 1460, 1461 (D.C. Cir. 1983).

19 The Senate hearings by an ad hoc subcommittee resulted in the production of the Final Report of the Senate Select Committee to Study Undercover Activities of Components of the Department of Justice, S. Rep. No. 97-682 (1983). The House of Representatives's hearings, which were conducted by the House Judiciary Subcommittee on Civil and Constitutional Rights, resulted in the production of the FBI Undercover Operations Report, H.R. Doc. No. 98-267 at 1-3 (1984). For a summary of notable federal undercover investigations, including Abscam, see Morton Rosenberg, Selected Congressional Investigations of the Department of Justice Since 1920, http://www.house.gov/reform/oversight/crs-doj.htm (Dec. 5, 1997); see also Monroe Freedman, The FBI Goes Undercover: Keystone Kops in Jackboots, Legal Times, June 12, 1995, at 27 (identifying common problems with undercover operations).

that criminal investigations and prosecutions be conducted in a fundamentally fair manner, commanded by the Fifth Amendment, are . . . endangered by the undercover technique as it is being used today," and "the technique pose[s] a very real threat to our liberties."[20]

One of the major problems that the report identified was that "the FBI's use of . . . deceptive practices and the need to avoid discovery have resulted in severe harm befalling totally innocent citizens . . . as a result of careless (even callous) neglect or conscious design on the part of the undercover agents."[21] A subsection of the report, entitled "Damage to Third Parties," identified several examples of overzealous undercover activities that resulted in substantial financial and physical harm to innocent third parties.[22] One such misguided operation resulted in claims totaling more than forty-seven million dollars being filed against the United States.[23] Furthermore, the report concluded that procedural safeguards were needed to limit such harms wherever possible (although they could never eliminate it completely)[24] and emphasized the importance of compensating victims whenever undercover operations injure innocent third parties.[25]

B. Recent Cases Addressing Law Enforcement Agents' Liability

In *Brown v. Nationsbank Corp.*,[26] the Fifth Circuit became the first court to address "the specific limits on federal agents' authority in undercover operations."[27] In that case, appellant Brown was innocently drawn into the scope of the undercover operation as a business partner for undercover agents. When he learned that both the business he was supporting and his partners were bogus, he was "physically and psychologically intimidated" and "threatened with prosecution," despite not being a target of the investigation.[28] The

---

[20] FBI Undercover Operations Report, supra note 19, at 2.

[21] Id. at 5.

[22] Id. at 19-24 (describing, inter alia, activities of agents in Operations Recoup and Whitewash, which resulted in confiscation of cars from innocent citizens, economic and reputational harm to local businesses, and threats of physical harm and financial ruin).

[23] Id. at 22 n.51 (referring to Operation Recoup).

[24] Id. at 87.

[25] See id. ("[A]ssuming that there are situations in which an operation may be deemed necessary *notwithstanding* the possibility of third party injuries, it is incumbent on the Department of Justice to assure that such injuries are compensated and claims dealt with fairly.").

[26] 188 F.3d 579 (5th Cir. 1999). The case grew out of the FBI's "Operation Lightning Strike," a sting operation "designed to uncover contract procurement fraud and other illegal activity committed in the aerospace community." Id. at 583.

[27] Id. at 590 (noting also that "[n]o court has addressed the particular issue presented by this case").

[28] Id. at 583-84. Brown was the primary appellant, but others affected by the FBI's conduct were also parties to the case. Id. at 583.

question, presented to the court in the form of a *Bivens*[29] claim against five FBI officers, was "whether it was constitutionally permissible for federal agents to inflict damages on innocent nontargets during an undercover operation."[30] The court responded with a resounding no.[31]

Following a path beaten by recent Supreme Court precedent, the court first located the basis of Brown's *Bivens* claim in the Fifth Amendment's due process guarantee, which "imposes clear limits on law enforcement conduct" and protects citizens from "conscience-shocking injury" by the government.[32] The court then tried to place the injurious government action alleged by Brown somewhere on a spectrum between "deliberate harm," which will always support a *Bivens* claim, and "simple negligence," which "is categorically beneath the threshold of constitutional due process."[33]

---

[29] See supra note 11 and accompanying text. A recent Supreme Court decision has explained that, in order to overcome the qualified immunity of a government officer, a *Bivens* claim must clear two hurdles, analyzed consecutively in a predetermined order. Conn v. Gabbert, 526 U.S. 286, 290 (1999). First, the court must determine whether the plaintiff has alleged the deprivation of a constitutional right. If the first hurdle is cleared, the court then must determine whether that right clearly was established at the time of the violation. Id.

[30] *Brown*, 188 F.3d at 591 (internal footnote omitted).

[31] Id.

[32] Id. The idea that the government should be punished for conscience-shocking behavior is closely related to, but distinct from, the "outrageous government conduct defense" contemplated in United States v. Russell, 411 U.S. 423, 431-32 (1973), and subsequently criticized in Hampton v. United States, 425 U.S. 484, 489-90 (1976). That defense (if it still exists) seeks to overturn a defendant's conviction because "the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Russell*, 411 U.S. at 431-32 (citation omitted). For a more detailed discussion of the brief rise and apparent decline of this defense, see Jill Burtram, The Failure of the Due Process Defense in *United States v. Gamble*, 63 Denv. U. L. Rev. 327, 339 (1986) (tracing development and decline of due process defense). Importantly, then-Associate Justice Rehnquist's opinion in *Hampton* limited even the possible availability of such a due process defense to actions taken by law enforcement officers against the defendant, rather than third parties, thereby rendering the issue totally irrelevant to this Note. *Hampton*, 425 U.S. at 490.

[33] The court began by acknowledging that it was starting from the premise that "[t]he touchstone of due process is protection of the individual against arbitrary action of government." *Brown*, 188 F.3d at 591 (quoting Wolff v. McDonnell, 418 U.S. 539, 558 (1974)). It then went on to explain that there are poles at the extremes of due process violations by government officials, which correspond to whether or not such violations will support a *Bivens* claim. Id. At one extreme, citizens are protected from "deliberate harm from government officials." Id. at 591 (citing Daniels v. Williams, 474 U.S. 327, 331 (1986)). At the other extreme, "harm inflicted due to government actors' simple negligence is categorically beneath the threshold of constitutional due process." Id. (citing *Daniels*, 474 U.S. at 328). In between these two poles, a court must determine whether a specific instance of "mid-level culpability" is adequate to sustain a plaintiff's claim of a constitutional due process violation. Id.

In making this determination, the court looked to the recent Supreme Court decision in *County of Sacramento v. Lewis*.[34] In *Lewis*, the parents of a motorcycle passenger killed by police in a high-speed chase brought a civil suit against the officer involved, alleging the deprivation of their son's due process right to life.[35] The Supreme Court ultimately rejected the parents' claim after deciding that, although a showing of "deliberate indifference" may support a cognizable constitutional due process claim, it could not do so in the specific circumstance of an impromptu police chase.[36]

The Court's decision rested on an analogy between a police chase and a prison riot, in which the Court held that "a much higher standard of fault than deliberate indifference has to be shown for officer liability"[37] because of the immediate threats posed by a volatile situation in which an officer must act "in haste, under pressure, and frequently without the luxury of a second chance."[38] The Court contrasted these situations with that of a prison official's "deliberate indifference to inmate welfare," which does give rise to liability because of "the luxury enjoyed by prison officials of having the time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations."[39]

After considering these Supreme Court examples from *Lewis*, the Fifth Circuit concluded that in order to support his claim, Brown would need to show that the government officer had an opportunity for reflection before taking action and that the officer nonetheless ac-

---

This conception of the spectrum of possible constitutional due process violations mirrors that articulated by the Supreme Court. For example, in County of Sacramento v. Lewis, 523 U.S. 833 (1998), the Court explained that "[i]t should not be surprising that the constitutional concept of conscience shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability." Id. at 848.

