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Ashcroft v. Free Speech Coalition: How Can Virtual Child Pornography Be Banned Under the First Amendment?

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"How is it that the American judicial system is throwing women in jail for overdue library books but at the same time telling pornographers that they are free to continue to make child pornography on computers?"[1] This was the question asked by Representative Joseph R. Pitts of Pennsylvania on May 14, 2002, a month after the Supreme Court issued its opinion in *Ashcroft v. Free Speech Coalition*.[2] Representative Pitts told the story of a woman from Hazelton, Pennsylvania, who was put in jail for failing to pay fines for overdue library books.[3] He compared this woman's plight with the Supreme Court decision and noted, "[S]omething is very wrong here."[4]

Whether or not Representative Pitts's statement recognizes the complexity of the question of the constitutionality of laws regulating virtual child pornography, and whether or not it is completely logical to see a connection between stiff punishments for overdue library books and perceived leniency for makers of child pornography, the statement does illustrate the social and emotional implications of the Court's decision.[5] Without considering the reasoning behind the decision, many people feel that something must be done about virtual child pornography.[6] Ernest E. Allen of the National Center for Missing & Exploited Children[7] testified that "the Court's decision will result in the proliferation of child pornography in America, unlike anything we have seen in more than twenty years."[8] He expressed his concern that, after the Court's decision, pedophiles will still "sexually victimize children" and "photograph those acts," but that they will morph and manipulate the images so that the children are not identifiable.[9] Since a morphed image is "virtual," pornographers will avoid prosecution.[10] Certainly, it is hoped that Mr. Allen is wrong. However, in any case, an examination of the *Ashcroft* decision can demonstrate to lawmakers what they may not do in their efforts to regulate virtual child pornography.[11] Perhaps understanding what is not acceptable may shed light on what is acceptable, giving guidance to lawmakers in their efforts to regulate virtual child pornography.[12]

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1. 148 CONG. REC. H2393-01 (daily ed. May 14, 2002) (Statement of Rep. Pitts).
2. Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).
3. 148 CONG. REC. H2393-01 (daily ed. May 14, 2002) (Statement of Rep. Pitts).
4. *Id.*
5. *See id.*
6. *See Virtual Child Pornography: The Impact of the Supreme Court Decision in the Case of* Ashcroft v. Free Speech Coalition: *Hearing Before the House Subcomm. of Crime, Comm. on the Judiciary*, 107th Cong. 13-18 (2002) (testimony of Ernest E. Allen, President & Chief Executive Officer of the National Center for Missing & Exploited Children) [hereinafter Testimony of Ernest E. Allen].
7. The National Center for Missing & Exploited Children is a non-profit corporation congressionally mandated by the Children's Assistance Act of 1984. 42 U.S.C. § 5771 (1994). It works with the U.S. Department of Justice as the national resource center on the issue of missing and exploited children. Testimony of Ernest E. Allen, *supra* note 6.
8. Testimony of Ernest E. Allen, *supra* note 6.
9. *Id.*
10. *Id.*
11. *See infra* Part II.E (analyzing the *Ashcroft* decision).
12. *See infra* Part III.A (discussing Congress's amendment to the law challenged in *Ashcroft v.*

In *Ashcroft*, the Court struck down portions of the Child Pornography Protection Act (CPPA) that criminalize images that "appear[] to be" of minors engaged in sexually explicit activity for overbreadth.[13] Specifically, the Court found that the statute did not require the material to be obscene and yet the state had not shown a compelling state interest in regulating non-obscene sexual speech.[14] The result is that Congress can only regulate virtual child pornography if it is obscene.[15] However, lawmakers remain concerned that the obscenity doctrine will not be sufficient to stop the creation of virtual child pornography.[16]

This note will examine the recent Court decision in *Ashcroft*. Part I will look at the background and context of the CPPA. Part II will look at the Court's reasoning and offer alternative ways of viewing the CPPA. Part III will look at the reaction of Congress to the Court's decision, its amendment to the CPPA, and whether that amendment will pass constitutional muster. Finally, Part III will also make specific policy recommendations in line with the Court's reasoning in hopes of answering the question "how can virtual child pornography be banned under the First Amendment?"

I. BACKGROUND: OBSCENITY AND CHILD PORNOGRAPHY

In *Ashcroft*, the Court was guided by two main doctrines that could be applied to the problem of virtual child pornography: obscenity and child pornography.[17] In order to understand how these doctrines dictated the decision, it is important to look at the development of each. The progression began with *Roth v. United States*.[18]

A. Roth v. United States

In *Roth*, the Court found that obscene speech is wholly without constitutional protection.[19] Because obscene speech is without value, it merits no protection under the First Amendment.[20] In *Roth*, two defendants, Roth and Alberts, were charged and convicted under federal and California obscenity statutes, respectively.[21] Roth was convicted of mailing obscene circulars and advertising and mailing an obscene book, while Alberts was

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Free Speech Coalition, 535 U.S. 234 (2002)).

13. *Ashcroft*, 535 U.S. at 241-42, 258.
14. *Id.* at 251.
15. *Id.*
16. *See, e.g.*, 148 CONG. REC. H2393-01 (daily ed. May 14, 2002) (Statement of Rep. Pitts).
17. *Ashcroft*, 535 U.S. at 240.
18. Roth v. United States, 354 U.S. 476 (1957).
19. *Id.* at 492.
20. *Id.* at 484.
21. *Id.* at 480-81.

convicted of keeping for sale obscene and indecent books and of producing obscene advertisements for the books.[22]

The Court, in considering a First Amendment challenge to the statutes under which the defendants were convicted, relied partially on *Chaplinsky v. New Hampshire*.[23] In *Chaplinsky*, the Court had declared that certain categories of speech are wholly without protection because "it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem."[24] The Court in *Roth* concluded that obscenity is one of these categories.[25] Sexual speech no doubt has value; society may benefit from discussions of human sexuality, whether educational, political, literary, or artistic.[26] However, obscenity is "no essential part of any exposition of ideas" and is of "such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality."[27] Thus, obscenity joined ranks with libel and fighting words, "those [types of speech] which by their very utterance inflict injury or tend to incite an immediate breach of the peace," which *Chaplinsky* had concluded were without protection.[28]

In *Roth*, the Court further considered the appellants' argument that obscenity law merely punished impure thoughts, rather than that which was related to "overt antisocial conduct" and incited such conduct.[29] The background to this argument was that speech could only be regulated if it created a "clear and present danger of antisocial conduct."[30] This theory arose from *Schenk v. United States*, in which the Court had held that Congress can suppress certain types of speech if they present a clear and present danger that Congress has a right to prevent.[31] The Court in *Roth*

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22. *Id.*

23. *Id.* at 485.

24. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

25. *Roth*, 354 U.S. at 485.

26. *Id.* at 487. The Court elaborated:

> The portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to [hu]mankind through the ages; it is one of the vital problems of human interest and public concern.

Id.

27. *Id.* at 485.

28. *Chaplinsky*, 315 U.S. at 572.

29. *Roth*, 354 U.S. at 485-86.

30. *Id.* at 486.

31. Schenk v. United States, 249 U.S. 47, 52 (1919); *see also* Commonwealth v. Feigenbaum, 70 A.2d 389, 390 (Pa. 1950) (holding that an obscenity law's scope "must be defined with regard to the universal right of free speech [or press], as limited only by some universally valid restriction required by a clear and present danger"). Justice Warren also took the clear and present danger approach in his concurrence in *Roth*. *See Roth*, 354 U.S. at 495 (Warren, J., concurring). Without using the language "clear and present danger," Justice Warren concluded that "[p]resent laws depend largely upon the effect that the materials may have upon those who receive them." *Id.*

concluded, however, that no clear and present danger needed to be shown.[32] Because the speech was wholly without value and therefore without protection, it was immaterial whether it incited any particular conduct.[33] Implicit in the Court's holding, that it was not necessary to show a clear and present danger, was the conclusion that no clear and present danger could be shown.[34]

Ultimately, the Court concluded that the standard to be applied in obscenity cases is whether "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."[35]

B. Miller v. California

Roth's obscenity standard, however, was refined in *Miller v. California*, which provides the current obscenity test.[36] In *Miller*, the appellant mass mailed advertisements for the sale of illustrated "adult" books.[37] Subsequent to *Roth*, in *Memoirs v. Massachusetts*, the Court had refined the obscenity test to require three elements: (1) the dominant theme of the speech, taken as a whole, appeals to a prurient interest in sex; (2) the speech is patently offensive as affronting contemporary community standards; and (3) it is "utterly without redeeming social value."[38] In *Miller*, the Court rejected the third prong of this test, "utterly without redeeming social value."[39] This

32. *Roth*, 354 U.S. at 486.

33. *Id.*

34. *See id.* at 501 (Harlan, J., concurring) ("There is a large school of thought, particularly in the scientific community[,] which denies any causal connection between the reading of pornography and immorality, crime, or delinquency."); *accord* William B. Lockhart & Robert C. McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 MINN L. REV. 295 (1954). In considering the effects of obscenity on conduct, Lockhart and McClure concluded, notwithstanding the ambiguities as to what type of conduct would be sufficiently antisocial, that there was a "doubtful assumption that a causal relationship exists between reading a book that suggests or incites sexual *thoughts* and the *conduct* of the reader, a proposition on which there is little or no reliable information." *Id.* at 332-33 (emphasis added). Moreover, the authors concluded that, to the extent that courts had tacitly assumed that sexual thoughts translate into action, the assumption was of "doubtful validity." *Id.* at 333.

35. *Roth*, 354 U.S. at 489.

36. Miller v. California, 413 U.S. 15 (1973). The Court struggled with the definition of obscenity for fifteen years. New York v. Ferber, 458 U.S. 747, 754 (1982). During this period, the Court held firm to the holding in *Roth* that there is a legitimate state interest in prohibiting obscenity while at the same time recognizing the "inherent dangers of undertaking to regulate any form of expression." *Id.* at 755 (quoting *Miller*, 413 U.S. at 23). The struggle over the definition illustrates this difficulty and the Court's attempt to strike an appropriate balance. *Id.*

37. *Miller*, 413 U.S. at 17.

38. Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966).

39. *Miller*, 413 U.S. at 24-25 ("We do not adopt as a constitutional standard the 'utterly without redeeming social value' test of Memoirs v. Massachusetts."). The Court in *Miller* further pointed out that the *Memoirs* test was the result of a plurality opinion in which only three Justices had joined. *Id.* at 21.

prong was unworkable, requiring the "prosecution to prove a negative," which was a "burden virtually impossible to discharge under our criminal standards of proof."[40] Rather, the Court adopted a different three-prong test: [1] whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; . . . [2] whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and [3] whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[41]

The Court also considered whether use of a national or state standard was more appropriate in determining whether the work appeals to the prurient interest.[42] The Court concluded that a national standard would be unworkable; the nation is too large and diverse for a national consensus to be reached.[43] Therefore, whether a work appeals to the prurient interest is a question of fact based on the locality of the jury.[44] Further, the Court noted, "[i]t is neither realistic nor constitutionally sound" to interpret the Constitution so that "people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City."[45] The assumption underlying this statement appears to be that people in Maine or Mississippi may have more stringent standards for what appeals to the prurient interest than people in Las Vegas or New York, and therefore may find some works obscene that would not be obscene in those cities.[46]

Interestingly, the Court drew this conclusion while at the same time intending to stay true to another proposition from *Roth*: that the material be judged by its impact on the average person rather than by its impact on a "particularly susceptible or sensitive person."[47] Under the *Miller* standard, while the material is no longer judged by the most susceptible person, it is now effectively judged by the most susceptible community, given the national distribution of many works.[48] However, the Court rejected this argument, concluding that, even under the "national criteria," there would be some works that would be acceptable in some places but not in others.[49]

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40. *Id.* at 22.

41. *Id.* at 24 (quoting Roth v. United States, 354 U.S. 476, 489 (1957)).

42. *Id.* at 30-34.

43. *Id.* at 30.

44. *Id.* The Court made this statement notwithstanding the general proposition that, under the United States Constitution, First Amendment limitations on the powers of the states should not vary from community to community. *Id.*

45. *Id.* at 32.

46. *See id.*

47. *Id.* at 33. This proposition was a rejection of a doctrine originating in *Regina v. Hicklin*, 3 Q.B. 360 (1868). The *Hicklin* test judged obscenity by the effect of isolated passages upon the most susceptible persons. Roth v. United States, 354 U.S. 476, 488-89 (1957). The use of the community standard is meant to provide a more balanced approach so as not to make the test too restrictive. *Id.*

48. *Miller*, 413 U.S. at 32-33 n.13. This argument is especially true when considering works that are distributed over the internet and therefore, necessarily, internationally. *See* Dennis W. Chiu, *Obscenity on the Internet: Local Community Standards for Obscenity are Unworkable on the Information Superhighway*, 36 SANTA CLARA L. REV. 185 (1995).

49. *Miller*, 413 U.S. at 32-33 n.13. The Court also rejected the argument that a community

C. New York v. Ferber

The specific question of child pornography was decided in *New York v. Ferber*.[50] In *Ferber*, a bookstore owner was convicted under a New York statute that prohibited the knowing promotion of a sexual performance by a child under age sixteen by distributing material that depicted such a performance.[51] The Court concluded that the statute was constitutional even though it did not require the material to be obscene.[52] The Court reasoned that "prevention of sexual exploitation and abuse of children" constitutes a government objective of great importance.[53] Children were harmed in the making of the pornography, and there is a compelling state interest in ending this harm.[54] Additionally, the Court concluded that distribution of child pornography can be punished because the material depicting the minors leaves a permanent record of the child's participation in the harm that is exacerbated by distribution and, in order to cut off the creation of child pornography, the distribution channels of pornography have to be cut off.[55] The Court concluded that it is not necessary for the state to show the material is obscene because the relevant question is not whether the work meets the test for obscenity under *Miller*, but whether a child was harmed in the process of making the material.[56] Finally, the Court concluded that the value of permitting depictions of "children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*."[57] If necessary for the literary, artistic, or scientific merit of the work, an older person who looks younger can be used or mere simulations of the acts outside the prohibitions of the statute can be employed.[58]

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standard impairs the flow of interstate commerce: "Obscene material may be validly regulated by a State . . . to protect the general welfare of its population despite some possible incidental effect on the flow of such materials across state lines." *Id.*

50. New York v. Ferber, 458 U.S. 747 (1982).

51. *Id.* at 750-51.

52. *Id.* at 756.

53. *Id.* at 757.

54. *Id.* at 758.

55. *Id.* at 759. The theory is that production of child pornography will continue until the market for the material dries up and severe criminal penalties are imposed on those who sell, advertise, or otherwise promote the product. *Id.* at 760. "The advertising and selling of child pornography provide an economic motive" for the illegal production of such materials. *Id.* at 761.

56. *Id.* "'It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value.'" *Id.* (citation omitted). Additionally, a "sexually explicit depiction need not be 'patently offensive' in order to have required the sexual exploitation of a child for its production." *Id.*

57. *Id.* at 762.

58. *Id.* at 762-63.

