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School is Back in Session: The Miller & Dost Tests

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“Words have meaning. And the meaning doesn’t change.” -Antonin Gregory Scalia (Associate Justice, U.S. Supreme Court)

Words have meaning, but they often also have a range of interpretation. When applying a description to a word, we must strive for the most accurate definition. The Spotlight Team applies accurate descriptors to validated content so officers can use that information to investigate further as well as use for possible intervention opportunities related to concerning behaviors. The meanings and range of interpretation for many of the descriptors used by the Spotlight Team are often founded in law and the courts. Whether by

statute or landmark case law decisions, the Spotlight Team looks to these resources for accurate classifications. This is especially true when analyzing and classifying content as Erotic, Obscene, Pornography, Child Erotica, and Sexually Explicit Conduct. The following are examples of the current definitions used by the Spotlight Team:

- *Erotic: Any content where the dominant theme of which taken as a whole appeals to prurient interest. Any content that elicits, or tries to elicit, a sexual response of some kind.*
- *Pornography: Images or video depicting sexual acts, sexual arousal, or explicit nude imagery intended to be sexual in nature.*
- *Child Erotica: Content that is sexually arousing to persons having a sexual interest in minors but that is not, in and of themselves, obscene or that do not necessarily depict minors in sexually explicit poses or positions. Includes but not limited to fantasy writings, letters, diaries, books, sexual aids, souvenirs, toys, costumes, drawings, cartoons and non-sexually explicit visual images.*
- *Sexually Explicit Content: As defined by statute, specifically, 18 USC 2256.*

There are two tests that are widely used to gauge whether certain content meets the criteria for specific classifications. The first, The Miller Test, was established by the U.S. Supreme Court for use by judges and juries to determine whether material is obscene. The Miller Test was established in three major cases: *Miller v. California*, 413 U.S. 15, 24-25 (1973); *Smith v. United States*, 431 U.S. 291, 300-02, 309 (1977);

and *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987).

The three-pronged Miller test is as follows:

1. *Whether the average person, applying contemporary adult community standards, finds that the matter, taken as a whole, appeals to prurient interests (i.e., an erotic, lascivious, abnormal, unhealthy, degrading, shameful, or morbid interest in nudity, sex, or excretion);*
2. *Whether the average person, applying contemporary adult community standards, finds that the matter depicts or describes sexual conduct in a patently offensive way (i.e., ultimate sexual acts, normal or perverted, actual or simulated, masturbation, excretory functions, lewd exhibition of the genitals, or sado-masochistic sexual abuse); and*
3. *Whether a reasonable person finds that the matter, taken as a whole, lacks serious literary, artistic, political, or scientific value.*

Any material that satisfies this three-pronged test may be found obscene.

The second, The Dost Test, is a six-factor guideline established in 1986 in the United States district court case *United States v. Dost*, 636 F. Supp. 828 (S.D.Cal. 1986). The court developed the Dost Test in order to better determine whether a visual depiction of a minor constitutes a "lascivious exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(B). The Dost Test consists of six criteria, but not all of the criteria need to be met, nor are other criteria necessarily excluded in this test. The criteria are as follows:

1. *Whether the focal point of the visual depiction is on the child's genitalia or pubic area.*

2. *Whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity.*
3. *Whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child.*
4. *Whether the child is fully or partially clothed, or nude.*
5. *Whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity.*
6. *Whether the visual depiction is intended or designed to elicit a sexual response in the viewer.*

The Spotlight Team regularly evaluates descriptors used to validate content and updates definitions and terminology as appropriate. Agencies receiving the Spotlight service can give feedback any time via the Spotlight Performance Survey:

<https://forms.office.com/r/K9JpsNjKHE>

Spotlight is a data analysis service offered by IPPC Technologies that uses human verification augmented with artificial intelligence (AI) technologies to validate content captured and flagged by IPPC's monitoring and analysis solutions. Spotlight's mission is to provide agencies and officers with streamlined and verified leads, for possible intervention opportunities related to concerning behaviors, as well as, to reduce the amount of data officers ultimately need to review. For more information on IPPC and Spotlight services please call (888) WEB-IPPC, contact me directly at bkelly@ippctech.net or by calling (516)341-4201.



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