34 523 U.S. 833 (1998).

35 Id. at 836-37. The parents' claim was made pursuant to 42 U.S.C. § 1983. Id. at 837. A § 1983 claim is the equivalent, with respect to a state government official, of a *Bivens* claim against a federal government official. See Wilson v. Layne, 526 U.S. 603, 609 (1999) ("Both *Bivens* and § 1983 allow a plaintiff to seek money damages from government officials who have violated his [constitutional] rights."). See also 42 U.S.C. § 1983 (2002) (establishing that any person who, under color of law, subjects another person "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law").

36 *Lewis*, 523 U.S. at 852, 854 ("[W]e hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983.").

37 Id. at 852-53.

38 Id. at 852 (quoting prison riot case of Whitley v. Albers, 475 U.S. 312, 320 (1986)).

39 Id. at 853.

ted with deliberate indifference to Brown's constitutional rights.[40] The court then had little trouble applying these requirements to the facts before them, in which "the FBI made decisions which harmed the [plaintiff] after ample opportunity for cool reflection."[41] The fact that the FBI officers had "invested almost two years and thousands of man hours in developing the sting operation" was particularly relevant to the court's decision that the officers' better judgment had more than enough time to assert itself and temper their deliberate decisions to violate the appellant's constitutional rights.[42]

Although the court determined that the agents' actions against Brown normally would support a *Bivens* claim, his suit was unsuccessful because it failed the second prong of *Bivens* analysis, which requires the court to determine whether the right violated by the government agents was clearly established at the time of the violation.[43] Because the agents' actions in this case predated the Supreme Court precedent of *Lewis*, on which the court relied, and because the case was one of first impression, the court held that it would be unfair to hold the agents liable despite the severity of the injury inflicted on Brown. *Brown*, therefore, marks a turning point in the case law of *Bivens* claims by innocent third parties. In the future, the technicality that precluded liability in *Brown* should not support a similar defense by other agents.[44]

II
THE HISTORY OF CHILD PORNOGRAPHY LAWS AND THEIR ENFORCEMENT

Part I established the framework within which a court would analyze a suit brought by a child depicted in pornography against the of-

---

[40] Brown v. Nationsbank Corp., 188 F.3d 579, 592 (5th Cir. 1999) ("When . . . extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking. But when unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness [is insufficient] to spark the shock that implicates the large concerns of the governors and the governed.") (quoting *Lewis*, 523 U.S. at 853) (citation omitted).

[41] Id.

[42] Id. In an unfortunate twist for the appellants (including Brown), the Fifth Circuit affirmed the district court's decision to dismiss their claims anyway. For some appellants, the court affirmed because the statue of limitations on their claims had expired; for one, however, the novelty of the due process question and the fact that the Supreme Court case on which the court relied for its analysis was decided in 1998, four years after the alleged violations, meant that the second hurdle of his *Bivens* claim could not be cleared. See supra note 29.

[43] See supra notes 29, 42.

[44] For a more detailed discussion of why this is so, see infra notes 142-43 and accompanying text.

ficers who used the child's image as bait in an undercover investigation. This Part looks to the history of child pornography laws and the ways in which they have been interpreted by the federal courts in order to determine whether a depicted child could allege that law enforcement agents' use of his image amounted to a serious injury. Part II.A provides a general overview of the history of child pornography laws and examines the reasoning of the Supreme Court in the landmark decisions that upheld them. Part II.B then focuses on the specific question of whether the children depicted in child pornography should be considered direct victims of the act of distributing their images. Because Congress and most circuit courts are now in agreement on this point, the Part concludes that the children whose images are used as bait in undercover investigations are directly and seriously victimized by that act. This conclusion provides the necessary grounds for Part III's analysis of a hypothetical *Bivens* claim by an innocent third party whose image is used by law enforcement officers during the course of an undercover investigation.

A. History of Child Pornography Laws and Their Acceptance by the Supreme Court

The enactment of the first federal child pornography statute in 1978 was a direct reaction to the national news media's sudden focus on the previously under-publicized crime of child sexual abuse.[45] Because child pornography is a particularly lurid manifestation and record of child sexual abuse, it was an obvious target for lawmakers, and in 1977 Congress enacted the Protection of Children Against Sexual Exploitation Act of 1977[46] ("Child Protection Act") to combat what Congress referred to as the "national tragedy" of child pornography.[47]

The swiftness of Congress's reaction can be judged in relation to the speed with which similar laws were enacted by the states. In 1978, when Congress passed the Child Protection Act, only six states had enacted comparable statutes; today, every state has such a law.[48] Enacted in 1977, the New York statute challenged in *New York v. Ferber*[49] was one of the earliest state child pornography laws.[50] It banned the use of a child in any "sexual performance," meaning "any play,

[45] See Adler, supra note 3, at 928 ("Child pornography law arose in direct response to a cultural crisis: starting in the late 1970s, child sexual abuse was discovered as a malignant cultural secret, wrenched out of its silent hiding place and elevated to the level of a national emergency.") (internal quotations omitted).

[46] Pub. L. No. 95-225, 92 Stat. 7 (codified as amended at 18 U.S.C. §§ 2251-2252, 2256 (2002)).

[47] H.R. Rep. No. 98-536, at 1 (1983), reprinted in 1984 U.S.C.C.A.N. 292.

[48] Adler, supra note 3, at 929 n.30.

[49] 458 U.S. 747 (1982).

motion picture, photograph or dance" that included "sexual conduct," which in turn was defined to include "intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals" as well as the promotion and sale of such materials.[51]

In the first line of the *Ferber* decision, which upheld the New York statute, the Supreme Court contextualized the First Amendment debate over the regulation of child pornography by noting that "[i]n recent years, the exploitative use of children in the production of pornography has become a serious national problem."[52] This observation signaled the Court's concern for the children who are harmed in the production of child pornography, and it indicated that, because of this underlying harm, the Court was prepared to treat the regulation of child pornography differently from the regulation of adult pornography.[53] Whereas the Court had previously held that adult pornography could be banned only if it was "obscene," in *Ferber* the Court held that all child pornography that depicted actual children may be prohibited.[54]

---

[50] Adler, supra note 2, at 230 (describing 1977 as "turning point" in public awareness of child pornography and date of first laws against child pornography "including the New York law that came before the Supreme Court five years later in Ferber").

[51] N.Y. Penal Law §§ 263.00-263.10 (McKinney 2000).

[52] *Ferber*, 458 U.S. at 749.

[53] In Miller v. California, 413 U.S. 15 (1973), the Supreme Court articulated a three-prong test for determining whether material is obscene for the purpose of constitutional adjudication. Briefly, the test's prongs are: (1) whether the average person would find that the speech, taken as a whole, appeals to the prurient interest in sex; (2) whether it is patently offensive; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Id. at 24. The test is still the standard to determine obscenity.