D. Osborne v. Ohio

After *Ferber*, the Court concluded that the possession of child pornography can also be criminalized in *Osborne v. Ohio*.[59] In this case, the appellant was convicted after police found four photographs in the appellant's home.[60] In *Stanley v. Georgia*, the Court had held that the state cannot criminalize private possession of obscene material; to do so impinges on a person's "right to receive information in the privacy of his home, and [the] justifications for [the] law [are] inadequate."[61] However, in *Osborne*, the Court noted that "*Stanley* was a narrow holding," and that the state interests in regulating possession of child pornography are greater than the interests in regulating obscenity.[62] First, rather than expressing concern with public morality, the concern is to protect victims of child pornography.[63] Second, as in *Ferber*, the Court reasoned that curbing possession would curb the market for and therefore the production of child pornography.[64] Finally, evidence suggested "that pedophiles use child pornography to seduce other children into sexual activity."[65] The Court described these interests as grave.[66]

E. Background to the CPPA

While the creation, distribution, and possession of child pornography have been held to be unprotected speech, technological advances have begun to obviate the need to use real children.[67] While child pornography is proliferating, these technological advances only exacerbate the problem, as more people have access to the material through the internet.[68] Computers

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

60. *Id.* at 107.

61. Stanley v. Georgia, 394 U.S. 557, 564-68 (1969).

62. *Osborne*, 495 U.S. at 108.

63. *Id.* at 109.

64. *Id.* at 109-10.

65. *Id.* at 111. There was nothing in the opinion that suggested that this rationale alone would be sufficient to justify the holding. *See id.* It was additional to the market deterrence and victim protection rationales. *See id.*

66. *See id.*

67. Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439, 439 (1997).

68. *See, e.g.*, Maimon Alan, *New Initiatives Needed to Fight Child Porn, Officials Say U.S. Attorney Wants United Effort Against Exploitation Via Web*, COURIER J., Dec. 6, 2002, at B; Jerry Seper, *Blue Ridge Team Nabs Pedophiles*, WASH. TIMES, July 15, 2002, at B1 (reporting that there are over 100,000 web sites devoted to child pornography as well as countless chat rooms and message boards); Rebecca Allison, *Child Porn Websites Trigger 36 Arrests*, THE GUARDIAN, May 21, 2002, at P5 (noting that "[p]eople who access child pornography are fueling the widespread and often organised [sic] sexual abuse of children by peadophiles [sic] across the world"). Some have argued that computers are even the primary means of distributing child pornography. *See* John C. Scheller, Note, *PC Peep Show: Computers, Privacy, and Child Pornography*, 27 J. MARSHALL L. REV. 989, 990 (1994). Additionally, the problem is international in scope. *See* Scott Dean, *Cyberspace: The Final Frontier*, PA. L. J., Apr. 12, 1993, at A-1. Finally, for a thorough and compelling discussion of child pornography on the internet, how it is accessed, and the current law enforcement problems in this area, see PHILIP JENKINS, BEYOND TOLERANCE: CHILD PORNOGRAPHY

have also allowed a revolution in the creation of child pornography.[69] It is no longer necessary to use a real child—rather, images can be created via computer.[70] As a response to these developments, Congress passed the CPPA in 1996.[71] While the act retained a provision against the types of depictions forbidden in *Ferber*, it also added three provisions—those that were ultimately at issue in *Ashcroft*.[72]

II. *ASHCROFT V. FREE SPEECH COALITION*: THE COURT CONSIDERS A FIRST AMENDMENT CHALLENGE TO THE CPPA.

In *Ashcroft*, the Free Speech Coalition, a California trade association for the adult entertainment industry, a publisher of a book promoting the nudist lifestyle, a painter of nudes, and a photographer specializing in erotic images brought a pre-enforcement challenge to the CPPA.[73] Specifically, they challenged two provisions of the CPPA. First, they challenged 18 U.S.C. § 2256(8)(B), which prohibited "'any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture'" that "'is, or *appears to be*, of a minor engaging in sexually explicit conduct.'"[74] This provision captured not only computer-generated images, or "virtual child pornography," but also images created by more traditional means, such as paintings, and those images that appear to be of children, but are, in fact, of adults.[75] The second challenge was to 18 U.S.C.

ON THE INTERNET (2001).

69. Burke, *supra* note 67, at 439.

70. *Id.* Morphed images of real children (as opposed to virtually created images) have been the focus of some scholarship. *See* Burke, *supra* note 67, at 440-41. However, the Court in *Ashcroft* upheld the provision of the CPPA regulating these images (and it was not challenged) because they "implicate the interests of real children and are in that sense closer to the images in *Ferber*." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 241 (2002). However,

> new photographic and computer imaging technologies make it possible to produce by electronic, mechanical, or other means, visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from untouched photographic images of actual children engaging in sexually explicit conduct.

18 U.S.C. § 2251 (2000), Cong. Finding 5.

These images are not just altered images, but images wholly created by computer. *Id.* at Cong. Finding 6(B); *see also* United States v. Hilton, 167 F.3d 61, 65 (1st Cir. 1999) (stating that pornographic images may be derived from a simple cartoon character or high-resolution image resembling a real child). They may also include images of adults altered to look like children. *See* Burke, *supra* note 67, at 440-41. Images using youthful-looking adults were also at issue in *Ashcroft*. *Ashcroft*, 535 U.S. at 241 (O'Connor, J., concurring and dissenting in part).

71. *See* 18 U.S.C. § 2252 (2000), Cong. Findings 1-13; *see also* 148 CONG. REC. S4389-01 (daily ed. May 15, 2002) (statement of Sen. Carnahan) (discussing the problems with virtual child pornography and why the CPPA was passed).

72. *Ashcroft*, 535 U.S. at 241.

73. *Id.* at 242.

74. *Id.* at 241 (emphasis added) (quoting 18 U.S.C. § 2256(8)(B) (2000)).

75. *Id.*

§ 2256(8)(D).[76] This provision defined child pornography as any sexually explicit image that is "'advertised, presented, described, or distributed in such a manner that conveys the impression'" [that] it depicts "'a minor engaging in sexually explicit conduct.'"[77] This provision was aimed at pandering, but the Court concluded that it even punished those who possess the pornography but took no part in the pandering.[78] The provisions were challenged as overbroad.[79]

A. Majority Opinion

Writing for the majority, Justice Kennedy, with whom Justices Stevens, Souter, Ginsberg, and Breyer joined, found the first provision was overbroad first because it did not require the material to be obscene as required under *Miller*.[80] The majority reasoned that, without requiring obscenity, any material that shows what appears to be juveniles in sexually explicit activity may be subject to criminal prosecution, including works that are innocent, such as a picture in a psychology manual and a movie depicting the horrors of sexual abuse.[81] Additionally, the Court found that there are many works of artistic value that could be subject to the law, such as the critically-acclaimed, award-winning films *American Beauty* and *Traffic*.[82] The Court concluded that whether or not these films did in fact violate the CPPA, they were within the "wide sweep" of the CPPA's prohibitions.[83] While, under obscenity law, the entire work is considered to determine whether or not it has literary, artistic, or scientific value, under the CPPA the presence of one sexually explicit scene could bring the work within the statute's reach.[84]

Next, the Court found that the provision was overbroad because, while under *Ferber*, child pornography was not required to be obscene, this was due to the fact that that provision was aimed at how the work was created, not at its content.[85] Under *Ferber*, even if a work has value, if it exploits children, it is not permitted.[86] However, when virtual child pornography is created, no actual children are harmed in its making.[87] Additionally, the Court concluded that the sexually explicit images of children are not by

76. *Id.*

77. *Id.* (quoting 18 U.S.C. § 2256(8)(D) (2000)).

78. *Id.*

79. *Id.* at 243. Another provision of the CPPA that prohibited morphing images of real children into sexual positions was not challenged. *Id.*

80. *Id.* at 243-46.

81. *Id.* at 246.

82. *Id.* at 247-48. *American Beauty* won the Academy Award for Best Picture in 2000. *Traffic* was nominated for Best Picture in 2001. *Id.*

83. *Id.*

84. *Id.* at 248.

85. *Id.* at 249.

86. *Id.*

87. *Id.* at 250. "Virtual child pornography is not 'intrinsically related' to the sexual abuse of children, as were the materials in *Ferber*." *Id.* (quoting New York v. Ferber, 458 U.S. 747, 759 (1982)).

definition without value, and that, in fact, *Ferber* acknowledged that if such images do have value, they can be created using youthful-looking adults.[88] In short, the Court determined that *Ferber's* justifications do not apply to virtual child pornography, and so *Ferber* could not be used to offer support to the CPPA.[89]

After finding that the previous justifications for prohibiting child pornography—obscenity and abuse of children—were not required by the CPPA, the Court considered alternative justifications for regulating virtual child pornography.[90]

First, the government argued that the CPPA was "necessary because pedophiles may use virtual child pornography to seduce children."[91] The Court rejected this argument as insufficient to justify the prohibition on speech.[92] The Court concluded that, although the government can punish adults who show these materials to children,[93] speech that is "within the rights of adults to hear may not be silenced completely in an attempt to shield children from it."[94] The Court concluded that basing the prohibitions on the possibility that the material will be seen by children would result in reducing the adult population to viewing only material that is fit for children, and that the Court has repeatedly disallowed such a result.[95]

Second, the government argued that virtual child pornography, like real child pornography, can "whet[] the appetites of pedophiles and encourage[] them to engage in illegal conduct."[96] However, the Court stated that the causal connection between the speech and the illegal conduct was not

88. *Id.*

89. *Id.* at 250. The Court stated, "*Ferber*, then, not only referred to the distinction between actual and virtual child pornography, it relied on it as a reason supporting its holding. *Ferber* provides no support for a statute that eliminates the distinction and makes the alternative mode criminal as well." *Id.*

90. *Id.* The Court explained that "[t]he CPPA, for reasons we have explored, is inconsistent with *Miller* and finds no support in *Ferber*. The Government seeks to justify its prohibitions in other ways." *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 251-52; *see also* Ginsberg v. New York, 390 U.S. 629 (1968) (upholding punishment of a storeowner who sold a "girlie" magazine to a sixteen-year-old in violation of a state statute).

94. *Ashcroft*, 535 U.S. at 252; *see also* Sable Communications, Inc. v. FCC, 492 U.S. 115 (1957) (refusing to allow prohibition of adult communication simply because it could be harmful to children).

95. *Ashcroft*, 535 U.S. at 252-53; *see* United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000) (striking down statute that required cable television providers to either scramble adult programming or limit it to certain hours unless it was the least restrictive means of preventing children from seeing or hearing adult material); Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997) (striking down statute aimed at protecting children from harmful materials on the internet); Butler v. Michigan, 352 U.S. 380 (1957) (striking down statute that prohibited making available to the general public a book with a potentially negative influence on youth).

96. *Ashcroft*, 535 U.S. at 253.

sufficient.[97] The Court concluded that the best way to deter illegal activity is to punish the activity, but that there can be no restraints on a person's thoughts because of the indefinite possibility that that person may at some time engage in illegal conduct as a result of the thoughts.[98]

Third, the government argued that the "objective of eliminating the market for pornography produced using real children necessitates a prohibition on virtual images as well."[99] This is because virtual and real images are "part of the same market"—the creation of one promotes the creation of the other.[100] The Court quickly rejected this argument as "implausible."[101] It concluded that "[i]f virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice."[102]

Finally, the government argued that, because of the similarity between real and virtual images, prosecution of real pornography would be more difficult.[103] Even experts may have trouble telling the difference between a real and a virtual image, so a pornographer could simply defend against a charge by arguing that the image is virtual.[104] However, the Court concluded that protected speech could not be limited so as to eliminate unprotected speech.[105] The government pointed to an affirmative defense within the CPPA that allowed the defendant "to avoid conviction for nonpossession offenses by showing the materials were produced using only adults" and it was not pandered as child pornography; the government argued, essentially, that the burden of proof was simply shifted.[106] Aside from the constitutional concerns with requiring a defendant to prove speech is protected, the Court concluded that this affirmative defense was insufficient because it could not be invoked by possessors or by those who use computer-imaging or other means that do not involve the use of

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97. *Id.*

98. *Id.* at 253-54.

99. *Id.* at 254.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 255. In fact, the Court pointed out the opposite may be true. *Id.* "The possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted." Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

106. *Ashcroft*, 535 U.S. at 255-56; *see* 18 U.S.C. § 2252A(c) (2000). This statute reads:

> It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3), or (4) of subsection (a) that (1) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; (2) each such person was an adult at the time the material was produced; and (3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.

Id.

youthful-looking adults.[107] The Court, however, by its language, left open some possibility that an affirmative defense could be sufficient if properly drafted.[108]

After finding that the "appears to be" provision of § 2256(8)(B) was overbroad, the Court considered the challenge to § 2256(8)(D).[109] The Court found that the provision did not consider the content beyond requiring that it be sexually explicit; it did not even have to involve minors if it was presented as being of minors.[110] The legislature had presented no findings relating to how images can be harmful simply by being pandered as child pornography.[111] The Court stated that, while pandering can be relevant as to whether something is obscene,[112] § 2256(8)(D) prohibited a substantial amount of speech that did not fall within that rationale.[113] Possessors of pandered material could be criminally liable for possession even though they had no role in how the work was presented; even if the possessor knew the material was mislabeled, possession would still be a crime.[114] The Court concluded that "[t]he First Amendment requires a more precise restriction."[115]

B. Justice Thomas's Concurrence

Justice Thomas stated that the best rationale offered for the CPPA was that prosecutions may be thwarted because virtual child pornography is indistinguishable, even by experts, from real pornography.[116] He concluded that, although at that point the government had not shown with facts that this was a real problem, "technology may evolve to the point where it becomes impossible to enforce actual child pornography laws."[117] In this case, Justice

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107. *Ashcroft*, 535 U.S. at 255-56.

108. *Id.* at 256 ("Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and insufficient, even on its own terms.").

109. *Id.* at 257. See *supra* text accompanying note 77 for the language of the statute.

110. *Id.* at 257.

111. *Id.*

112. *Id.*; *see also* Ginzburg v. United States, 383 U.S. 463 (1966). In *Ginzburg*, the publications in question were not themselves obscene. *Id.* at 465 n.4. Rather, the Court found that the "setting in which the publications were presented" could be a relevant aid to determining whether a work was obscene. *Id.* at 465-66. In considering the setting, the Court determined that the works were pandered and that "[w]here the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity." *Id.* at 470. The Court was concerned that a work that is presented to appeal to the prurient interest may escape prosecution by the defendant simply devising some literary, artistic, or scientific value as a pretext. *Id.*

113. *Ashcroft*, 535 U.S. at 258.

114. *Id.*

115. *Id.*

116. *Id.* at 259 (Thomas, J., concurring).