[54] See *Ferber*, 458 U.S. at 753 ("The Court of Appeals' assumption [that the Miller test for obscenity must be met in order to regulate child pornography] was not unreasonable in light of our decisions. This case, however, constitutes our first examination of a statute directed at and limited to depictions of sexual activity involving children."). The Court's acceptance of the proposition that speech could be prohibited because of the criminal behavior that it depicted was a striking departure from prior First Amendment doctrine. See Adler, supra note 3, at 932, 982-85.

The Court gave several reasons why this should be the case, most of which were related to the prevention of the underlying child abuse that is depicted in the offending images. Chief among the reasons offered by the Court was that the regulation of many activities involving children is frequently distinguished from the regulation of the same activities involving adults because of the state's "compelling interest" in protecting children. The Court concluded that, because "[i]t is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling," the legislature's stated intention to "protect[ ] . . . children from exploitation through sexual performances" was an acceptable reason for regulating the distribution of child pornography. *Ferber*, 458 U.S. at 756-57 (internal quotations omitted).

The Court also accepted that it was impractical to limit prosecution to the "low-profile, clandestine industry" of child pornography production and that the "most expeditious if not the only practical method of law enforcement" is to close "the distribution network." Id. at 759-60.

With respect to the specific crime of distributing child pornography, the Court concluded that that crime injured the children depicted in the distributed material in two important ways. First, the children are harmed by knowing that a permanent record of their abuse exists and that it may be exposed in the future. Second, the dissemination of the images is an invasion of the child's right to privacy.

Regarding the former harm, the Court's finding was grounded in both "the legislative judgment, as well as the judgment found in the relevant literature, . . . that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child."[55] The "legislative judgment" was illustrated for the court by the nearly universal enactment of child pornography laws by the states and the federal government.[56] The judgment of the "relevant literature" was attributed in significant part to the findings of Professor David P. Shouvlin.[57] Professor Shouvlin had researched the ways in which the documentation of abuse by child pornographers affects children even after the abuse has ended and had reached the following conclusion:

> [Pornography] poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.[58]

The Court embraced this conclusion and relied on it to conclude that "[t]he distribution of photographs and films depicting sexual activity by juveniles . . . are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation."[59]

Finally, the Court offered two lesser reasons for excepting child pornography from the prevailing *Miller* standard of obscenity: The likelihood that any material of artistic, scientific, or intellectual value would be prohibited by a ban on child pornography is "exceedingly modest, if not de minimis" and the fact that the prohibition of entire categories of speech is an accepted (if rare) approach in First Amendment jurisprudence. Id. at 762-64. But see Ashcroft v. Free Speech Coalition, 122 S.Ct. 1389, 1400 (2002) (describing at length examples of artistically meritorious works involving sexual activity by minors, including Romeo and Juliet and motion pictures Traffic and American Beauty).

[55] *Ferber*, 458 U.S. at 758.

[56] See Id. ("Suffice it to say that virtually all of the States and the United States have passed legislation proscribing the production of or otherwise combating 'child pornography.'"). See also id. at 758 n.9 (citing legislative history of child pornography legislation).

[57] Id. at 759 n.10.

[58] Id. (quoting David P. Shouvlin, Preventing the Sexual Exploitation of Children: A Model Act, 17 Wake Forest L. Rev. 535, 545 (1981)).

[59] Id. at 759. In its most recent child pornography decision, *Free Speech Coalition*, 122 S.Ct. at 1405, the Court struck down sections of the Child Pornography Prevention Act

The Court's finding of an invasion of the depicted children's privacy also relied on the findings of researchers, including Professor Shouvlin, as well as on Supreme Court precedent concerning the right to privacy. After citing the evidence of psychological harm caused to depicted children by the distribution of their images, the Court found that the exposure of photographic evidence to an audience beyond that of the original abuser "violates 'the individual interest in avoiding disclosure of personal matters.'"[60] The language in this passage is the same as that used in several Supreme Court cases that have recognized that "the zone of privacy long has been held to encompass an 'individual interest in avoiding disclosure of personal matters.'"[61] It follows that the depicted children's right to privacy[62] is also violated by the distribution of child pornography.

In 1990, eight years after *Ferber*, the Supreme Court heard *Osborne v. Ohio*,[63] which was another challenge to a state law banning the distribution of child pornography. The Court again accepted the state's justifications, which were substantially similar to those offered by New York in *Ferber*.[64] Specifically, the Court reiterated that the

---

that criminalized "virtual" child pornography—material created entirely on a computer and without the use of an actual child. In that case, the Court affirmed the rationales of *Ferber* and *Osborne*, particularly the fact that child pornography involving actual children is "intrinsically related" to the sexual abuse of children, whereas virtual child pornography is not. Id. at *Ferber*, 458 U.S. at 1402. According to the Court, one of the two main ways in which child pornography is tied to the abuse of children is that, as "a permanent record of a child's abuse, the continued circulation itself would harm the child who had participated. Like a defamatory statement, each new publication of the speech would cause new injury to the child's reputation and emotional well-being." Id. at 1401.

60 *Ferber*, 458 U.S. at 759 n.10 (quoting Whalen v. Roe, 429 U.S. 589, 599 (1977)). *Whalen* distinguished between two distinct privacy interests, both of which have been recognized by the Court as emanating from the Bill of Rights: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." 429 U.S. at 599-600. The privacy interest implicated by the distribution of child pornography is of the first kind.

A more thorough analysis of the constitutional right to privacy is beyond the scope of this Note, but for a summary and analysis of that nebulous doctrine, see generally, David A.J. Richards, Constitutional Legitimacy and Constitutional Privacy, 61 N.Y.U. L. Rev. 800 (1986) (discussing, inter alia, history and development of right to privacy); Jed Rubenfeld, The Right of Privacy, 102 Harv. L. Rev. 737 (1989) (same).

61 Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 529 (1990) (Blackmun, J., dissenting) (quoting *Whalen*, 429 U.S. at 589).

62 For a limited discussion of this alleged right, which has been upheld repeatedly by the Supreme Court, see supra notes 60-61 and accompanying text.

63 495 U.S. 103 (1990). This time, the issue before the Court was the constitutionality of an Ohio statute, which prohibited possession of images containing "lewd exhibitions" not just of a child's genitals, but of any child nudity. Ohio Rev. Code Ann. § 2907.323(A)(3) (Anderson 1993).

64 The Court relied heavily on *Ferber* to uphold the statute in *Osborne*. See infra notes 65-66 and accompanying text.

state had a compelling interest in protecting children from abuse[65] and that the distribution of child pornography prolonged—and thereby increased—the harm initially visited upon the depicted children when the photographs were taken.[66]

B. *Are Depicted Children the Victims of Transporting Child Pornography in Violation of the Protection of Children Act?*

All the circuit courts that have addressed the question of who is the victim of the crime of transporting child pornography in interstate commerce in violation of the Child Protection Act have done so in the context of sentencing appeals by appellants who have been convicted under the Act. The answer to this question can have important consequences for a defendant charged with multiple violations of the statute, for the fact that multiple criminal acts have the same victim usually results in a court deciding to group them together for sentencing purposes, which in turn results in a lesser sentence.[67]

With its decision in *United States v. Toler*,[68] the Fourth Circuit became the first circuit court to consider the question.[69] In order to determine whether the defendant's conviction for interstate transpor-

---

[65] *Osborne*, 495 U.S. at 109; see also supra note 54. The Court also echoed *Ferber*'s finding that the prohibition of mere possession was necessary to prevent the production of child pornography. *Osborne*, 495 U.S. at 109-10 ("It is . . . surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand. In *Ferber*, . . . we found a similar argument persuasive . . . .").

[66] Id. at 111 ("[A]s *Ferber* recognized, the materials produced by child pornographers permanently record the victim's abuse. The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come."). In Ashcroft v. Free Speech Coalition, 122 S.Ct. 1389 (2002), the Court affirmed the holding of *Osborne*, which it described as "anchor[ing] its holding in the concern for the participants, those whom it called the 'victims of child pornography.'" Id. at 1401-02 (quoting *Osborne*, 495 U.S. at 110).

[67] If multiple counts are "closely related" under U.S. Sentencing Guideline § 3D1.2, they are grouped together for sentencing purposes, resulting in a lower offense level in the sentencing guidelines. A lower offense level translates into a shorter sentence. An important factor in determining whether counts are "closely related" is whether they have the same victim. U.S. Sentencing Guidelines Manual § 3D1.2(a) & cmt. nn.2-3 (2001).

In the context of child pornography, if the victims of the crime of mailing or receiving child pornography are the children depicted, then a defendant who receives four videos featuring four different children can be convicted on four separate counts of violating 18 U.S.C. § 2252(a), each of which has a different victim. Thus, the counts will not be grouped together when his sentence is determined. On the other hand, if society is the victim of all four counts, and the children are only indirect or secondary victims, then the counts will be grouped together, resulting in a lesser sentence. For an example of this in practice, see infra note 70.

[68] 901 F.2d 399 (4th Cir. 1990).

[69] The specific provision of the Act in question was 18 U.S.C. § 2252(a). Id. at 400.

tation of pornographic photographs, which depicted the defendant's twelve-year-old stepdaughter, should be grouped with two counts of interstate transportation of that same girl with the intent to engage in prohibited sexual conduct, the court had to decide whether the defendant's stepdaughter was the primary victim of all three crimes.[70] After a cursory consideration of the matter, the court concluded that the statute's "primary focus . . . is the harm to the moral fabric of society at large."[71] The flip-side of this seemingly innocuous conclusion was that the stepdaughter was *not* a direct victim of the crime of transporting child pornography in interstate commerce. The Fourth Circuit would be the first and last circuit court to so hold.

Over the next eleven years, the Third,[72] Fifth,[73] Sixth,[74] Seventh,[75] Eighth,[76] Ninth,[77] and Eleventh Circuits[78] were confronted with substantially the same question. In each case, the court in question declined to follow the Fourth Circuit's lead, ruling instead that a child depicted in pornography that is transported in interstate commerce is the primary victim of that crime.[79] The grounds for disagreement between the Fourth Circuit and the subsequent contradictory decisions of the other seven circuits have been threefold: (1) the plain meaning of the statutes in question; (2) Congress's intent in enacting

---

70 In the case of *Toler*, not grouping the count of transporting pornographic images of Toler's stepdaughter across state lines with the two separate counts of transporting the stepdaughter herself across state lines with the intent to engage in prohibited sexual conduct resulted in an offense level of twenty-one, which corresponded to a sentence of between thirty-seven and forty-six months. Grouping the counts would have lowered the offense level to twenty, which corresponded to a sentencing range of thirty-three to forty-one months. Id. at 401-02 & n.3.

71 Id. at 403. The court relied particularly on a Senate Report that "expresses the fear that unless the dissemination of child pornography is checked, it could contribute to a continuing cycle of child abuse." Id. at 403 n.5 (citing S. Rep. No. 95-438, at 5-9 (1977)). The court noted that the defendant's stepdaughter was *a* victim of both offenses but did not believe that she was the "primary victim" of the § 2252(a) offense, which is the determinative distinction in grouping counts for sentencing. Id. at 403.

72 United States v. Ketcham, 80 F.3d 789 (3d Cir. 1996).

73 United States v. Norris, 159 F.3d 926 (5th Cir. 1998).

74 United States v. Hibbler, 159 F.3d 233 (6th Cir. 1998).

75 United States v. Sherman, 268 F.3d 539 (7th Cir. 2001).

76 United States v. Rugh, 968 F.2d 750 (8th Cir. 1992).

77 United States v. Boos, 127 F.3d 1207 (9th Cir. 1997).

78 United States v. Tillmon, 195 F.3d 640 (11th Cir. 1999).

79 But see Judge Richard Posner's opinion in *Sherman*, 268 F.3d at 550-53. In his dissent from the Seventh Circuit's decision not to hear the *Sherman* case en banc, Judge Posner voiced the lone judicial objection since *Toler* to the conclusion that the depicted child is the primary victim of 18 U.S.C. § 2252. Id. 551-52 (analogizing the primary victims in child pornography to the primary victims in immigration and drug offenses: society at larg). Whatever the merits of Judge Posner's argument, it runs contrary to the position of an overwhelming majority of the circuits that have decided the issue, including his own Seventh Circuit, and is of no precedential value.

(and subsequently amending) the statute; and (3) Supreme Court precedent.

1. *The Plain Meaning of the Child Protection Act and United States Sentencing Guideline § 3D1.2*

On its face, the Child Protection Act does not indicate who ought to be considered the victim of the crime of interstate transportation of child pornography.[80] Courts addressing this question have therefore looked to the United States Sentencing Guidelines for direction. The meaning of the word "victim" is explained[81] in Application Note 2 of Sentencing Guideline § 3D1.2 as follows:

> The term "victim" is not intended to include indirect or secondary victims. Generally, there will be one person who is directly and most seriously affected by the offense and is therefore identifiable as the victim. For offenses in which there are no identifiable victims (e.g. drug or immigration offenses, where society at large is the victim), the "victim" . . . is the societal interest that is harmed.[82]

In *Toler*, the Fourth Circuit cited this Note, without elaboration, as convincing evidence that the primary victim of the interstate transport of child pornography is "the moral fabric of society at large."[83] In light of the subsequent, unanimous disagreement with its reading of the Note, one wishes the court had explained more clearly the process by which it reached this conclusion.

In contrast to the Fourth Circuit, the other circuit courts that relied on this Note examined it much more closely. For example, drawing on the Note's suggestion that "[g]enerally, there will be one person who is directly and most seriously affected by the offense," the Ninth Circuit opined that "a commonsense reading of the Note strongly suggests that . . . the 'persons who are directly and most seri-

---

[80] Although the text of the statute does not answer this question, both the Fifth and Third Circuits noted that the original name of the act, "The Protection of Children Against Sexual Exploitation Act of 1977," supports the conclusion that Congress considered the children depicted in child pornography to be direct victims of the crimes contained in the act. See United States v. Norris, 159 F.3d 926, 930-31 (5th Cir. 1998); United States v. Ketcham, 80 F.3d 789, 793 (3d Cir. 1996). The Fifth Circuit found this to be particularly strong evidence of the statute's plain meaning in light of Supreme Court advice that "[t]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." *Norris*, 159 F.3d at 931 (quoting Alemendarez-Torres v. United States, 523 U.S. 224, 234 (1998)) (internal quotations omitted).

[81] The explanation of a provision of the United States Sentencing Guidelines "must be given 'controlling weight unless it is plainly erroneous or inconsistent'" with the text of the provision. Stinson v. United States, 508 U.S. 36, 45 (1993) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)). Unfortunately, *Stinson* failed to provide guidance in cases when the explanation is merely unhelpful.

[82] U.S. Sentencing Guidelines Manual § 3D1.2, cmt. n.2 (2001).