117. *Id.* The government did not point to any cases where a defendant had been acquitted by claiming the image was virtual. *Id.*

Thomas concluded that an affirmative defense or "some other narrowly drawn restriction" may suffice.[118]

In response to the Court's conclusion that lawful speech cannot be suppressed to deter or punish unlawful speech,[119] Justice Thomas countered, "the Government may well have a compelling interest in barring or otherwise regulating some narrow category of 'lawful speech' in order to enforce effectively laws against pornography made through the abuse of real children."[120] Noting that the Court left open the possibility of a more complete affirmative defense, Justice Thomas concluded that this contained the implicit assumption that there may be a constitutional way to regulate virtual child pornography.[121] Further, he did not necessarily believe that an affirmative defense was the only constitutional alternative.[122]

C. Justice O'Connor's Concurrence and Dissent in Part

In Justice O'Connor's view, there are two categories of virtual child pornography within the reach of the statute—that which uses youthful-looking adults and that which is computer generated.[123] Justice O'Connor agreed with the Court that the prohibition as it applied to youthful-looking adults was overbroad because there are many materials possessing serious artistic, literary, or political value that may fall under the statute.[124] However, she concluded that computer-generated virtual child pornography can be banned.[125] Specifically, she relied on the narrow scope of the overbreadth doctrine.[126] Justice O'Connor argued that, given the compelling

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118. *Id.*

119. *See supra* notes 103-08 and accompanying text.

120. *Ashcroft*, 535 U.S. at 259.

121. *Id.*

122. *Id.*

123. *Id.* at 261 (O'Connor, J., concurring and dissenting in part). Section 2256(8)(B) itself does not make this distinction. 18 U.S.C. § 2256(8)(B) (2000). However, there are other areas of the CPPA where this distinction is made. *See* 18 U.S.C. § 2252A(c) (2000). The affirmative defense is available only for those who are charged in relation to materials made using subjects who are actually adults. *Ashcroft*, 535 U.S. at 267.

124. *Ashcroft*, 535 U.S. at 267; *see supra* notes 80-84 and accompanying text. Justice O'Connor agreed with the majority that these materials would fall within the reach of the CPPA. *Ashcroft*, 535 U.S. at 262.

125. *Ashcroft*, 535 U.S. at 262.

126. *Id.* Both the majority and Justice O'Connor looked to *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), for guidance regarding the overbreadth doctrine. *Id.* at 255. In *Broadrick*, the Court concluded that the traditional rules of standing are altered in First Amendment cases—there is no requirement that the person attacking the statute demonstrate that the statute has been enforced against him or her in an unconstitutional way. *Broadrick*, 413 U.S. at 612. The rationale for this change in the rules of standing was that the very possibility of enforcement could cause a person to refrain from constitutionally protected speech. *Id.* The Court described several different types of overbreadth challenges: (1) statutes that "by their terms, seek to regulate 'only spoken words,'" where the Court prefers some speech to go unpunished rather than curb lawful speech; (2) where rights of association are burdened; (3) and where time, place, and manner restrictions require official approval under laws that "delegate[] standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights." *Id.* at 612-13. When the result of these challenges is the state's inability to apply the statute at all unless a limiting

interest in protecting children that was made clear in *Ferber*, the congressional findings that pornographic images "whet the appetites of child molesters" and that such images can be used to seduce young children justify the ban.[127] Justice O'Connor was most concerned with the possibility that prosecutors may not be successful because of a defense that the image is virtual.[128] Justice O'Connor was especially concerned with "the rapid pace of advances in computer-graphics technology."[129] While Justice Thomas found it dispositive, at least in this particular case, that no defendant had successfully employed the defense,[130] Justice O'Connor was less bothered by these facts, noting that "this Court's cases do not require Congress to wait for harm to occur before it can legislate against it."[131]

In response to the argument that many works that fall outside these justifications were still within the definition of the statute, and so the statute was not narrowly tailored, Justice O'Connor argued that a more appropriate interpretation of the words "appears to be" is "virtually indistinguishable from."[132] While sexually explicit cartoons, sketches, or statues may "appear to be" of minors, these images are not likely to seduce children or produce difficulties for prosecutors.[133] However, all those works that are "virtually indistinguishable" from real child pornography surely will pose these dangers.[134] Justice O'Connor further noted that this interpretation of the language is consistent with congressional intent and findings.[135] Justice O'Connor finally noted that, given the narrow nature of the overbreadth doctrine, it was up to the challengers to show that a "substantial amount of valuable or harmless speech" would still be threatened with this interpretation.[136] She concluded that the respondents had provided no examples of works that had serious value or did not facilitate child abuse

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instruction is given, the Court should use the doctrine sparingly because it is "strong medicine." *Id.* at 613. The Court held, therefore, that in order to protect the legitimate sweep of a statute, a statute should not be struck down unless the overbreadth is real and substantial in relation to the legitimate sweep of the statute, and unless the overbreadth cannot be cured by case-by-case analysis of the facts or a limiting instruction. *Id.* at 613, 615-16.

127. *Ashcroft*, 535 U.S. at 263 (O'Connor, J., concurring and dissenting in part).

128. *Id.*

129. *Id.*

130. *See supra* notes 116-22 and accompanying text; *see also* United States v. Fox, 248 F.3d 394 (5th Cir. 2001) (rejecting the "mistake of fact" defense); United States v. Vig, 167 F.3d 443 (8th Cir. 1999) (rejecting defendant's argument that the prosecution failed to show the images were of a real child); United States v. Kimbrough, 69 F.3d 723 (5th Cir. 1995) (finding no error in refusal to give jury instructions that they must find the image to be of a real minor).

131. *Ashcroft*, 535 U.S. at 264 (O'Connor, J., concurring and dissenting in part).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 265.

under this interpretation.[137]

D. Chief Justice Rehnquist's Dissent

Chief Justice Rehnquist concurred with Justice O'Connor that "Congress has a compelling interest in ensuring the ability to enforce prohibitions of actual child pornography" and that the Court should defer to Congress's findings regarding the coming changes in technology.[138] However, with regard to materials depicting youthful-looking adults, Chief Justice Rehnquist was convinced that the CPPA "need not be construed to reach such materials."[139]

Chief Justice Rehnquist agreed with Justice O'Connor both that *Broadrick* should be applied only in limited situations and that, when a limiting instruction can cure the overbreadth, such an instruction should be employed rather than striking down the entire statute.[140] With regard to § 2256(8)(B), Chief Justice Rehnquist concluded that the words "sexually explicit conduct"[141] could be construed to reach only the "hard core of child pornography."[142] This way, the majority and Justice O'Connor's concern over simulated images in works with literary or artistic value could be cured.[143] When read in this limited way, the CPPA would ban "visual depictions of youthful-looking adult actors engaged in *actual* sexual activity; mere *suggestions* of sexual activity, such as youthful-looking adult actors squirming under a blanket, are more akin to written descriptions than visual depictions and thus would fall outside the purview of the statute."[144] Chief Justice Rehnquist found that this understanding of the CPPA is consistent with congressional intent: the "simulated" in the definition just means that which is "made to look genuine."[145] Chief Justice Rehnquist finally concluded that another strength of this reasoning is that experience proves this to have been the understanding of the statute.[146] If the makers of *American Beauty* and *Traffic* had been concerned about the reach of the

137. *Id.* at 266. Justice O'Connor also concurred with the Court that the pandering provision should be struck down because "the [g]overnment fail[ed] to explain how this ban serves any compelling state interest." *Id.* at 262.

138. *Id.* at 267 (Rehnquist, C.J., dissenting).

139. *Id.* at 268. Chief Justice Rehnquist shared Justice O'Connor and the majority's concern that these types of depictions may have serious literary or artistic value. *Id.*

140. *Id.*

141. In 18 U.S.C. § 2256(2), "sexually explicit conduct" is defined as "actual or simulated . . . sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; . . . bestiality; . . . masturbation; . . . sadistic or masochistic abuse; . . . or lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. § 2256(2) (2000).

142. *Ashcroft*, 535 U.S. at 269 (Rehnquist, C.J., dissenting).

143. *Id.* at 269-70.

144. *Id.* at 269.

145. *Id.* As evidence of this, the Chief Justice cited *United States v. Hilton*, 167 F.3d 61, 72 (1999), *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1102 (9th Cir. 1999) (Ferguson, J., dissenting), and S. REP. NO. 104-358, pt. I, p.7 (1996). *Id.*

146. *Ashcroft*, 535 U.S. at 271.

statute, the films "would not have been made the way they were;" rather, their speech would have been "chilled" by the statute's broad applications.[147]

Chief Justice Rehnquist next considered § 2256(8)(D), concluding that, like § 2256(8)(B), the provision could be limited so that it would be constitutional.[148] "Conveys the impression" could be limited to apply only to the "sordid business of pandering" that has been found to be without First Amendment protection.[149] In response to the majority and Justice O'Connor's argument that even possession by someone who had no role in the pandering would be punishable, Chief Justice Rehnquist looked to *United States v. X-Citement Video, Inc.*,[150] which requires that possession be "knowing."[151] He concluded that the "knowing" requirement could be applied here as well, and the CPPA construed to criminalize only "the knowing possession of materials actually containing visual depictions of real minors engaged in sexually explicit conduct, or computer generated images virtually indistinguishable from real minors engaged in sexually explicit conduct."[152]

In short, Chief Justice Rehnquist thought that, consistent with the limited nature of the holding in *Broadrick*, each of the majority's and Justice O'Connor's concerns with the CPPA could be cured by limiting the reach of its provisions.[153]

E. The Reasoning of the Justices: Considerations and Critique

The crux of the debate between the majority, the concurrences, and the dissent is two-fold: whether the interests asserted by the government are sufficient to justify the CPPA and how the scope of the CPPA should be defined.[154] Justices Thomas and O'Connor and Chief Justice Rehnquist did not take issue with the proposition that *Miller* and *Ferber* do not justify the CPPA.[155] Rather, they took issue (Justice Thomas to a lesser extent) with the majority's conclusion that there are no compelling state interests behind the CPPA besides those advanced in *Miller* and *Ferber*.[156] Although the asserted interest most persuasive to most Justices was the interest in prosecuting real child pornography, there are further concerns, unaddressed

147. *Id.*
148. *Id.*
149. *Id.* (quoting Ginzburg v. United States, 383 U.S. 463, 467 (1966)).
150. United States v. X-Citement Video, Inc., 513 U.S. 64 (1994).
151. *Ashcroft*, 535 U.S. at 273 (citing *X-Citement Video*, 513 U.S. at 77-78).
152. *Id.*
153. *Id.*
154. *See Ashcroft*, 535 U.S. 234.
155. *Id.* at 259-60, 262, 267-73
156. *See id.* at 259, 263, 273.

by any of the Justices, with regard to the other interests.[157] Perhaps there are interests in regulating virtual child pornography aside from its effect on real pornography; perhaps it is an evil unto itself.[158] Whether the other asserted interests may in fact be compelling is a question that must at least be asked.

1. The Seduction of Children

Only two opinions addressed the seduction of children argument, the majority's and Justice O'Connor's.[159] Perhaps this indicates that this argument was not taken too seriously.[160] However, the support the majority offered does not necessarily point to the result. The main basis for the majority's rejection of the seduction of children argument was *Sable Communications v. FCC*.[161] In *Sable Communications*, the government sought to impose a ban on indecent and obscene interstate commercial telephone messages, known as "dial-a-porn."[162] The Court found that there *is* a compelling interest in shielding children from "dial-a-porn" messages: "We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards."[163] The problem with the statute in *Sable Communications* was not that there was no interest in keeping children from hearing the messages; rather, it was that the particular statute was not narrowly tailored because it also shielded adults from the materials completely separate and apart from the possible reach of children.[164] In *Ashcroft*, the Court relied on this case to show that "speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it."[165]

However, this does not lessen the state's interest in shielding children from that speech; it simply means the statute must be more narrowly tailored.[166] In *Sable Communications*, an affirmative defense was suitable for this purpose.[167] A previous version of the bill at issue in *Sable Communications* had allowed the defendant to show, as an affirmative

157. *See infra* Part II.E.1 through II.E.7 for a discussion of the considerations that the Justices did not address.

158. *See, e.g.*, Burke, *supra* note 67, at 466 (pointing out that virtual pornography may be more effective than real pornography in seducing children because it can be customized using pictures of the child's friends); discussion *infra* Part II.E.2 (discussing the process by which pedophiles become socialized to believe that the acquisition and development of pornography is normal).

159. *Ashcroft*, 535 U.S. at 250-52. Justice O'Connor only mentions it in passing. *See id.* at 260 (O'Connor, J., concurring and dissenting in part).

160. *See id.*

161. *Ashcroft*, 535 U.S. at 252.

162. Sable Communications, Inc. v. FCC, 492 U.S. 115, 118 (1989).

163. *Id.* at 126.

164. *Id.*

165. *Ashcroft*, 535 U.S. at 252.

166. *See Sable Communications*, 492 U.S. at 126 (noting that the government has a compelling interest in protecting minors, but that the government must do so through "carefully tailored" means).

167. *Id.* at 120-21.

defense, that the defendant restricted access to the messages to adults only in accordance with FCC procedures.[168] The Court found that the FCC procedures "were a satisfactory solution to the problem of keeping indecent dial-a-porn messages out of the reach of minors."[169] Therefore, *Sable Communications* seems to stand more for the proposition that an affirmative defense can cure overbreadth than for the proposition that the interest itself is not sufficient.[170]

The majority further looked to *Butler v. Michigan* to show that the state's interest in stopping the seduction of children is not a sufficient interest to justify the statute.[171] In *Butler*, the statute in question made it an offense to make materials that had a potentially harmful influence on minors available to the general public.[172] As in *Sable Communications*, the Court found that what adults were permitted to see and hear could not be limited because of its effect on children.[173]

However, the problem with looking to both *Butler* and *Sable Communications* is that neither truly addresses the harm that concerned the government and led to the passage of the CPPA.[174] In both *Butler* and *Sable Communications*, the concern seems to be how the materials will affect children's mental and moral health; the concern is essentially the influence on children and their minds.[175] In *Ashcroft*, the statute's concern with the "seduction of children" does not seem to be that children will be exposed to sex, but that they will be the victims of sex.[176] Anne M. Coughlin[177] testified before the Senate that the nomenclature of

> abuse, exploitation, enticement, seduction—is sensible and balanced, but it does not fully capture the core harm to children that

168. *Id.*

169. *Id.* at 128.

170. *See id.* at 126-28. For example, an affirmative defense that would limit the scope of the CPPA in this way could require a showing that the materials in question could not be used for the seduction purpose. *See Ashcroft*, 535 U.S. at 252 ("The evil in question depends upon the actor's unlawful conduct."). Justice O'Connor stated that cartoon sketches or statues of children that are sexually suggestive cannot be used to seduce children. *Id.* at 264 (O'Connor, J., concurring and dissenting in part). Justice O'Connor gave no explanation for why this is true. *See id.* See *infra* notes 200-05 and accompanying text for a discussion of this argument.

171. *Ashcroft*, 535 U.S. at 252.

172. Butler v. Michigan, 352 U.S. 380, 380 (1957).

173. *Id.* at 383-84.

174. *Compare Sable Communications*, 492 U.S. at 126 (noting that there is a legitimate interest in "protecting children from exposure to indecent dial-a-porn messages") *and Butler*, 352 U.S. at 383 (noting a governmental concern regarding written materials that might be harmful to children), *with Ashcroft*, 535 U.S. at 251.

175. *Sable Communications*, 492 U.S. at 126; *Butler*, 352 U.S. at 383.

176. *See Stopping Child Pornography: Protecting Our Children and the Constitution: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2002) (statement of Anne M. Coughlin) [hereinafter Statement of Anne M. Coughlin].