[83] United States v. Toler, 901 F.2d 399, 403 (4th Cir. 1990).

ously affected,' and are 'therefore identifiable as the victims,' are the children who perform the pornographic acts."[84] The court then rejected the defendant's attempt to analogize his crime to that of receiving illegal drugs, a crime described in the Note as being without an identifiable victim.[85] In so ruling, the court distinguished between "the garden-variety drug user . . ., who is, practically speaking, *his own* victim" and "[t]he *child* pornographer [who] victimizes not himself, but *children*."[86]

Two circuits, the Ninth and the Fifth, referred to dictionary definitions to ascertain the plain meaning of the word "victim" as used in U.S. Sentencing Guideline § 3D1.2. The Ninth Circuit relied on a definition of "victim" that included "one that is acted on and usu[ally] adversely affected by a force or agent[;] . . . one that is injured, destroyed, or sacrificed [or] subjected to oppression, hardship, or mistreatment[;] . . . one that is tricked or duped."[87] Applying this definition to the circumstances of the crime, the court concluded that "it seems to us scarcely debatable that the children depicted . . . were the primary 'victims' of [the defendant's] criminal conduct."[88] The Fifth Circuit used a similar definition of "victim"—"anyone who suffers either as a result of ruthless design or incidentally or accidentally"—to reach the same conclusion.[89]

2. *The Legislative History of the Chile Protection Act*

In *Toler*, the Fourth Circuit relied on a Senate report that focused on child pornography's tendency to perpetuate a cycle of abuse to

---

[84] United States v. Boos, 127 F.3d 1207, 1209-10 (9th Cir. 1997) (original brackets omitted).

[85] U.S. Sentencing Guidelines Manual § 3D1.2, cmt. n.2 (2001).

[86] *Boos*, 127 F.3d at 1210.

[87] Id. (emphasis omitted) (quoting Webster's Ninth New Collegiate Dictionary 1314 (1986)).

[88] Id. The court took the various characteristics of victims, as defined in the quoted dictionary passage, and applied them to the facts of the case. It found that:

> [I]t was the children depicted—and not society at large—who were "acted on" and "adversely affected," who oftentimes were "forced" to participate in the production of the pornography in which [the defendant] traded, who were "injured" (both physically and psychologically) as a result of [the defendant's] patronage of the porn industry, who were "sacrificed" to satisfy [his] curiosities, who were "subjected" to the cruelest form of "oppression, hardship and mistreatment" at the hands of pornography producers and photographers, and whose lives were quite possibly "destroyed" in the process. Moreover, . . . it was the children—and not society at large—who were "tricked and duped into participating in the pornographic activities."

Id. (original brackets omitted).

[89] United States v. Norris, 159 F.3d 926, 929 (5th Cir. 1998) (quoting Webster's Third New International Dictionary 2550 (1971)).

conclude that Congress's main concern in enacting the Protection of Children Act was the prevention of future abuse rather than the protection of the actual children depicted, for whom such protection presumably came too late.[90] Subsequent courts examining the relevant legislative history have reached the opposite conclusion.

The Eighth Circuit, in *United States v. Rugh*,[91] agreed with the *Toler* court that Congress had "expressed grave concerns about the effect of child prostitution and pornography on the nation's moral fabric," but proceeded to conclude that "merely because the exploitation of these children has a secondary effect on society at large does not diminish the fact that the primary victim in this crime is the child."[92] In *Norris*, the Fifth Circuit concurred with the Eighth Circuit's interpretation of the legislative history, an interpretation that it bolstered by citing a 1996 Congressional finding that "where children are used in its production, child pornography permanently records the victim's abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years."[93]

---

[90] See United States v. Toler, 901 F.2d 399, 403 & n.5 (4th Cir. 1990) (noting that abused children often become abusers as adults).

[91] 968 F.2d 750 (8th Cir. 1992).

[92] Id. at 755.

[93] Id. at 929-30 (quoting Child Pornography Prevention Act of 1996, 18 U.S.C. § 2251 note at 611 (2002)).

Probably the most frequently cited piece of legislative history in this debate was Congress's observation that "the use of children . . . as the subjects of pornographic materials is very harmful *to both the children and the society as a whole*." S. Rep. No. 95-438, at 5 (1977), reprinted in 1978 U.S.C.C.A.N. 40, 43 (emphasis added). This brief and inconclusive statement was cited by the Fourth Circuit in *Toler* as convincing evidence that society, rather than the children depicted, is the primary victim when child pornography is distributed. See *Toler*, 901 F.2d at 403 & n.5. Every other circuit that interpreted this passage, however, concluded that this reference to child pornography's harm to society in no way detracted from the obvious harm done to the children involved in its manufacture, who are its direct victims and who were of at least equal concern to Congress according to this statement. See, e.g., United States v. Boos, 127 F.3d 1207, 1211 (9th Cir. 1997) ("[This statement] no more supports [defendant's] argument than it undermines it (in that the Report recognizes harm to *both* society *and* to children)."); United States v. Ketcham, 80 F.3d 789, 793 (3d Cir. 1996) ("The fact that a criminal statute in a general sense protects society as a whole cannot suffice to make society the primary victim."); *Rugh*, 968 F.2d at 755 ("[M]erely because the exploitation of these children has a secondary effect on society at large does not diminish the fact that the primary victim in this crime is the child.").

Several circuit courts also recognized that this statement is but a single articulation of the statute's purpose, which must be read in the context of numerous other congressional findings concerning child pornography's devastating effects on the children exploited in its production. See, e.g., *Boos*, 127 F.3d at 1211 ("[Such] selective citation . . . ignores the overall tenor of the legislative history, which leaves little doubt that Congress's chief concern was the protection of the children involved in the production of the pornographic images."). The Ninth Circuit best expressed this sentiment when it explained that its con-

3. *Supreme Court Precedent*

Although the Fourth Circuit in *Toler* did not cite Supreme Court precedent in support of its conclusion that the children depicted in child pornography are not the primary victims under the Protection of Children Act, this omission, like the court's conclusion, was not repeated by subsequent circuit court decisions. The Ninth Circuit was the first court in this debate to cite the Supreme Court's *New York v. Ferber*[94] decision for the proposition that "[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children. . . . [T]he materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation."[95] The Fifth Circuit adopted the same position, relying on *Ferber*'s finding that the dissemination of child pornography perpetuates the injury initially inflicted on the children during the production of the images.[96] Three years later, the Seventh Circuit rested its conclusion that the children depicted in child pornography are the primary and direct victims of its distribution on the same rationale: Each act of distribution constitutes a new offense against the privacy interests of the children.[97]

---

clusion was correct "[i]n light of . . . the overwhelming evidence from those portions of the legislative history *not* cited by the *Toler* court." Id. at 1213.

94 458 U.S. 747 (1982).

95 *Boos*, 127 F.3d at 1211 (alteration in original) (quoting *Ferber*, 458 U.S. at 759).

96 United States v. Norris, 159 F.3d 926, 929 (5th Cir. 1998), held that:

> Unfortunately, the "victimization" of the children involved does not end when the pornographer's camera is put away. The consumer, or end recipient, of pornographic materials may be considered to be causing the children depicted in those materials to suffer as a result of his actions. . . . [T]he simple fact that the images have been disseminated perpetuates the abuse initiated by the producer of the materials.

In addition to *Ferber*, the court also added the support of the Supreme Court's decision in *Osborne v. Ohio*, which had held that "pornography's continued existence causes the child victims continuing harm by haunting the children for years to come." *Norris*, 159 F.3d at 930 (alteration in original) (quoting Osborne v. Ohio, 495 U.S. 103, 111 (1990)).

97 See United States v. Sherman, 268 F.3d 539, 546-48 (7th Cir. 2001) (describing way in which "the possession, receipt and shipping of child pornography directly victimizes the children portrayed by violating their right to privacy, and in particular violating their individual interest in avoiding the disclosure of personal matters").

III
THE POSSIBILITY OF A *BIVENS* CLAIM BY A CHILD DEPICTED IN PORNOGRAPHY USED IN AN UNDERCOVER INVESTIGATION

While some child pornography prosecutions result from an inadvertent discovery of a child pornographer's cache of illegal images,[98] many of them are the successful products of undercover operations.[99] This Part examines the likelihood that a child depicted in pornography that is used in an undercover investigation would prevail in a *Bivens* claim against the officers who carried out the investigation. Part III.A summarizes the actual facts of the child pornography investigation[100] in the case of *United States v. Sherman*.[101] These facts are then used in Part III.B, which analyzes a hypothetical *Bivens* lawsuit brought by one of the children depicted in the pornography at issue in that case. Finally, Part III.C offers several possible changes to undercover procedures that would allow stings to continue without exposing officers to liability or compromising the integrity of law enforcement operations.

A. Anatomy of an Undercover Child Pornography Investigation

George Sherman, the defendant, carried on a correspondence with a Canadian man named Jason for several months in 1998.[102] In September of 1998, Sherman mailed Jason a videotape from Chicago

98 See, e.g., *Norris*, 159 F.3d at 927 (describing arrest of defendant who had taken his computer in for repair only to have files containing child pornography discovered by repairman).

99 See Adler, supra note 3, at 933 ("[S]ince the early 1990s, the Department of Justice has tripled the number of annual child pornography prosecutions it brings."). In fact, "[f]rom 1998 to 1999 alone, the FBI's Innocent Images project doubled its prosecutions." Id. at 933 n.56. See also Jack B. Harrison, The Government as Pornographer: Government Sting Operations and Entrapment; United States v. Jacobson, 916 F.2d 467 (8th Cir. 1990), rev'd, 112 S. Ct. 1535 (1992); 61 U. Cin. L. Rev. 1067, 1067-68 (1993) (ascribing increase in both undercover operations and prosecutions related to child pornography to passage of Protection of Children Against Sexual Exploitation Act and 1986 Meese Commission on Pornography).

100 Throughout, this Note uses the terms "undercover investigation" and "sting" interchangeably. Technically, a sting is only one kind of undercover investigation, and the kind of undercover investigation to which this Note refers is actually a "reverse sting." Whereas in a traditional sting undercover law enforcement agents posing as criminals acquire contraband from the target of the investigation, in a reverse sting the government agents, again posing as criminals, lure the target into taking possession of contraband from them. This distinction, however, is not consistently recognized and the word "sting" is sometimes defined broadly to include both kinds of operations. See Black's Law Dictionary 1426 (7th ed. 1999) (defining "sting" as "[a]n undercover operation in which law enforcement agents pose as criminals to catch actual criminals engaging in illegal acts").

101 268 F.3d 539 (7th Cir. 2001).

102 Id. at 540.

to Ontario with an accompanying letter that said "Here's your tape. Hope you enjoy it, Where's the TAPE that you are sending me???"[103] The videotape contained six hours of footage, about seventy percent of which involved minors, "including prepubescent minors, engaged in sexually explicit activity."[104] The tape was intercepted and confiscated by Canadian Customs officers who alerted the United States Customs Service.[105] Pursuant to this notification, U.S. Customs searched Sherman's apartment, where they seized eight more tapes containing "images of prepubescent minors engaged in sexually explicit activity."[106]

Around this time, independent of Canadian Customs and the U.S. Customs service, the FBI initiated an investigation into Sherman, which was carried out by the United States Postal Inspection Service.[107] At the FBI's instigation, an agent of the Postal Inspection Service mailed Sherman a letter that introduced the agent as "Lou and Ann," the owners of "Foreign Films Etcetera . . . a business specializing in visual materials 'very much outside the norm.'"[108] After a short correspondence between the defendant and the agent posing as Lou and Ann, Sherman ordered a video entitled "Boys-3" and a photo set entitled "Chicken For Hire."[109] According to promotional material that the agent had sent Sherman, the video "contained sexual activity between two boys aged twelve and thirteen,"[110] and the photo set portrayed "'uninhibited boys aged 8 to 15,' engaged in various sexual acts."[111] Sherman also completed a "sexual interests survey" for the undercover agent in which he indicated an interest in such pornographic genres as "chickenhawk," "incest," and "young, underage."[112] Despite being warned that some of the materials were "very illegal," Sherman indicated an interest in buying and trading such items.[113]

---

103 Id.

104 Id.

105 Id.

106 Id. at 541.

107 Id. ("The record does not reveal the source of the FBI's suspicions about Sherman, except to state that this investigation was entirely independent of any action by Canadian authorities or the Customs Service.").

108 Id.

109 Id.

110 Id.

111 Id.

112 Id. According to the court, "'Chickenhawk' refers to a category of pornography involving older adult males who have a sexual interest in very young or underage males. The young or underage males are referred to as 'chickens,' while the older men are 'hawks.'" Id. at 541 n.1.

113 Id.

In March of 1999, the undercover agent arranged a "controlled delivery" of the child pornography that Sherman had ordered.[114] Sherman received the package himself and signed a receipt for the delivery.[115] When Sherman's apartment was searched "a short time later," law enforcement officers found the photo set stashed under a cushion in the living room and the video hidden in Sherman's oven, along with a copy he had already made.[116] The officers also recovered "a number of videotapes containing images of nude, underage males."[117] Sherman was arrested and charged with three separate counts, including "knowingly receiving child pornography that had been mailed, shipped and transported in interstate or foreign commerce."[118]

B. *Analysis of a Hypothetical* Bivens *claim based on the facts of* United States v. Sherman

In light of *Brown* and *Lewis*,[119] the practice of using real child pornography in undercover operations against suspected consumers of child pornography may expose federal agents to liability via a *Bivens* claim brought by one of the depicted children. Although the use of child pornography by law enforcement in sting operations has been upheld in suits brought by defendants who have been caught by this method,[120] no court has ever heard a claim by a depicted child that a federal agent's conduct in mailing pornographic photos of him to a stranger is either a "conscience-shocking" violation of his Fifth Amendment due process right or a violation of his constitutional right to privacy. If such a lawsuit were brought against an agent, there is a very good chance that the plaintiff would prevail under the analysis set forth in *Brown*.[121] This can be demonstrated by applying the *Brown* court's analysis to the fact pattern above.

---

114 Id.

115 Id.

116 Id.

117 Id.

118 Id.

119 See supra Part I.B.

120 See Cynthia Perez, Case Note, United States v. Jacobson: Are Child Pornography Stings Creative Law Enforcement or Entrapment?, 46 U. Miami L. Rev. 235, 245 (1991) (claiming that every challenge to child pornography stings has been rejected). Perez's case note, however, concerns challenges from the perspective of defendants who are the targets of undercover operations. Therefore, none of the courts in those cases would have addressed the harm to the children involved, because, in the words of one court, a defendant "does not have standing to raise the rights of other persons whose rights may have been violated in the course of this investigation." United States v. Mitchell, 915 U.S. 521, 526 n.8 (9th Cir. 1990).