177. Anne M. Coughlin is a Professor of Law at the University of Virginia School of Law. *Id.*

> the criminal law here[178] aims to deter and punish. The harm involved in many of these cases is not merely sexual exploitation or seduction or (even) abuse. Rather, the harm is rape . . . [T]he people who use pornographic images to convince children to have sex with them are raping those children.[179]

When looked at this way, pornography takes the form more of a weapon—something used to facilitate and make crimes possible—than something that is merely a negative influence on children.[180] The children, no matter what occurs after viewing the material, are not the actors in this situation.[181] Rather, the actors are the adults who victimize them.[182] The question then becomes whether the government may not only "punish adults who provide unsuitable materials to children,"[183] but also limit adults' access to and ability to produce "weapons" that consist of speech?[184]

The majority, while not addressing this question specifically, answered it in the negative.[185] The majority wrote, "The evil in question depends upon the actor's unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question."[186] However, the two seem closely related, especially to the extent that the crime, in some situations, could not be accomplished without the pornography.[187] That a defendant cannot rely on the First Amendment when the speech is the vehicle to committing a crime is a principle apparent in *Ferber*.[188] Additionally, in *Giboney v. Empire Storage & Ice Co.*, the Court upheld an injunction against union members who were picketing against non-union ice peddlers.[189] "[T]he avowed immediate purpose of the picketing was to compel the [Storage and Ice Company] to agree to stop selling ice to nonunion peddlers. [The law] make[s] such an agreement a crime."[190] In response to the union members' First Amendment challenge to this action, the Court held that "constitutional freedom for speech and press [does not extend] its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."[191] Surely a tool or weapon of a crime is an "integral part" of the

178. This reference is to an amendment to the CPPA, which is discussed in greater detail in Part III.A, *infra*.

179. Statement of Anne M. Coughlin, *supra* note 176.

180. *See id.* This, of course, is accepting governmental findings that such seductions can and do occur. *See, e.g.*, 1 ATT'Y GEN. COMM. ON PORNOGRAPHY, FINAL REP. 649 (1986).

181. *See* Statement of Anne M. Coughlin, *supra* note 176.

182. *See id.*

183. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 251-52 (2003).

184. *See id.*

185. *Id.* at 252.

186. *Id.*

187. *See* Statement of Anne M. Coughlin, *supra* note 176; 1 ATT'Y GEN. COMM. ON PORNOGRAPHY, FINAL REP. 649 (1986).

188. New York v. Ferber, 458 U.S. 747, 764-66 (1982).

189. Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

190. *Id.* at 492.

191. *Id.* at 498.

crime.[192] If the picketing in *Giboney* was integral enough to the crime of restraining trade to warrant such a statement by the Court, the analogy is probably close enough to show that virtual child pornography can also be an integral weapon in the rape of children.[193]

The majority's disposition of the seduction of children argument also seems in conflict with the Court's reasoning in *Osborne*. In *Osborne*, the Court accepted the seduction of children argument as legally viable even if insufficient in itself to justify the anti-possession statute.[194] However, in *Ashcroft*, the Court took issue with the viability, not the sufficiency, of the interest.[195] It seems like, at the very least, the Court should have addressed its reasoning in *Osborne* and explained why it does not apply in this context.[196] The Court in *Ashcroft* even acknowledged earlier in its opinion that *Osborne* recognizes the seduction argument.[197] However, the Court then ignored *Osborne* and argued that the seduction reasoning limits what adults can see and hear.[198] The Court's failure to directly address *Osborne* seems to substantially weaken the credibility of its reasoning.[199]

Further, Justice O'Connor justified her reading of the language "appears to be" to mean "virtually indistinguishable from" in part on the ground that some works that are distinguishable from real child pornography cannot be used to "seduce" children.[200] She was thinking of works such as cartoon-

192. *See id.*

193. *Compare id.* (allowing the state to proscribe speech which is being used as an "integral part" of a plan to illegally restrain trade) *with* Statement of Anne M. Coughlin, *supra* note 176 (asserting that child pornography is used to commit rape). Of course, this argument has weaknesses, too. First, in *Giboney*, there was no statute that sought to make picketing itself illegal because of its potential to interfere with commerce, whereas in the case of the CPPA, the regulation is aimed at the speech, not the effect of the speech. *Compare Giboney*, 336 U.S. at 491, *with* 18 U.S.C. §§ 2256(8)(B), (D) (2000). Picketing, however, is an activity or speech that may have many legitimate purposes that would be affected by such a regulation, while there is little or no value in child pornography, real or virtual. *See Giboney*, 336 U.S. at 494 (noting that the picketers argued their purpose was to improve labor conditions); *Ferber*, 458 U.S. at 762. The lack of value in child pornography points to the conclusion that it can only be used for one purpose: a criminal purpose. *See Ferber*, 458 U.S. at 762. To that extent, the speech is much more part and parcel of the crime than picketing was in *Giboney*. *See id.* Second, the majority in *Ashcroft* pointed out that "[t]here are many things innocent in themselves . . . such as cartoons, video games, and candy, that might be used for immoral purposes," but that these things are not made illegal because of this potential. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 251 (2002). The difference, however, between child pornography and candy, and the role it plays in the abuse of children is, again, the presence or absence of a legitimate purpose. *See Ferber*, 458 U.S. at 762. An adult can give candy to a child with no criminal purpose. However, it is hard to fathom a legitimate reason why an adult would show pornography to a child.

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

195. *Ashcroft*, 535 U.S. at 250-54.

196. *Id.* (discussing why the interest is not compelling without any mention of *Osborne*).

197. *Id.* at 250.

198. *Id.* at 252-53.

199. *See id.* at 250-54.

200. *Id.* at 264 (O'Connor, J., concurring and dissenting in part).

sketches and statues.[201] It seems true that there is little justification for criminalizing cartoon-sketches and statues; they pose no prosecutorial problems, their lack of realism probably makes them less attractive to pedophiles, and they are not exchanged in a general market for child pornography.[202] However, they probably can be used to lower the inhibitions of children, just as realistic pictures can.[203] Children are especially drawn to cartoons and items that look like toys, and therefore the seduction argument seems to apply to cartoons and statues as well as pictures.[204] However, because this is a very narrow class of materials, its criminalization could probably be limited to criminalizing actual use.[205]

2. Whets the Appetites of Pedophiles

The next argument, that child pornography, whether real or virtual, whets the appetites of pedophiles and increases their propensity to abuse children,[206] imposes a large hurdle for the government to clear: ever since *Roth*, the propensity of obscenity to increase a certain type of action has not been the justification for regulating obscenity or pornography.[207] In *American Booksellers Ass'n v. Hudnut*, this argument was specifically rejected.[208] In *American Booksellers*, the Seventh Circuit refused to uphold a local ordinance regulating pornography that exhibited women in positions of subordination on the basis that such pornography increases violence against women and negatively influences society's images of women.[209] Although the state's interest in protecting children may be higher than its interest in protecting women because of children's special vulnerability, regulations of obscenity or indecency are not upheld explicitly because of their propensity to influence conduct.[210]

However, just because courts do not use this concept as a justification does not mean that no court could. With more specific factual findings, a sufficient causal link between pornography and illegal conduct may be developed.[211] *Dennis v. United States* contains the proposition that the

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201. *Id.*

202. *See* 18 U.S.C. § 2251 (2000), Cong. Findings 1-13 (outlining the purposes of criminalizing virtual child pornography).

203. Jason Baruch, Comment, *Constitutional Law: Permitting Virtual Child Pornography—A First Amendment Requirement, Bad Policy, or Both?*, 55 FLA. L. REV. 1073, 1077-78 (2003).

204. *See Ashcroft*, 535 U.S. at 251 (noting that pedophiles may use many materials, including cartoons, video games, and candy for "immoral purposes").

205. *See supra* Part II.E.1 (discussing why, for much virtual child pornography, prohibiting the conduct it leads to may not be sufficient).

206. *See supra* notes 96-98 and accompanying text.

207. *See supra* notes 29-34 and accompanying text.

208. Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).

209. *Id.* at 327-30.

210. *See id.* at 328-30 ("If the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech."). The court looked at unpopular political ideas and religions and noted that all of these ideas necessarily have some impact on conduct. *Id.*

211. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 253-54 (2003).

gravity of the evil can offset the probability of the evil: the more evil the harm is, the less probable it must be.[212] In *Dennis*, speech was punished in light of a communist conspiracy.[213] Even though the Court found that the likelihood of success of a communist conspiracy to overthrow the government was small, the gravity of the danger offset that fact, therefore allowing the speech to be proscribed.[214] The analogy is clear: rape and abuse of children is such a great evil that perhaps less of a showing of actual causation of the harm may be permitted.[215]

Further, the harm is greater with virtual child pornography than with obscenity.[216] With obscenity, the concern is the corruption of the morals of society or the general perversion of sexuality.[217] With both virtual child pornography and real child pornography, the harm is specific: the rape of children.[218] Rather than requiring the danger to be "clear and present," the gravity of the potential harm may allow speech to be punished when the harm is just probable or intended.[219]

There is some evidence that there is a strong connection between child pornography and child molestation. In one "study of convicted child molesters, 77% of those who molested boys and 87% of those who molested girls admitted to the habitual use of pornography in the commission of their crimes."[220] Additionally, there is some evidence that rather than child

212. Dennis v. United States, 341 U.S. 494, 510 (1951) ("'In each case (courts) must ask whether the gravity of the "evil" discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger' . . . We adopt this statement of the rule." (quoting Chief Judge Learned Hand)). Additionally, it does not matter whether the speech is evidence of a crime or the speech itself is made unlawful. *Id.* at 506.

213. *Id.* at 509-10.

214. *See id.* at 509-11.

215. *See id.*

216. *Compare* Roth v. United States, 354 U.S. 476, 485 (1957), *with* Statement of Anne M. Coughlin, *supra* note 176.

217. *See Roth*, 354 U.S. at 485; *see also* Lockhart & McClure, *supra* note 34, at 329-31 (noting that, prior to *Miller*, obscenity was determined in connection with that which has the "tendency to suggest impure and libidinous thoughts," "suggest[s] lewd thoughts and excit[es] sensual desires," and "stir[s] the sexual impulses").

218. Statement of Anne M. Coughlin, *supra* note 176.

219. *See Dennis*, 341 U.S. at 509-11 (outlining a balancing-type test for determining if potentially harmful speech may be proscribed on that basis).

220. DONNA RICE HUGHES, HOW PORNOGRAPHY HARMS CHILDREN: PROTECTING CHILDREN IN CYBERSPACE, *at* http://www.protectkids.com/effects/harms.htm (2001); *accord* S. REP. NO. 104-358, at 13 (1996) (quoting psychiatrist Dr. Victor Cline as saying "the overwhelming majority . . . use child pornography and/or create it to stimulate and whet their sexual appetites"). *Contra* JENKINS, *supra* note 68. Professor Jenkins notes that although a substantial number of child molesters are caught with child pornography, there are a vast number of users of child pornography who are never caught by law enforcement. *Id.* at 127-28. Accordingly, it is impossible to know what actual percentage of people who use child pornography also molest children. *Id.* Jenkins also notes that on on-line bulletin boards frequented by pedophiles many speak out against child molestation. *Id.* at 129. Notwithstanding the pedophiles' inability to see their use of child pornography itself as abuse of children, this anecdotal evidence may work against a conclusion that consumers of child pornography necessarily *act* on their desires. *See id.*

pornography causing child molestation—surely pedophilia, whatever its causes, is that which causes child molestation—the drive to acquire more child pornography (also caused by pedophilia) may encourage pedophiles to create their own "original" pornography.[221] The on-line culture of those who "collect" child pornography "is driven by the quest for new material, the urge to complete collections."[222] Thus, pedophiles create pornography in order to acquire pornography, rather than for profit.[223] If experts cannot tell the difference between real and virtual child pornography, perhaps pedophiles cannot either.[224] Perhaps pedophiles, in their drive to acquire what they believe to be real pornography, may create some real pornography of their own.[225] In addition, there is a "broad public consensus" that accepts the assertion that child pornography causes crime, some even going so far as to conclude that it is a "direct stimulus to child abduction or murder."[226]

Furthermore, pedophiles who regularly engage in the on-line exchange of child pornography become socialized.[227] Through the exchange of child pornography with others, they begin to feel that they are normal.[228] Professor Jenkins notes that

> [i]n the case of electronic porn, this tendency may be reinforced by a kind of desensitization, a hunger for ever more illegal material. While a novice [someone new to looking at and collecting child pornography] might be amazed and stimulated by the first few soft-core pornographic images, these are all too likely to become routine, and one turns avidly to harder-core sites.[229]

The methodology that Professor Jenkins used in reaching these conclusions did not involve actually looking at any child pornography.[230] Therefore, Professor Jenkins would be unable to conclude whether the pornography that is exchanged is real or virtual.[231] But whether real or virtual, it would seem that it can have the same effect of socializing the pedophile, suppressing his own inhibitions and shame over his behavior, and encouraging him to turn to more and more violent images.[232] Accordingly, the creation of real child pornography, and therefore the abuse of children, is

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221. JENKINS, *supra* note 68, at 105.

222. *Id.*

223. *Id.*

224. *See* 18 U.S.C. § 2251 (2000), Cong. Finding 5 (finding that virtual child pornography is "virtually indistinguishable" from real child pornography).

225. JENKINS, *supra* note 68, at 105.

226. *Id.* at 4-5.

227. *Id.* at 107-09.

228. *Id.*

229. *Id.* at 109.

230. *Id.* at 18-20 (stating that the book is based on textual material found in newsgroups, message boards, etc.).

231. *See id.*

232. *See id.* at 109.

encouraged.[233] Professor Jenkins's research also brings to light the idea that child pornography, for the pedophile, is an end unto itself, not just a means to child molestation.[234] Perhaps it is easier to accept the proposition that looking at virtual child pornography may cause the creation of real pornography than it is to accept the argument that there is an initial causal connection between looking at pornography and molesting children to gratify a whetted appetite.[235]

In *Dennis*, the Court was concerned with the conspirators' *intent* to overthrow the government.[236] Likewise, intent to cause harm to children can be inferred in many cases involving the creation of virtual or real child pornography.[237] It is a common presumption of both civil and criminal law "that a person intends the natural and foreseeable consequences of his voluntary actions."[238] The creators of child pornography, real or virtual, can surely foresee that pedophiles, and no one else, will have any interest in their work. Creators of child pornography, both real and virtual, are presumably aware that pedophiles regularly abuse children. As discussed above, the fact that pedophiles encourage each other to post "original" pornography on the internet supports this notion.[239] Perhaps, in some situations, intent to bring about harm can be inferred.[240] If intent can be established, as it was in *Dennis*, it may be sufficient to justify regulating the speech.[241]

The majority did not consider *Dennis* at all in its analysis.[242] Rather, it relied on other cases that require a clear causal connection to be shown.[243] In both cases that the Court cited, *Hess v. Indiana*[244] and *Brandenburg v. Ohio*,[245] the required degree of causal connection between the speech and the crime was not determined. Though it was clear that the crime could not be

233. *See id.* at 105.

234. *See id.*

235. *See id.*; Ashcroft v. Free Speech Coalition, 535 U.S. 234, 253 (2002).

236. *See* Dennis v. United States, 341 U.S. 494, 500 (1951) ("It has been suggested that the presence of intent makes a difference in the law when an 'act otherwise excusable or carrying minor penalties' is accompanied by such an evil intent.").

237. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 749 (1982) (finding that "the distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children . . . .").

238. Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 278 (1979) (rejecting the principle in the particular context of that case).

239. *See supra* notes 221-25 and accompanying text.

240. *See supra* notes 242-48 and accompanying text.

241. *See Dennis*, 341 U.S. at 509 ("Certainly an *attempt* to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent." (emphasis added)).

242. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 239-58 (2002).

243. *See id.* at 253-54.

244. 414 U.S. 105 (1973) (per curiam).

245. 395 U.S. 444 (1969) (per curiam).

committed at "some indefinite future time,"[246] the majority just concluded that the government could only suppress speech that "'is directed to inciting or producing imminent lawless action.'"[247] There was no discussion as to how strong the correlation must be, only the statement that a "more direct connection" than had been shown was required.[248] The majority, therefore, failed to give much direction to lawmakers as to whether further fact finding may cure the problems or whether the majority, by its lack of direction, was indicating its lack of openness to the idea altogether.[249]

3. Need to Eliminate the Market for Real Pornography

If this argument[250] were to be accepted, then the *Ferber* rationale would apply: real children would be harmed, and that would be a sufficient justification for the regulation.[251] What is most difficult about this argument is that it seems somewhat impossible to prove. If the illegal trade of real pornography were to increase, how could it be demonstrated that this occurred because of the increase in virtual child pornography? It seems, as the Court concluded, "implausible."[252] It is perhaps for this reason that the majority declined to look at any case or consider any factual contention that had been submitted by the government in support of its rejection of this argument.[253] The majority looked only to *Bartnicki v. Vopper*[254] for the proposition that the market deterrence interest does not apply in all cases.[255] The majority also relied briefly on *Ferber* and *Osborne* for the idea that there should be some underlying crime that the government seeks to deter by eliminating the market.[256] However, the Court concluded that, in this case, "there is no underlying crime at all."[257] In other words, the creation of virtual child pornography is not, in and of itself, criminal, unlike the creation of real child pornography.[258] Of course, the argument is that the underlying crime is the creation of real child pornography, which is encouraged or enabled by virtual child pornography.[259] Meanwhile, the concurrences and dissents did not address this argument at all.[260] Apparently, it was not the

246. *Ashcroft*, 535 U.S. at 253 (citing Hess v. Indiana, 414 U.S. 105, 108 (1973)).

247. *Id.* (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

248. *Id.*

249. *See id.*

250. *See supra* notes 99-102 and accompanying text.

251. *See* New York v. Ferber, 458 U.S. 747, 759-60 (1982). The market deterrence theory was accepted in *Osborne* as necessary to eliminate real child pornography. Osborne v. Ohio, 495 U.S. 103, 109-10 (1990).

252. *Ashcroft*, 535 U.S. at 254.

253. *See id.* at 253-54.

254. 532 U.S. 514 (2001).

255. *Ashcroft*, 535 U.S. at 254.

256. *Id.*

257. *Id.*

258. *See id.*

259. *See supra* notes 233-37 and accompanying text.

260. *See Ashcroft*, 535 U.S. at 259-60 (Thomas, J., concurring); *id.* at 260-67 (O'Connor, J., concurring and dissenting in part); *id.* at 267-73 (Rehnquist, C.J., dissenting).

basis for their conclusion that there is a compelling interest in regulating virtual child pornography.[261]

However, one possibility that the Court did not consider is that the production of real child pornography becomes more likely to occur when considered in conjunction with the government's argument that prosecution of pornographers becomes more difficult.[262] If the indistinguishability of virtual and real child pornography makes prosecution more difficult, and pornographers, through the legality of virtual pornography have something of a built-in defense to child pornography charges, then the risk of producing real child pornography goes down.[263] If criminal punishments are the main deterrent of the creation, distribution, and possession of child pornography, and these punishments become less likely, then the creation of real child pornography may in fact increase.[264]

This argument, of course, makes several factual assumptions. First, it assumes that pornographers have the option of producing real child pornography. As it is, many pornographers may make virtual child pornography because they do not have access to children. This can be inferred because, until recently, both types of pornography were illegal (and obscene virtual child pornography is *still* illegal).[265] Therefore, there was no less risk in producing or possessing virtual child pornography than in producing or possessing real child pornography.[266] However, the Court made this same factual assumption.[267] The Court discounted the government's argument because "few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice."[268]

One final angle to the market-deterrence argument is that collectors of child pornography themselves do not necessarily know whether they are in possession of real or virtual pornography.[269] This conclusion is inferred from the government's claim that even experts have difficulty telling the difference between real and virtual pictures.[270] If that is the case, pedophiles do not necessarily know the difference either; only the pedophile that made

261. *See id.*

262. *See supra* notes 103-08 and accompanying text.

263. *See Ashcroft*, 535 U.S. at 263 (O'Connor, J., concurring and dissenting in part).

264. *See id.*

265. *See id.* at 258.

266. *See id.*

267. *Id.* at 254.

268. *Id.* Additionally, the market-deterrence/prosecution argument, in spite of its intuitive sense, suffers from the same deficiency from which the "whets the appetite" argument suffers: there is no clear causation. Furthermore, in order for it to be at all persuasive, the "hinders prosecution" argument must be accepted. Therefore, the market-deterrence argument does not provide a completely *independent* justification for the CPPA's regulation of speech.

269. 28 U.S.C. § 2251 (2000), Cong. Finding 5.

270. *Ashcroft*, 535 U.S. at 254.

the picture knows.[271] The idea that pedophiles do not make a sharp distinction between real and virtual pictures lends credence to the government's finding that virtual and real pictures are often exchanged for each other.[272] This conclusion may especially be true in light of the fact that, in some circumstances, virtual child pornography may be preferable to real pornography in that it allows the creator to make it "custom" to fit his preferences.[273] While the Court concluded that pedophiles might choose virtual child pornography because it would be legally safer,[274] the picture that the government paints is one of a holistic problem, in which the only place where a distinction between real and virtual pictures exists is in the courts.[275]

4. Hinders Prosecution

This argument was the most persuasive to Justices Thomas and O'Connor and to Chief Justice Rehnquist.[276] In each opinion, however, the concurring or dissenting Justice who was persuaded by the argument failed to offer any real explanation for why he or she found the argument persuasive, or at least more persuasive than the others.[277] Justice Thomas simply remarked that that government "may well have a compelling interest" in barring some speech to punish other speech, but he did not look to a single case for support.[278] Justice O'Connor concluded that this argument was of "even more serious concern" than the other concerns expressed by the government, but looked to a case only to counter Justice Thomas' concern that the defense had not been successfully employed.[279] She did not cite any precedent to show that enabling prosecution is a compelling governmental interest in other contexts.[280] Finally, Chief Justice Rehnquist also concluded that "Congress has a compelling interest in ensuring the ability to enforce prohibitions of actual child pornography," and, apparently in response to Justice Thomas, that the Court should defer to Congress's finding that advancing technology will inhibit prosecutions.[281]

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271. *See Child Pornography Prevention Act of 1995, Hearing Before the Senate Comm. on the Judiciary*, 104th Cong. (1996) (statement of Sen. Orrin Hatch) ("To a pedophile who is seeking or disseminating child pornography, or a child molester using pornographic images of child sexuality, or to a child who is being seduced by images of children engaged in sexual conduct, they can neither tell, nor would they care, if the images are real or manufactured, so long as they appear real.").

272. *See id.* (testimony of Bruce A. Taylor).

273. S. REP. NO. 104-358, at 16 (1996).

274. *Ashcroft*, 535 U.S. at 254.

275. *See id.*

276. *See supra* notes 117-20, 128-31, 138 and accompanying text.

277. For a discussion of the persuasiveness of this argument, see *infra* notes 291-95 and accompanying text.

278. *Ashcroft*, 535 U.S. at 259 (Thomas, J., concurring).

279. *Id.* at 267 (O'Connor, J., concurring and dissenting in part) (citing *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), to show that Congress does not have to wait for the harm to occur).

280. *See id.*

281. *Id.* at 267 (Rehnquist, C.J., dissenting).

However, he also failed to look to any precedent to show that the government has a compelling interest in ensuring prosecutions.[282]

It is in fact relevant that the Justices did not look to precedent in this context. This asserted interest is the one most addressed by the dissenting and concurring Justices, and, therefore, the one most in need of support.[283] In addition, the support is also needed to counter the arguments made by the majority.[284] Granted, the majority looked only to *Broadrick*, but it was for a proposition that appears to apply in this situation: that "[t]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . . ."[285] Therefore, punishing protected speech in order to deter unprotected speech "turns the First Amendment upside down."[286]

The problem with the majority's reliance on *Broadrick* is that the statement to which the majority looks only supports and describes the overbreadth doctrine.[287] It establishes the principle that allows overbreadth challenges—that a law may not capture speech it has no right to capture.[288] However, the statement in *Broadrick* does not assume the factual situation at issue here: that the protected speech is interfering with the ability to punish the unprotected speech, that there may be spurious claims by defendants that their speech falls into the protected category when in fact it belongs in the unprotected, or that it is impossible to distinguish between protected and unprotected speech.[289] *Broadrick*, therefore, offers a general proposition but not one that is nearly specific enough to address the interest actually asserted here.[290]

It seems that the case that best supports the argument that the hindering of prosecutions is a compelling governmental interest is *Ferber*.[291] If prosecutors cannot convict creators, distributors, or possessors of real child pornography because of its resemblance to virtual child pornography, real children are harmed.[292] Part of the reason for such prosecutions is to deter

282. *See id.*

283. *See supra* notes 117-20, 128-31, 138 and accompanying text.

284. *See Ashcroft*, 535 U.S. at 254-55.

285. *Id.* at 255.

286. *Id.*

287. *See* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

288. *See id.* at 611 ("It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment . . . .").

289. *See id.* at 605-08 (noting that *Broadrick* involved a challenge to a statute that restricted the public, political activities of civil servants which set out "plain" and "explicit" standards regarding what activities were permitted and not permitted).

290. *See id.* at 612.

291. *See supra* notes 50-58 and accompanying text.

292. *See supra* notes 262-64, 269-73 and accompanying text.

and punish the creation of child pornography.[293] If the deterrence and punishment do not occur, children who are victims of real child pornography go without vindication for the wrongs committed against them,[294] and, as discussed above, the creators of real child pornography can continue unabated.[295]

Additionally, the Court has allowed the criminalization of non-speech activities as a mere means of enforcing congressional objectives.[296] In *Perez v. United States*, the Court, in order to eliminate organized crime, allowed a loan-sharking statute, passed under the Commerce Clause, to be applied to a defendant who had participated in loan-sharking only intrastate.[297] The Court concluded that "'[w]hen it is necessary [for Congress] in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so.'"[298] Of course, *Perez* did not involve a person's First Amendment rights or an activity that would otherwise be protected.[299] However, *Perez* did involve a person's freedom, and it made a person liable under federal law for activities for which he would not otherwise have been liable.[300] Thus, *Perez*, at least loosely, stands for the proposition that the government's interest in stamping out crime may extend to otherwise legal activities.[301]

5. Affirmative Defense

A final argument regarding § 2256(8)(B) is that the affirmative defense, which allowed the defendant to show that the material was made using only adults and that it was not pandered, makes the CPPA not a "measure suppressing speech but . . . a law shifting the burden to the accused to prove the speech is lawful."[302] The majority did not look to a single case to justify its conclusion that there are "serious constitutional difficulties" in requiring the defendant to prove that "his speech is not unlawful," and then claimed that the Court need not decide the question.[303] The Court's assertion of constitutional difficulties flies in the face of *Sable Communications*, where the Court found that an affirmative defense could save the statute from

293. *See* New York v. Ferber, 458 U.S. 747, 760 (1982) ("[T]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.").

294. *See id.* at 760 n.10 (discussing the long-lasting detrimental impacts of the creation of child pornography using real children on the children who were used to make the pornography).

295. *See supra* notes 271-75 and accompanying text.

296. *See* Perez v. United States, 407 U.S. 146 (1971) (holding that intrastate activities that cannot normally be regulated by Congress are nonetheless subject to federal power because of their effects on interstate commerce).

297. *Id.* at 146-47, 155.

298. *Id.* at 154 (quoting Westfall v. United States, 274 U.S. 256 (1927) (Holmes, J.)).

299. *Id.* at 146 (noting that the conviction in question was for loan-sharking).

300. *Id.* at 154-57.

301. *See id.*

302. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255 (2003).

303. *Id.*

constitutional difficulties.[304] In *Sable Communications*, previous versions of the challenged statutes had provided an affirmative defense wherein the defendant could show that measures had been taken to limit access to the dial-a-porn messages to adults.[305] This affirmative defense was similar to the defense to the CPPA: it was a defense that limited the scope of the statute only to the interests that it sought to protect.[306] Just as the affirmative defenses mentioned in *Sable Communications* limited the reach of the statute to people who provided access to messages to children, the affirmative defense to the CPPA sought to limit the reach of the statute to virtual pornography rather than pornography using youthful-looking adults that had not been pandered.[307]

Notwithstanding the Court's objection to the affirmative defense as a concept, Justice Thomas concluded that the Court left an affirmative defense open as a possibility, but he offered no guidance as to what an appropriate affirmative defense might look like.[308] Justice O'Connor and Chief Justice Rehnquist chose not to address the issue at all.[309] Therefore, in determining what a constitutional version of the CPPA may look like, the possibility of an affirmative defense is something to be considered, but that will be difficult to design.[310] What a constitutional regulation of virtual child pornography may look like is discussed below.[311] As the provisions change, the burden of any given showing may be shifted to the defendant in the form of an affirmative defense.[312]

6. Standard of Review

In each of the opinions, the Justices implicitly applied strict scrutiny.[313] For content-based regulations, strict scrutiny is the appropriate level of review, requiring the government to show a compelling governmental

304. *See* Sable Communications, Inc. v. FCC, 492 U.S. 115, 120-23 (1989). The version of the statute that was challenged eliminated the affirmative defenses. *Id.* at 122-23.

305. *Id.* at 121-22.

306. *Compare* 47 U.S.C. § 223(b)(2) (repealed) (affirmative defense in *Sable Communications*), *with* 18 U.S.C. § 2252(A)(c) (2000) (affirmative defense in *Ashcroft*).

307. *See* 18 U.S.C. § 2252A(C) (2000) (amended following *Ashcroft*).

308. *Ashcroft*, 535 U.S. at 259-60 (Thomas, J., concurring).

309. *Id.* at 260-67 (O'Connor, J., concurring and dissenting in part); *see id.* at 267-73 (Rehnquist, C.J., dissenting).

310. *See id.* at 255 (stating that "[t]he Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful," but then refusing to decide whether the government might be permitted to do so and in what circumstances).

311. *See infra* Part III.B.

312. *See infra* Part III.B.