121 See supra Part I.B.

When deciding a *Bivens* claim, a court must first decide whether or not the plaintiff has alleged the deprivation of a constitutional right. In this hypothetical lawsuit, the plaintiff, one of the boys depicted in the "Boys-3" video or the "Chicken For Hire" photo set, could allege the violation of two distinct constitutional rights: his Fifth Amendment right to due process and his right to privacy.

The court's analysis of the plaintiff's due process rights would follow exactly the *Brown* court's analysis. If the undercover agents' act of mailing pornographic images of the child plaintiff to a known or suspected pedophile is a "conscience-shocking injury" or an "arbitrary action of the government" against the plaintiff, then there is a strong chance that that act violated the plaintiff's constitutional due process rights. *Norris*, *Boos*, and *Sherman* each followed the Supreme Court's decisions in *Ferber* and *Osborne* by holding that simply disseminating pornographic images of a child harms that child, whether or not he is aware of the dissemination.[122] Under this reasoning, it should not matter whether the images were mailed to a pedophile by law enforcement agents or by another pedophile; the harm to the child depends on the act rather than the actor's identity.

It may be argued that the mailing of child pornography within the controlled parameters of an undercover investigation is categorically different from the dissemination of child pornography between or among pedophiles because the image is being used to trap a single pedophile rather than being distributed within a wider web of possible viewers. But nowhere do *Ferber*, *Osborne*, and the circuit court cases that have cited them distinguish the harm to a depicted child on the basis of how many people have seen it or will see it. Because anti-distribution laws criminalize mere possession for private use,[123] and because the images are "a permanent record"[124] of the depicted child's abuse regardless of whether the image sits untouched in a dresser drawer or is posted on the Internet, the same rationale that the Supreme Court accepted for criminalizing child pornography supports the conclusion that the use of child pornography by undercover agents in a sting inflicts not only a comparable but an identical harm on a depicted child.

---

[122] United States v. Sherman, 268 F.3d 539, 546-47 (7th Cir. 2001); United States v. Norris, 159 F.3d 926, 929-30 (5th Cir. 1998); United States v. Boos, 127 F.3d 1207, 1211 (9th Cir. 1997); New York v. Ferber, 458 U.S. 747, 759 (1982).

[123] See 18 U.S.C. § 2252(a)(4)(B) (2002) (criminalizing knowingly possessing one or more visual depictions "if . . . the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and . . . such visual depiction is of such conduct").

[124] *Ferber*, 458 U.S. at 759.

This argument is even stronger when two additional factors are considered. First, the image used by the agents in the sting is likely to be viewed by more than one agent, as well as targeted pedophiles, judges, juries, defense attorneys, and prosecutors. These images have been seized in previous criminal investigations, and law enforcement officers have made a deliberate choice to keep the "permanent record" of abuse alive instead of destroying the images and thereby ending the potential for ongoing harm to the depicted children. In *Osborne*, the Supreme Court recognized that "[child] pornography's continued existence causes the child victims continuing harm by haunting the children in years to come."[125] Therefore, so long as law enforcement agents fail to destroy the images and instead use them repeatedly to bait and convict new targets of undercover investigations, an ongoing harm to the depicted children is being wrought.

Second, in the fact pattern before the court in this hypothetical lawsuit, the target of the investigation had time to make a copy of the "controlled" videotape before it was recovered by law enforcement.[126] If the target had time to copy a videotape sent to him in the sting, he also had time to upload it to the internet, to scan and post the photos that accompanied the video, and to e-mail all of these images to other consumers of child pornography with whom he may have been in contact. It is therefore incorrect to think of the use of child pornography in stings as controlled or limited by the actions of the agents. The harm to the child plaintiff depicted in the pornography is not diminished because his image was disseminated by law enforcement agents in the course of a controlled undercover operation.

Supreme Court precedent would also support the plaintiff's claim of a violation of his right to privacy. Recall that in *Ferber* the Court held that the mere existence of child pornography is an invasion of the privacy of the depicted child and that "[d]istribution of the material violates 'the individual interest in avoiding disclosure of personal matters.'"[127] A right to privacy has been recognized repeatedly and upheld by the Supreme Court[128] and that right, if it protects anything, protects a citizen from having pornographic and injurious images of

---

125 Osborne v. Ohio, 495 U.S. 103, 111 (1990).

126 See supra text accompanying note 116.

127 *Ferber*, 458 U.S. at 759 n.10 (quoting Whalen v. Roe, 429 U.S. 589, 599 (1977)). For more on the Court's use of privacy doctrine in the context of the distribution of child pornography, see supra notes 60-61 and accompanying text.

128 The right to privacy is a gypsy of constitutional jurisprudence, which makes its home in the shade of every inviting Amendment and provision. In its opinion in *Whalen*, the Court cited academic articles, cases, and opinions of individual Supreme Court justices that located the right to privacy within an "undefined penumbra" cast variously by the First, Fourth, Ninth, and Fourteenth Amendments. *Whalen*, 429 U.S. at 598-600 & nn.23-27.

himself distributed to members of the public by the government.[129] So, regardless of whether the plaintiff chooses to rest his *Bivens* claim on a violation of his constitutional due process rights or his right to privacy, he has ample precedent to support it.

After the plaintiff has established a prima facie violation of his constitutional rights, the court, following the Supreme Court's lead in *Lewis*, must consider both the culpability of the federal officers charged and the circumstances under which they engaged in the conduct that violated the plaintiff's rights. In *Brown*, the court recognized that, for the purposes of analyzing a *Bivens* claim, culpability exists along a spectrum, with "deliberate harm from government officials" at one end and "harm inflicted due to government actors' simple negligence" at the other.[130] The more that law enforcement agents' actions appear to the court to be acts of deliberate harm, the more likely it is that the court will assign liability.

The harm to the plaintiff in this hypothetical lawsuit cannot be said to be the result of "simple negligence" on the part of the FBI or postal agents. The mailing of the plaintiff's image was a conscious choice and not an accidental consequence or merely negligent. At a minimum, the agents who mailed the pornographic images of the plaintiff were acting with "deliberate indifference,"[131] and, to the extent that it may have occurred to them that the plaintiff was unlikely to want photographic depictions of his abuse mailed to a stranger, it would not be a stretch to characterize their conduct as deliberate or knowing harm. In the interests of charity and of presenting the harder case, this Note will attribute only an indifferent state of mind to the agents.

According to the *Brown* court's reading of the Supreme Court's reasoning in *Lewis*, conduct undertaken with "deliberate indifference" to the constitutional rights of a *Bivens* plaintiff must be looked at in light of the competing pressures on the government agent charged with the violation. Specifically, the *Brown* court distinguished between cases in which the government agent had sufficient time to weigh the consequences of his actions and cases in which the pressures of time and imminent danger reduced the degree of his culpability.[132]

Although the right has yet to find a permanent constitutional home, it is beyond dispute that the Supreme Court has recognized its existence. See supra notes 60-61.

[129] See supra notes 60-61.

[130] In See Brown v. Nationsbank Corp., 188 F.3d 579, 591 (5th Cir. 1999).

[131] In *Brown*, this lower level of culpability was considered sufficient to support a *Bivens* claim. Id. at 591-92.

[132] See supra notes 34-42 and accompanying text.