313. *See Ashcroft*, 535 U.S. at 259-60 (Thomas, J., concurring); *id.* at 265 (O'Connor, J., concurring and dissenting in part); *id.* at 257 (Rehnquist, C.J., dissenting). The majority did not address the level of scrutiny at all, but it seems that, if they were applying a lesser standard, it is likely that they would have said as much.

interest that is narrowly tailored to achieve that interest.[314] Content-based regulations are those which, "by their terms[,] distinguish favored speech from disfavored speech on the basis of the ideas or views expressed."[315] Beyond that definition, it is difficult to discern which laws favor or disfavor speech: while the CPPA may disfavor child pornography as compared with other sexual speech, it does not discriminate against views expressed within the category of child pornography.[316] By contrast, laws that are content-neutral are subject only to intermediate scrutiny, meaning they must serve a substantial governmental interest and they may not unreasonably limit alternative avenues of communication.[317] Laws that are aimed at the secondary effects of speech, rather than its content, may be characterized as content-neutral.[318]

An argument can be made that the CPPA is content-neutral and therefore more properly the subject of intermediate scrutiny.[319] Perhaps, had the majority so concluded, they could have found the asserted interests to be substantial enough to pass this level of review.[320] The district court in *Ashcroft* concluded that the CPPA was in fact content-neutral.[321] Judge Conti concluded that "the CPPA is designed to counteract the *effect* that such materials has [sic] on its viewers, on children, and to society as a whole, and is not intended to regulate or outlaw the ideas themselves."[322] To some extent, the CPPA seems like the law at issue in *City of Renton v. Playtime Theatres, Inc.*[323] In *City of Renton*, a local ordinance prohibited any "adult motion picture theater" from locating within 1000 feet of residential areas, churches, parks, or schools.[324] The Court concluded that the purpose of the statute was to "prevent crime, protect the city's retail trade, [and] maintain property values," all effects of the statute unrelated to the content of the speech.[325] Likewise, the CPPA was designed to prevent secondary effects of child pornography: seduction of children, expansion of

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314. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).

315. *Id.* at 643.

316. *See, e.g.*, Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 72-73 (1976) (allowing ordinance prohibiting operation of adult movie theater and explaining that "the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message a film may be intended to communicate").

317. *See Turner Broad. Sys.*, 512 U.S. at 642; City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986).

318. *See City of Renton*, 475 U.S. at 47.

319. *See, e.g.*, Free Speech Coalition v. Reno, No. C 97-0281VSC, 1997 WL 487758, *4 (N.D. Cal. Aug. 12, 1997).

320. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 241 (2002) (identifying Congress's asserted reasons for passing the law). However, Justice Kennedy, in his majority opinion in *Ashcroft*, concluded that the Court would had to have found that virtual child pornography was an entirely separate category of unprotected speech in order to uphold the statute. *Id.* at 246. It is not clear whether the Court even considered applying the content-neutrality test in this context. *See id.*

321. *Free Speech Coalition*, 1997 WL 487758, at *4.

322. *Id.*

323. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

324. *Id.* at 44.

325. *Id.* at 48.

the market for child pornography, and, most importantly, difficulties in prosecution.[326] Arguably, the government is not targeting virtual child pornography because of its content, but because of the effects of the material.[327] The government also does not distinguish between differences in content that can be characterized more broadly as virtual child pornography; it simply criminalizes speech about child sexuality, regardless of what it actually says, because of the effects of such speech.[328] The problem with this approach, however, lies in the language of the statute itself, a statute that exactly describes the content of the speech that is to be regulated.[329] While *City of Renton* did not allow the exhibition of prohibited materials,[330] the CPPA is instead aimed at production,[331] which is inherently more closely tied to content than to exhibition. Also, the CPPA follows statutes such as the one in *Ferber*, which rested on content-based, categorical prohibitions of speech.[332] Additionally, no circuit court that has heard the case has found that the CPPA is content-neutral.[333]

The Court may very well have concluded that the CPPA is content-neutral, but in the end it sprung from a line of cases all of which assume that child pornography statutes are content-based.[334] The fact that the statute is aimed at secondary effects does not change that the means through which it accomplishes those effects is content-discriminatory.[335] Additionally, the Court would not necessarily have concluded that the interests asserted by the government met the content-neutrality test.[336] With regard to each of the asserted interests, the Court was not concerned so much with their severity

326. *See* 18 U.S.C. § 2251 (2000), Cong. Findings 1-13.

327. *See id.*

328. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 246 (2002) (explaining that pictures in a psychology manual could fall into the statute's prohibitions).

329. 18 U.S.C. § 2256(8)(B), (D) (2000).

330. *City of Renton*, 475 U.S. at 43.

331. 18 U.S.C. § 2251 (2000), Cong. Findings 6-7.

332. *See* Matthew K. Wegner, Note, *Teaching Old Dogs New Tricks: Why Traditional Free Speech Doctrine Supports Anti-Child-Pornography Regulations in Virtual Reality*, 85 MINN. L. REV. 2081, 2114-15 (2001) (analyzing the content-neutrality doctrine and its application to the CPPA).

333. *See* United States v. Hilton, 167 F.3d 61, 68 (1st Cir. 1999) ("Blanket suppression of an entire type of speech is by its very nature a content-discriminating act."); United States v. Fox, 248 F.3d 394, 400 (5th Cir. 2001) (upholding the CPPA after applying strict scrutiny); United States v. Mento, 231 F.3d 912, 918 (4th Cir. 2000) (upholding the CPPA after applying strict scrutiny); United States v. Acheson, 195 F.3d 645, 650 (11th Cir. 1999) (upholding the CPPA after applying strict scrutiny); Free Speech Coalition v. Reno, 198 F.3d 1083, 1091 (9th Cir. 1999) (striking down the CPPA after applying strict scrutiny).

334. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 249-50 (2002) (analyzing *New York v. Ferber*, 458 U.S. 747 (1982), and *Osborne v. Ohio*, 495 U.S. 103 (1990)).

335. Police Dept. v. Mosley, 408 U.S. 92 (1972) (striking down law that did not allow picketing within 150 feet of a school unless it was peaceful labor picketing).

336. *See Ashcroft*, 535 U.S. at 246 (noting that, in order to uphold the law, the Court would have to find virtual child pornography was unprotected speech).

or compelling nature as it was that they were not factually supportable.[337] The Court apparently reasoned that if the government cannot show, for instance, that child pornography whets the appetites of pedophiles and leads to more crime against children as a matter of fact, this asserted interest is not supportable as compelling or substantial, no matter what test is applied.[338]

Another possible alternative to strict scrutiny is a balancing test.[339] In his dissent from the Ninth Circuit majority opinion, Judge Ferguson concluded that "the proper mode of analysis is to weigh the state's interest in regulating child pornography against the material's limited social value."[340] Judge Ferguson concluded that, in both *Ferber* and *Osborne*, a balancing test was used.[341] Additionally, the language of *Miller* points to a balancing test; the *Miller* Court concluded that obscenity is unprotected because it is of "such slight social value" that any benefit "is clearly outweighed by the social interest in order and morality."[342] Therefore, in those cases where the Court has concluded that a type of speech is wholly without First Amendment protection, it has done so using a balancing test.[343] This test seems especially appropriate given that the predecessors of the CPPA also used this test.[344] In addition, the CPPA applies to a type of speech that is without much value.[345] Judge Ferguson concluded, after using the balancing test, that virtual child pornography should be a category of unprotected speech.[346] The interests asserted by the government and the reasons for passing the statute outweighed the minimal value of the speech.[347]

Despite the viability of the balancing test as an option, the majority barely took notice of it.[348] Justice Kennedy acknowledged Judge Ferguson's conclusion that virtual child pornography should be regarded as a category of speech wholly without value and concluded that "[i]t would be necessary for us to take this step to uphold the statute."[349] However, he never

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337. *E.g.*, *Ashcroft*, 535 U.S. at 253 ("The government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse.").

338. *See id.* at 254-55 ("Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.").

339. *See* Free Speech Coalition v. Reno, 198 F.3d 1083, 1101 (1999) (Ferguson, J., dissenting).

340. *Id.*

341. *Id.*

342. Miller v. California, 413 U.S. 15, 20-21 (1973).

343. *See id.*

344. *See Free Speech Coalition*, 198 F.3d at 1101 (Ferguson, J., dissenting).

345. *See* New York v. Ferber, 458 U.S. 747, 762 (1982) (asserting that "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*"). See also Wade T. Anderson, Comment, *Criminalizing "Virtual" Child Pornography Under the Child Pornography Prevention Act: Is it Really What it "Appears to Be?,"* 35 U. RICH. L. REV. 393, 418-21 (2001), for an explanation as to why a balancing test is appropriate.

346. *Free Speech Coalition*, 198 F.3d at 1101 (Ferguson, J., dissenting).

347. *Id.*

348. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 249-58 (2002).

349. *Id.* at 246.

explained why the majority chose not to take that step.[350] He merely moved on to explain that the CPPA did not require obscenity.[351] Perhaps the reason was that, according to the majority's view of the scope of the statute, so much material with serious artistic, literary, or scientific value would be prohibited that it could not be seen as a category of speech wholly without value.[352]

Given the multiple possibilities pertaining to the proper test to be applied—strict scrutiny, intermediate scrutiny, or a balancing test—it would have been appropriate for the majority to address the subject.[353] Also, given the strength and scholarly support for the balancing test argument,[354] it would be helpful to know why the Court chose not to apply it. After resolving the question of the constitutionality of the CPPA, it is still a mystery why the Court chose strict scrutiny.[355] The Court's conviction that the CPPA captured materials of value seems to be the most viable explanation.[356]

7. Scope of the CPPA

The majority focused much of its opinion on why the foregoing interests were not sufficient to support the CPPA.[357] The majority spent almost no time justifying its reading of the language of the CPPA to include so much material with literary, artistic, and scientific value.[358] At the same time, Justice O'Connor and Chief Justice Rehnquist quickly stated, without explaining why, that the foregoing interests *were* sufficient, and then focused their attention on the scope of the CPPA and how its terms should be construed.[359] In this sense, the majority and dissenters are like two ships passing: each Justice gave relatively little direct response to the disagreeing Justices' conclusions. However, how the terms of the CPPA are construed is integral to whether the statute in fact applies only to child pornography or to a whole host of materials, the banning of which serves no interest.[360]

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350. *See id.*

351. *Id.*

352. *See id.* at 241 (noting that the literal terms of the statute prohibit Renaissance paintings of classical mythology and some Hollywood movies).

353. *See supra* notes 314-18, 339-43 and accompanying text.

354. *See* Adam J. Wasserman, *Virtual.Child.Porn.Com: Defending the Constitutionality of the Criminalization of Computer-Generated Child Pornography by the Child Pornography Prevention Act of 1996—A Reply to Professor Burke and Other Critics*, 35 HARV. J. ON LEGIS. 245, 274-78 (1998).

355. *See Ashcroft*, 535 U.S. at 246.

356. *See id.*

357. *See id.* at 249-58.

358. *See id.*

359. *Id.* at 259-60, 263-66 (O'Connor, J., concurring and dissenting in part); *id.* at 267-73 (Rehnquist, C.J., dissenting).

360. *See Ashcroft*, 535 U.S. at 267-69 (Rehnquist, C.J., dissenting) (construing the statute

The "appears to be" provision was questioned by the majority, Justice O'Connor, and Chief Justice Rehnquist.[361] The majority read the language broadly, speculating that by its "literal terms" the statute could include a "Renaissance painting depicting a scene from classical mythology."[362] The majority did not explain why the statute should be read to include works that Congress probably, if not obviously, did not intend to include in the statute's scope.[363] The statute clearly was not aimed at Renaissance paintings or Hollywood films,[364] but the majority concluded that the only limiter of the statute would be the jury.[365] It is hard to imagine a broader reading of the statute.[366]

At the same time, the reading of the statute does make some logical sense. If the statute was construed so as not to reach any works with literary, artistic, or social value, obscene works are basically the only things that would remain.[367] Chief Justice Rehnquist sought to limit the statute to "hard-core" pornographic works by use of the "sexually-explicit" language, and the result is that it is hard to imagine any work within this reading that would not be obscene.[368] The majority recognized that "the apparent age of persons engaged in sexual conduct is relevant to whether a depiction offends community standards."[369] Most communities probably find sexually explicit images of children without any additional value to be offensive; it is likely that the only people who have any interest in them are pedophiles.[370]

However, the statute was not intended to reach only obscene images.[371] The majority reasonably concluded that the CPPA is like the law in *Ferber*.[372] Additionally, obscene materials are proscribed in a separate statute.[373] Therefore, for the Court to have concluded that the CPPA reaches

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narrowly in order to avoid reaching movies such as *American Beauty* and *Traffic*).

361. *Id.* at 241-42; *id.* at 262-66 (O'Connor, J., concurring and dissenting in part); *id.* at 267-71 (Rehnquist, C.J., dissenting).

362. *Id.* at 241.

363. *See id.*

364. 18 U.S.C. § 2251 (2000), Cong. Finding 1.

365. *Ashcroft*, 535 U.S. at 241.

366. *See id.*

367. *See* Miller v. California, 413 U.S. 15, 24 (1973) (defining obscenity by reference to literary, social, or artistic value).

368. *See Ashcroft*, 535 U.S. at 269 (Rehnquist, C.J., dissenting).

369. *Id.* at 240.

370. This conclusion is based on the premise that all communities find pedophiles, and that which is marketed toward them, to be patently offensive. *See* JENKINS, *supra* note 68, at 4 ("Since child pornography first entered the public consciousness . . . [it] has been regarded as an extreme and unforgivable form of deviance . . . For child pornography, . . . there is no . . . minoritarian school that upholds the rights of individuals to pursue their private pleasures.") A possible exception may be images of minors who appear to be sixteen or seventeen years of age. *See Ashcroft*, 535 U.S. at 240 (recognizing that depictions of young children may be obscene even though depictions of older adolescents engaged in the same acts may not be). Material depicting seventeen-year-olds that is pandered as material involving minors may still be considered obscene, to the extent that pandering may contribute to a finding of obscenity. *See* Ginzburg v. United States, 383 U.S. 463, 474 (1966); *Ashcroft*, 535 U.S. at 257-58.

371. *Ashcroft*, 535 U.S. at 240.

372. *Id.*

373. *Id.*; *see also* 18 U.S.C. §§ 1460-66 (2000).

only obscene materials would be redundant.[374] However, to the extent that the CPPA reaches materials that are merely indecent or disturbing or that do have value, the majority may very well be correct in finding that there is no compelling interest in proscribing them.[375] Justice O'Connor interpreted the statute exactly that way, concluding that the government sought to regulate pornography that is "merely indecent," and yet she still concluded that there was a compelling interest in regulating virtual images.[376] Justice O'Connor did not explain what "merely indecent" child pornography is, or how it can possibly cause all the problems the government claimed it causes.[377] Perhaps Justice O'Connor was thinking of the type of video at issue in *United States v. Knox*, which involved young girls dancing in abbreviated attire in which the camera focused on clothed genital areas.[378] This example illustrates just how limited the class of materials under consideration would be if the discussion focuses on non-obscene, sexually explicit images of children.[379]

Therefore, while Congress probably did not intend the CPPA to apply to images with serious value, it probably also did not intend the statute to be limited to obscene materials. The problem is in conceiving what materials without serious literary, artistic, or social value remain "merely indecent," as Justice O'Connor described it,[380] or what materials are "hard core pornographic," as Chief Justice Rehnquist described it,[381] without being obscene. Perhaps the question of whether such materials exist could be left to the jury. Or perhaps, under Chief Justice Rehnquist's model, prosecutors are simply alleviated of the burden of having to prove that "hard core" images are obscene.[382]

Chief Justice Rehnquist probably made the most persuasive argument regarding the scope of the statute.[383] *Broadrick* strongly supports avoiding striking down a statute on overbreadth if a limited view of the statute is possible.[384] Justice O'Connor gave no justification for construing the statute

374. *See Ashcroft*, 535 U.S. at 240.