According to the facts of *Sherman*, the agents who violated the plaintiff's rights spent six months planning the sting operation.[133] This time period should, under the logic of *Brown*, place the agents' actions in the category of facts analogous to the fact pattern in *Brown* rather than in the category of high-pressure decisions that can be analogized to a prison riot or a high-speed police chase.[134] As in *Brown*, the agents who violated the plaintiff's rights in this case "made decisions which harmed the Plaintiff[ ] after ample opportunity for cool reflection."[135] The agents had considerable time for deliberation before they chose to violate the plaintiff's constitutional rights, and therefore a court hearing the case should agree with the *Brown* court that such a violation is actionable under *Bivens*.[136]

Establishing a violation of a constitutional right is only the first of two steps in litigating a *Bivens* claim, albeit the more difficult.[137] The court must decide next whether the plaintiff's constitutional right that was violated by the government agent was clearly established at the time of the violation. This step protects an agent from suit when he acts in accordance with currently acceptable norms of constitutional law of which he is presumed to have been aware.[138] It is important to recognize that this standard explicitly precludes a government agent from claiming in his defense that his actions comported with common law-enforcement practice.[139]

The standard of whether a reasonable person would have known that his actions violated the plaintiff's constitutional rights[140] requires an agent to examine his conduct objectively and assess its likely effects on innocent third parties before acting. In this hypothetical suit, both of the possible rights that the plaintiff could allege were violated—the right to privacy and the due process right—are well-established and commonly known constitutional rights.[141]

---

133 The FBI first became aware of Sherman's activities in September of 1998 and the sting took place in March of 1999. See supra notes 101-18 and accompanying text.

134 See supra notes 36-39 and accompanying text.

135 *Brown*, 188 F.3d at 592.

136 Id. ("[A]llegations that federal agents inflicted damages on [the plaintiff], an innocent non-target, during this particular undercover operation and refused him compensation states a claim under Bivens.").

137 See supra note 29.

138 See Wyatt v. Cole, 504 U.S. 158, 166 (1992) ("[G]overnment officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct [does] not violate clearly established statutory or constitutional rights of which a reasonable person would have known.") (brackets in original) (internal quotation omitted).

139 Id.

140 Id.

141 For a discussion of the rights in question, and of cases that have recognized them in substantially the same form as asserted by the plaintiff in this case, see supra notes 119-29 and accompanying text.

In *Brown*, the Fifth Circuit deemed it inappropriate to hold the federal agents liable because the court was addressing for the first time the question of the limits of law enforcement actions vis-à-vis innocent third parties and because *Lewis*, the Supreme Court case on which its analysis rested, was decided after the alleged violations had occurred.[142] But in the very act of letting the agents in that case off the hook, the *Brown* court slammed the door on agents who might try to escape liability in the future by using that argument. The only reason that the court in *Brown* did not find the agents in that case liable was that it believed that it was unfair to punish them for actions that, at the time they were taken, had never before been held to give rise to liability.[143] Now that the precedents of *Brown* and *Lewis* exist, that defense is foreclosed for all future agents. Relying on *Brown*, the court in this case should hold the federal agents liable for deciding, despite the luxury of time and forethought, to mail pornographic images of the child plaintiff, thereby violating his constitutional rights to due process and to privacy.

It may be cavilled that such a suit is unlikely to be brought.[144] Nonetheless, the fact that federal law-enforcement agents' actions, if widely known, would give rise to liability is a telling indication that the agents are engaging in a dubious practice. Given the fears expressed by Congress in the FBI Undercover Operations Report[145] and the Attorney General's admonishment to FBI agents in the FBI Undercover Operations Guidelines to "take reasonable steps to minimize the participation of an undercover employee in any otherwise illegal activity,"[146] it is inappropriate for the FBI or any other federal agency to engage in conduct that injures an innocent third party to such an extent that the party would be entitled to recover damages under the *Bivens* doctrine.

---

142 Brown v. Nationsbank, 188 F.3d 579, 592 (5th Cir. 1999)

> "[B]ecause we address today for the first time the parameters of due process protections afforded innocent third parties injured by law enforcement sting operations run amok, and because the Supreme Court's language that drives our analysis appeared in a case decided in 1998, we cannot say that the [relevant] due process rights . . . were clearly established during 1992-94.").

143 Id.

144 Because the clandestine nature of the child pornography industry is, in the case of an undercover operation, compounded by the equally clandestine nature of FBI undercover operations, it may be unlikely that the use of a child's image by law enforcement in a sting ever would become known to the child victim or his parents.

145 See FBI Undercover Operations Report, supra note 19, at 2-3, 5 (expressing serious concern over invasions of privacy and violations of constitutional rights caused by undercover investigations).

146 FBI Guidelines, supra note 16, at IV.H(2).

C. Suggested Solutions

If law enforcement agents are exposing themselves to liability under a *Bivens* suit then it follows that the practice of using real child pornography in undercover investigations should cease. A moratorium on child pornography stings would, however, be a dear price to pay. Therefore, this Part suggests two possible changes to law enforcement procedures. Both of these new procedures would avoid harming actual children, thereby eliminating the threat of a lawsuit from a depicted child while also avoiding the charges of inappropriate behavior that could be raised when the government mails pornographic, intensely private, and injurious images of innocent children to known or suspected pedophiles.

One solution would be for law enforcement agents to obtain consent from depicted children before using their images in undercover operations. The obvious difficulties[147] attending this option may not pose as significant a limitation as they might appear to at first glance. Because the same images can be used in multiple investigations, almost without limit, it would only be necessary for the FBI and other agencies to obtain a small number of "authorized" images in order to continue to conduct stings without interruption.

As a second solution, law enforcement agents could restrict the scope of their undercover operations to obtaining evidence of an *attempt* to receive child pornography, which is equivalent to actual receipt of such materials under a 1994 amendment to the Protection of Children Act.[148] Undercover agents could mail legal adult pornography (or almost anything else) to a target in response to his request for illegal child pornography and then arrest him upon receipt of the mock contraband.[149]

CONCLUSION

Child pornography and the sexual abuse of children that it depicts is one of the most popularly condemned crimes. Child pornography offends American society to such an extent that the Supreme

147 To name but a few problems, it may be difficult to identify the depicted children in the first place, to find them, and, for obvious reasons, to gain their consent to mail such intimate images to a stranger.

148 Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified at 18 U.S.C. § 2252(b) (2002)).

149 It is curious that, given the fact that both attempt and actual receipt of child pornography are covered by 18 U.S.C. § 2252, the agents in *Sherman* and other cases continue to use actual child pornography in their undercover investigations. Two possible reasons may be that it is more difficult for prosecutors to obtain a conviction for an attempt than for a completed crime and that the sentence for an attempt may be less severe, on balance, than the sentence for the successful receipt of real child pornography.

Court considers it one of the few forms of expression that is utterly without merit and, consequently, not protected by the First Amendment.

In enforcing laws against the possession of child pornography, federal law-enforcement agencies engage in elaborate undercover investigations in which they mail pornographic images of actual children to suspected pedophiles. For the same reasons that the Supreme Court has held that the mere possession of child pornography can be proscribed constitutionally, and several circuit courts have held that the children depicted in child pornography are directly harmed by its dissemination, the use of child pornography in these stings exposes the agents conducting the investigations to civil liability. Under the *Bivens* doctrine, the children depicted in the images used by federal law enforcement could sue the agents involved for monetary damages. Thus, the current method of federal undercover child pornography investigations should be evaluated by the Attorney General's office, which should adopt new undercover law enforcement techniques, such as those suggested in this Note, that rectify these problems.