375. *Id.* at 246-49.

376. *Id.* at 262 (O'Connor, J., concurring and dissenting in part).

377. *See id.*

378. United States v. Knox, 32 F.3d 733, 750 (3d. Cir. 1994). For further discussion of this video, see Burke, *supra* note 67. Although the author would conclude that a video such as this *should* be found to be obscene since it is clearly geared toward pedophiles and is exploitative of the girls, it is conceivable that *some* communities might conclude otherwise.

379. *See Knox*, 32 F.3d at 750.

380. *Ashcroft*, 535 U.S. at 262 (O'Connor, J., concurring and dissenting in part).

381. *Id.* at 269 (Rehnquist, C.J., dissenting).

382. *See id.*

383. *Compare* Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) ("Application of the overbreadth doctrine . . . is, manifestly, strong medicine."), *with Ashcroft*, 535 U.S. at 268 (Rehnquist, C.J., dissenting) (construing the statute narrowly so as to avoid striking it down for overbreadth).

384. *Broadrick*, 413 U.S. at 613; *see also supra* note 126.

to reach youthful-looking adults, especially considering the affirmative defense that the material was made using adults.[385] The majority made no attempt to limit the scope of the statute at all.[386]

Both Justice O'Connor and the majority also declined to limit § 2456(8)(D) in any way.[387] Chief Justice Rehnquist, however, first sought to limit the provision to materials pandered as depicting minors engaged in sexually explicit conduct.[388] If adopted by the majority, this limitation would have cured the majority and Justice O'Connor's concern that the pandering provision applied even to works not depicting minors engaged in sexually explicit conduct.[389]

Second, Chief Justice Rehnquist wished to impose a scienter requirement on the provision in order to counter the majority and Justice O'Connor's conclusion that the provision applied to possessors who had no responsibility for how the material was pandered.[390] Chief Justice Rehnquist argued that *X-Citement Video* justifies this imposition,[391] and, to some extent, that seems to be a fair assertion.[392] However, the statute in *X-Citement Video* included the word "knowingly" in its provisions.[393] The question there was just whether the word "knowingly" in one provision modified a later provision.[394]

In the CPPA, however, there is no use of the word "knowingly."[395] Congress surely had the option of including the word, with regard to possessors, if that was its intent. The statute in *X-Citement Video* indicates that Congress knows how to impose a "knowing" requirement if it so desires.[396] Oddly enough, despite the lack of any indication that Congress intended to impose a scienter requirement, Chief Justice Rehnquist concluded that the statute in *X-Citement Video* "lent itself much less than the present statute" to an actual scienter requirement.[397] Although Chief Justice Rehnquist's suggestion that a scienter requirement would both cure the majority's concerns and be more consistent with *Broadrick's* admonitions to limit statutes rather than strike them down as overbroad is attractive, Congress simply has not given the Court the authority to construe the statute in this way.[398]

Of the many possibilities at the Court's disposal—finding the asserted interests to be compelling, considering different standards of review,

385. *Ashcroft*, 535 U.S. at 261 (O'Connor, J., concurring and dissenting in part).
386. *Id.* at 246.
387. *Id.* at 262 (O'Connor, J., concurring and dissenting in part); *id.* at 257-58.
388. *Id.* at 271-72 (Rehnquist, C.J., dissenting).
389. *Id.* at 257-58; *id.* at 262 (O'Connor, J., concurring and dissenting in part).
390. *Id.* at 271-73 (Rehnquist, C.J., dissenting).
391. *See id.* at 273 (Rehnquist, C.J., dissenting).
392. *See* United States v. X-Citement Video, Inc., 513 U.S. 64 (1994).
393. *Id.* at 68.
394. *Id.*
395. *Ashcroft*, 535 U.S. at 242.
396. *See X-Citement Video*, 513 U.S. at 68.
397. *Ashcroft*, 535 U.S. at 271-73 (Rehnquist, J., dissenting).
398. *See* 18 U.S.C. § 2256(8)(D) (West 2003) (amended after *Ashcroft* decision).

construing the statute in a more limited way—the fact remains that the Court chose the conclusion it did. The conclusion the Court reached is not necessarily wrong; after all, the reasoning of the majority appears to be sound for the most part.[399] Certainly the decision shows that the "[C]ourt continues to be robustly pro-First Amendment."[400] A possible conclusion from the Court's decision is that "[c]utting across ideological lines, the [C]ourt has evinced a desire to sustain free speech claims against the interests of government in regulation."[401] True enough. But virtual child pornography is still a problem, even if the Court does not characterize that problem as compelling.[402] The remaining question, then, is what should Congress do?

III. CONGRESS'S REACTION AND THE FUTURE OF THE CPPA

Soon after the Supreme Court handed down the *Ashcroft* decision, a doctor in San Antonio appealed his conviction for possessing child pornography.[403] The doctor challenged the conviction because the government had not been required to prove that the images were real.[404] These appeals were occurring nationwide.[405] The concerns and predictions of opponents of child pornography were becoming a reality.[406] Congress realized the need to act, and on April 30, 2002, a few weeks after the Court issued its decision in *Ashcroft*, Representative Lamar Smith introduced an amendment to the CPPA in the House of Representatives.[407] Then, on May

399. *See supra* Part II.A.

400. Kenneth W. Starr, *The Anthrax Term*, WALL ST. J., July 5, 2002, at A12.

401. *Id.*

402. *See* Testimony of Ernest E. Allen, *supra* note 6.

403. Maro Robbins, *Doc Must Serve in Porn Case; Judge Denies Extended Bond During Appeal*, SAN ANTONIO EXPRESS-NEWS, June 18, 2002.

404. *Id.*

405. *Id.*

406. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 263 (2002) (O'Connor, J., concurring and dissenting in part).

407. 148 CONG. REC. H1769 (daily ed. Apr. 30, 2002). The bill was identified as H.R. 4623. An identical bill was introduced in the Senate, identified as S. 2511. *Bill Summary & Status for the 107th Congress*, *at* http://thomas.loc.gov (last visited Jan. 11, 2003). This bill was clearly a reaction to problems such as the potential affirmative defense available to defendants. The Congressional findings accompanying the new bill stated:

> The impact on the government's ability to prosecute child pornography offenders is already evident. The Ninth Circuit has seen a significant adverse effect on prosecutions since the 1999 Ninth Circuit Court of Appeals decision in *Free Speech Coalition*. After that decision, prosecutions generally have been brought in the Ninth Circuit only in the most clear-cut cases in which the government can specifically identify the child in the depiction or otherwise identify the origin of the image. This is a fraction of meritorious child pornography cases. The National Center for Missing and Exploited Children testified that, in light of the Supreme Court's affirmation of the Ninth Circuit decision, prosecutors in various parts of the country have expressed concern about the continued viability of previously indicted cases as well as declined potentially meritorious

15, 2002, Senator Orrin Hatch introduced an amendment in the Senate, although this one was somewhat different from the House version.[408] Both amendments made attempts to cure the constitutional problems with the original version of the bill while retaining its purpose.[409] In fact, the Senate bill became law on April 30, 2003.[410] This portion of this note will first examine the new law, its advantages, and its disadvantages. This note will then discuss what a constitutional virtual child pornography law might look like.

A. Public Law No. 108-21

The new law alters the definition of child pornography to include any depiction of sexually explicit conduct that is a "digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct."[411] The law clarifies that "indistinguishable from" means "virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct."[412] This definition is coupled with an affirmative defense that allows a defendant to show that the alleged child pornography was (1) "produced using an actual person," (2) that the "person was an adult [when] the material was produced," and (3) that the material was "not produced using any actual minor[s]."[413]

Initially, this new definition has superficial appeal because it is clearly aimed at images found on the internet.[414] The more limited aim of the law and its stream-lined definition excludes films such as *American Beauty*, *Traffic*, and *Romeo and Juliet*, which the *Ashcroft* Court expressed concern about including.[415] The problem that remains with the definition is that it proscribes computer images without regard to value.[416] Many value-laden

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prosecutions.

H.R. 4623, 107th Cong. (2002), Cong. Finding 9.

408. 148 CONG. REC. S4387-02 (daily ed. May 15, 2002). The Bill was identified as S. 2520. *Id.* A later version, apparently identical to the first, was reintroduced in the Senate on January 13, 2003. 149 CONG. REC. S237 (daily ed. Jan. 13, 2003). This time, the bill was identified as S. 151. *Id.*

409. *See* H.R. 4623, 107th Cong. (2002); S. 151, 108th Cong. (2003).

410. *Bill Summary and Status for the 108th Congress*, *at* http://thomas.loc.gov (last visited August 19, 2003). The House bill was passed in the House on June 25, 2002. *Bill Summary and Status for the 107th Congress*, *at* http://thomas.loc.gov (last visited Aug. 19, 2003). It was then referred to the Senate, where it died in committee. *Id.*

411. Pub. L. No. 108-21, § 502 (2003); 18 U.S.C. § 2256(8)(B) (2000).

412. Pub. L. No. 108-21, § 502 (2003); 18 U.S.C. § 2256(11) (2000).

413. Pub. L. No. 108-21, § 502 (2003); 18 U.S.C. § 2252(A) (2000).

414. *See* Pub. L. No. 108-21, § 501(6) (2003) (finding that "[t]he vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disks, and/or related media").

415. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 246-48 (2002). These films are distinguishable from films using real minors.

416. *See* Pub. L. No. 108-21, § 502 (2003) (proscribing digital or computer images but not specifically excluding works which have literary, artistic, or scientific value).

images may fall within the scope of the statute merely because of the method by which they were created.[417] Currently, many legitimate films are made using virtual actors.[418] For example, the film *Jurassic Park* was created using digital images, as was *Titanic*.[419] Therefore, a movie addressing themes similar to those addressed in *American Beauty* and *Traffic* that used "virtual actors" instead of real, youthful-looking adults would fall within the scope of the statute.[420]

The defendant is able to address this concern with the affirmative defense by showing that the film was not made using an actual minor.[421] This expanded affirmative defense probably cures the Court's concern with the scope of the defense.[422] However, the Court's concern with using an affirmative defense to cure problems with an otherwise defective definition is not addressed by this defense.[423] Legitimate filmmakers may still be "chilled," even if their work is not ultimately subject to prosecution, if their only guard against prosecution is an affirmative defense.[424] It seems preferable not to include these legitimate films in the scope of the statute at all.[425] At the same time, the affirmative defense removes from the statute valueless works that were created without using a real child; virtual child pornography created entirely by electronic means may cause the problem the statute seeks to remedy but are not included.[426]

The pandering provision of the new law adds a "knowing" requirement, does not include possession, and requires the material to be pandered as obscene.[427] The provision does not include possessors to the extent that (1) they are not explicitly mentioned, and (2) unlike the original CPPA, the provision against pandering is not included within the definition of child pornography.[428] Accordingly, the Court's concerns regarding how

417. *See id.*

418. *See* Anderson, *supra* note 345, at 393.

419. *Id.* at 394 ("All of these feats have been accomplished using sophisticated computer graphics software that blurs the distinction between imagination and reality.").

420. *See* Pub. L. No. 108-21, § 502 (2003). The statute does add a definition to "sexually explicit conduct" that requires "graphic" depictions. *Id.* The definition of "graphic" requires that the viewer be able to "observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted." *Id.* While this would exclude many films of value that are intended for general audiences, there is no clear reason to conclude that a film that does depict the genitals of the virtual actors is necessarily without value.

421. *See* Pub. L. No. 108-21, § 502 (2003).

422. *Ashcroft*, 535 U.S. at 255 (expressing concern over the defense's scope); Joseph J. Beard, *Virtual Kiddie Porn: A Real Crime? An Analysis of the PROTECT Act*, 21 ENT. & SPORTS LAW. 3, 5 (2003) (discussing this affirmative defense and noting that its scope is appropriate).

423. Beard, *supra* note 422, at 5.

424. *See* Broadrick v. Oklahoma, 413 U.S. 601, 630 (1973) (discussing chilled speech).

425. *See* discussion *infra* Part III.B.

426. *See* Pub. L. No. 108-21, § 503 (2003).

427. Pub. L. No. 108-21, § 503 (2003); 18 U.S.C. § 2252(A) (2000).

428. *See* Pub. L. No. 108-21, § 503 (2003); 18 U.S.C. § 2252(A) (2000).

possessors will be treated under the pandering provision have been cured.[429]

However, it is unclear how adding the word "obscene" cures the problems with the statute punishing activity that is unrelated to the content of the material.[430] Whether the pandering provision applies only to obscene materials, or to all sexually explicit materials depicting minors, the *Ashcroft* Court's concern was that a person could be punished for pandering materials even if the content is perfectly protected.[431] Just because the pandering conveys the impression that material is obscene does not mean that it is obscene.[432] The Court emphasized that pandering was relevant, "as an evidentiary matter," to the question of whether materials are obscene, but not that pandering could be punished regardless of content.[433]

The new law is arguably a step in the right direction in curing the problems with the CPPA.[434] However, it does not necessarily remedy the constitutional defects.[435] The new definition of child pornography fails to exclude works of literary, scientific, or artistic value.[436] The pandering provision punishes advertisers regardless of actual content.[437] Mark C. Alexander writes, "[I]n recent years, as Internet pornography has come to epitomize societal ills . . . Congress has responded by grandstanding, passing legislation that is, unsurprisingly, invalidated by the courts for failing constitutional standards. In seeking politically expedient symbolism without regard to the Constitution, Congress has failed."[438] Whether or not this statement applies to Public Law No. 108-21, another congressional failure surely cannot ameliorate the problems of virtual child pornography.[439]

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429. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 257-58 (2003) ("Materials falling within the proscription are tainted and unlawful in the hands of all who receive it, though they bear no responsibility for how it was marketed, sold, or described. . . . As a consequence, the CPPA . . . prohibits possession of material described, or pandered, as child pornography by someone earlier . . . .").

430. *See id.* at 257 (noting that the congressional findings supporting the CPPA are silent on the evils of pandering). The law does not purport to require the pandered material to contain any particular content. *See* Pub. L. No. 108-21, § 503 (2003). In fact, just the opposite is true: "The provision makes clear that no actual materials need exist; the government establishes a violation with proof of the communication and requisite specific intent." S. REP. NO. 108-002 (2003), *available at* http://thomas.loc.gov.

431. *Ashcroft*, 535 U.S. at 257-58.

432. *See id.* at 257 (noting that the phrase "conveys the impression" requires "little judgment about the content of the image").

433. *Id.* at 257-58.

434. *See generally* discussion this section. In addition, the new law has additional provisions that are meant to buttress enforcement of laws against child pornography that are outside the scope of this paper. *See* Pub. L. No. 108-21 (2003).

435. *See generally* discussion this section; *see also* Beard, *supra* note 422, at 5 (discussing potential constitutional difficulties with Pub. L. No. 108-21).

436. *See* Pub. L. No. 108-21 (setting forth no requirement regarding value).

437. *See id.* at § 503.

438. Mark C. Alexander, *The First Amendment and Problems of Political Viability: The Case of Internet Pornography*, 25 HARV. J.L. & PUB. POL'Y 977, 977-78 (2002).

439. *See id.*

B. A Picture of a Constitutional Bill

The first and most obvious way of avoiding constitutional problems with a regulation of virtual child pornography is to require, pure and simple, that it be obscene.[440] If the law adheres to the *Miller* standard, there will be no doubt at all that it is constitutional.[441] However, there are a few reasons why simply requiring obscenity is not desirable. First, a law requiring obscenity would be redundant because obscene images are proscribed in a different statute.[442] However, even if a distinction can be made between regulations of virtual child pornography requiring obscenity and obscenity laws themselves—such as enhancing punishments if minors are involved in an obscene depiction—a requirement of obscenity would interfere with the goals of stamping out all virtual child pornography. While requiring that the prosecution show obscenity would be a relatively small burden—probably the vast majority of images depicting children in sexually explicit conduct are obscene in even the most tolerant communities of our society[443]—simply making the distinction puts prosecutors in the difficult position of proving whether or not the depiction uses a real child. If the depiction uses a real child, and a showing of obscenity is therefore excused,[444] the prosecution would have to prove a real child was used, a burden already shown to be

440. Miller v. California, 413 U.S. 15, 23 (1973) ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.").

441. *See id.* at 24.

442. 18 U.S.C. §§ 1460-1466 (2000); *see also* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 239 (2003).

443. *See* JENKINS, *supra* note 68, at 4; *supra* note 376 (discussing community standards as they relate to child pornography). There is much discussion about the insufficiency of the current *Miller* standard because of its requirement that the material be judged accordingly to community, as opposed to national, standards. *See, e.g.*, Chiu, *supra* note 48. However, in the author's opinion these arguments are probably making too much of the variations between various communities' standards. While there may be real discrepancies with regard to pornography depicting adults, it is hard to imagine which communities would not find depictions of children to be "patently offensive," especially given the definition of sexually explicit conduct. *See* 18 U.S.C. § 2256(2) (2000) (defining "sexually explicit conduct" is as "actual or simulated . . . sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; . . . bestiality; . . . masturbation; . . . sadistic or masochistic abuse; . . . or lascivious exhibition of the genitals or pubic area of any person"). While there may be variations from community to community with regard to the image discussed in *Knox* (the young girls dancing), *see* 32 F.3d 733, 750 (3d. Cir. 1994), or with regard to pictures of young girls provocatively clad, few people would find actual depictions of minors engaged in sex to be merely indecent after determining those images had no other value. While Justice Kennedy noted that "[p]ictures of what appear to be 17-year-olds engaging in sexually explicit activity do not in every case contravene community standards," this statement is probably only true if the material has value. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 246 (2002). If there was in fact proof that the material without value depicted someone who appeared to be seventeen, as opposed to eighteen, many people would be offended that minors were in fact the targets of the material or that the material was pandered.

444. New York v. Ferber, 458 U.S. 747, 756-57 (1982) (allowing the prohibition of non-obscene child pornography because of the state's interest in protecting children from exploitation and abuse).

difficult to meet.[445] If the depiction does not use a real child, or the prosecution cannot show that it does, the prosecution must basically treat the charge as a charge of obscenity.[446] The result, given the difficulty of distinguishing between real and virtual child pornography, would probably be a negative effect on prosecutions of real child pornographers by imposing an obscenity requirement where it did not exist before.[447]

Aside from requiring obscenity, the area where the majority gave the most guidance with regard to the constitutionality of a statute regulating virtual pornography was when the Court stated that, in order to uphold the statute, the Court would have to find that virtual child pornography is wholly without First Amendment protection.[448] The Court implied, notwithstanding Justice Thomas's assertion that an affirmative defense could save the statute,[449] that this was the *only* way the statute could have survived.[450] Clearly, as it was written, the Court refused to make this finding.[451] However, the main basis for this may have been not that virtual child pornography is itself worthy of protection, but that the statute captured so much other material that is worthy of protection.[452] Therefore, perhaps the key to writing a constitutional statute is writing one that could persuade the Court to find virtual child pornography wholly without protection.[453] The key to doing this is to look at the types of materials that the Court has already declared to be without protection.[454] Obscenity, fighting words, defamation—according to the Court, all of these types of speech are, at their core, valueless.[455] While the Court made it clear in *Ashcroft* that secondary harms cannot be the justification for the law,[456] clearly these harms play some role in the Court's analysis.[457] Otherwise, there would be no reason for obscenity law at all.[458] There would be no reason to criminalize obscenity if the Court were not concerned with its effects, regardless of the Court's refusal to regulate based on a clear and present danger.[459] Likewise, the Court may consider the harms of virtual child pornography if it is convinced it has no value.[460] Therefore, the key is to define virtual child

445. *See* 18 U.S.C. § 2251 (2000), Cong. Finding 5.
446. *See* Miller v. California, 413 U.S. 15, 24 (1973).
447. *Compare Ferber*, 458 U.S. at 756-57, *with Ashcroft*, 535 U.S. at 256.
448. *Ashcroft*, 535 U.S. at 245-46.
449. *Id.* at 259 (Thomas, J., concurring).
450. *See id.* at 255-56.
451. *Id.* at 256.
452. *Id.* at 241.
453. *See id.*
454. *See* Miller v. California, 413 U.S. 15, 20-21 (1973).
455. *See id.*
456. *See Ashcroft*, 535 U.S. at 250-58.
457. *See id.*
458. *See id.*
459. *See supra* notes 29-34 and accompanying text (discussing the clear and present danger doctrine).
460. *Compare Ashcroft*, 535 U.S. at 241 (describing the valuable speech captured in the statute), *with Miller*, 413 U.S. at 20-21 (describing "valueless" speech).

pornography in such a way that everything that is captured in the statute is valueless.[461]

First, therefore, in defining virtual child pornography, "appears to be" should be changed to "virtually indistinguishable from," just as the current law does.[462] This will probably succeed in excluding many films with value from falling within the statute.[463] Hollywood films are probably distinguishable from virtual child pornography simply because they are marketed to general audiences.[464] Additionally, it will most likely exclude youthful-looking adults because youthful-looking adults are distinguishable from children.[465] If the identity of the adults in the material is known, the material will clearly be distinguishable from virtual child pornography. To be sure that youthful-looking adults are not included within the statute, the affirmative defense used by the new law is probably sufficient—the defendant can prove that only adults were used, but the material still cannot be obscene.[466]

Granted, the use of an affirmative defense that youthful-looking adults were used, even if the material is valueless (although not obscene), may cut against the overall efficacy of the statute. Perhaps all the harms caused by child pornography, aside from harm to a child, can be caused equally by youthful-looking adult pornography.[467] Surely the center of gravity is that pornography depicting children that has no value contributes to a culture of pedophilia and increases the danger of rape, whether real children were used or not.[468] Why make an exception for youthful-looking adults?

First, the Court in *Ashcroft* made clear that it will not tolerate the inclusion of youthful-looking adults in the statute.[469] Although the Court's ground for refusing to include youthful-looking adults was that much of this material has value,[470] the inclusion of youthful-looking adults implicates adult pornography. The inclusion of what is provably a depiction of an adult

461. *See Ashcroft*, 535 U.S. at 241; *Miller*, 413 U.S. at 20-21.

462. *See* Pub. L. No. 108-21, § 502 (2003).

463. *See Ashcroft*, 535 U.S. at 246-248; *id* at 268 (Rehnquist, C.J., dissenting). *Contra* Beard, *supra* note 422, at 5 (stating that it is not clear that "virtually indistinguishable from" cures the Court's concerns).

464. To explain further, child pornography is not generally marketed. There are no previews, television commercials, or print ads for child pornography. Therefore, if a movie is marketed as a Hollywood film, the way that *American Beauty* or *Traffic* were, that is an indication to the audience that the film is not child pornography. Any indication that the film is not child pornography makes the film distinguishable from child pornography.

465. *Ashcroft*, 535 U.S. at 261 (O'Connor, J., concurring and dissenting in part).

466. *See* Pub. L. No. 108-21, § 502 (2003).

467. *See* Statement of Anne M. Coughlin, *supra* note 176.

468. *Id.*

469. *Ashcroft*, 535 U.S. at 250-51 (citing *Ferber* for proposition that youthful-looking adults can be used); *id.* at 261-63 (O'Connor, J., concurring and dissenting in part) (concurring with the majority with regard to youthful-looking adult pornography).

470. *See id.* at 250-51.

engaged in sexually explicit activity on the justification that the adult looks like a child may raise particular concerns.[471] In *Hudnut*, the Seventh Circuit struck down a statute that defined pornography as the sexually explicit subordination of women.[472] The justification for the statute was similar to that in *Ashcroft*: it was essentially aimed at eradicating the negative effects of pornography.[473] Nevertheless, the depictions were protected.[474] Perhaps *Hudnut* stands for the proposition that pornography featuring adults is difficult to regulate with a content-based restriction, no matter what its effects.[475]

The strength in including youthful-looking adult pornography—which are *depictions* of children regardless of the source—is that it would enhance the completeness of the statute. However, as the Court has rejected the effects argument as a justification for regulating virtual child pornography, the inclusion would be tantamount to a restriction on adult pornography based on its content.[476] Such a restriction would likely cause constitutional problems absent a full obscenity requirement.[477] This may be especially true to the extent that the virtual child pornography statute may be aimed at creating a wholly unprotected category of speech.[478] The inclusion of pornography using adults in this category creates tension with the obscenity requirements that have already been imposed on sexually-oriented speech using adults.[479]

Second, a constitutional law should include a provision that requires the material have no artistic, scientific, or political value.[480] The intention is to define the material to be without value to increase the likelihood that it would be found to be without First Amendment protection.[481] The prosecutor should not have the same burden as he or she has with a showing

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471. *See* Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).

472. *Id.* at 324.

473. *Id.* at 325.

474. *Id.*

475. *See id.* Content-neutral regulations have been upheld. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 43 (1986); *see also supra* notes 314-18 and accompanying text (discussing content neutrality versus content-based statutes).

476. *See* Statement of Anne M. Coughlin, *supra* note 176 ("According to the Court's analysis, the criminalization of pornography is not justified based on claims about secondary harms—no matter how painful.").

477. *See* Miller v. California, 413 U.S. 15, 23-24 (1973). In *Miller*, the Court upheld restrictions on obscene speech involving adults on the ground that obscenity has no value; the Court did not discuss the secondary harms of pornography at all. *Id.*

478. *See* Free Speech Coalition v. Reno, 198 F.3d 1083, 1097 (9th Cir. 1999) (Ferguson, J., dissenting).

479. *See generally* Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002); New York v. Ferber, 458 U.S. 747 (1982); *Miller*, 413 U.S. 15.

480. *See Ashcroft*, 535 U.S. at 246 (expressing concern that the CPPA prohibited speech with "serious literary, artistic, political, or scientific value"). This showing, of course, would be in the alternative to showing that the material was made using a real, identifiable minor. *See Ferber*, 458 U.S. at 747. This is consistent with the construction of the original § 2256(8)(B) and with the new amended version. *See* Pub. L. No. 108-21, §§ 502-03 (2003). This suggested requirement is not to be construed as requiring obscenity or a modified version of obscenity.

481. *See Ashcroft*, 535 U.S. at 246.

of obscenity.[482] This proposed statute would avoid subjective community standards because the value standard is objective, asking what a reasonable person would conclude.[483] Another alternative may be, rather than imposing a showing of lack of value on the prosecution, creating an affirmative defense in which the defendant can show the material has value.[484] The advantage to this option, although there still would be some risk in imposing this burden on the defendant,[485] is that there would not be any difference between the standards for real and virtual child pornography for the prosecution, and accordingly, the prosecution would not have to prove that a real child was used.[486]

A final step in limiting the scope of the statute would be to define "sexually explicit" as "actual or indistinguishable from actual" sexually explicit conduct.[487] The "simulated" language currently used increases the likelihood that harmless material will be captured.[488] However, the exclusion of the "simulated" language would impose a burden on the prosecutor to show that the sexual conduct is real.[489] The use of the language "indistinguishable from actual" or similar language is close to Chief Justice Rehnquist's conclusion that only hard-core pornography need be reached.[490]

The pandering provision contained in the new law will probably survive constitutional scrutiny but for one additional change: there must actually be some requirements pertaining to the content of the material.[491] It is not enough that the material be pandered in a certain way if the actual content of the material is protected.[492] Taking the new definition and requiring that the material actually meet the definition of child pornography would certainly meet constitutional standards.[493] The strength of this provision would not be

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482. *See supra* discussion this section regarding why an obscenity requirement is undesireable.

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

484. *See* Sable Communications, Inc. v. FCC, 492 U.S. 115, 128 (1989) (finding that a properly crafted affirmative defense could cure a constitutional defect).

485. *See Ashcroft*, 535 U.S. at 256 ("The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful.").

486. That is, as long as there is a difference between standards for real and virtual child pornography, the prosecution would have to show which type of pornography was being prosecuted. The way to show this is inevitably showing whether a real child was used or not used.

487. Pub. L. No. 108-21, § 502 (2003) (defining sexually explicit as "actual or simulated" conduct).

488. *Ashcroft*, 535 U.S. at 263 (disapproving inclusion of "simulated" sex).

489. *See id.*

490. *See id.* at 270 (Rehnquist, C.J., dissenting). The new law attempts to cure this problem by requiring the actual depiction of genitals. Pub. L. No. 108-21, § 502 (2003).

491. *See Ashcroft*, 535 U.S. at 257 (disagreeing with the government's assumption that whether pandering "conveys the impression" that a work is of a minor engaging in sexually explicit conduct is dependent upon the actual content of the work).

492. *See id.*

493. *See id.* at 243.

particularly strong, but the Court has stated that legislative findings on the issue of child pornography are "silent on the evils" of images simply pandered in a certain way.[494] Without any clearly identified harm to be cured, the weakening of the pandering provision would probably not hurt the overall effectiveness of the statute.[495]

After limiting the definition of child pornography in these four ways, it is hard to conceive of any material that would fall within its provisions that would be considered valuable. In its congressional findings, in addition to emphasizing the government objectives that have already been accepted as valuable, Congress should emphasize the lack of value in what it seeks to ban.[496] If no material of any value is to be captured in the statute, the Court may very well find the asserted governmental interests adequate in a balancing test.[497] In fact, the Court intimated that it would.[498]

In summary, an amendment that (1) changed "appears to be" to "virtually indistinguishable from;" (2) defined the material in the statute as that which is without literary, social, political, or scientific value; (3) changed "simulated" sexual activity to "apparently actual;" and (4) maintained an affirmative defense that real, adult actors were used and that the material is not obscene would hopefully withstand constitutional scrutiny.[499] The material that fell within this definition would be comparable to obscenity and child pornography in that it has no value.[500] The possibility of material with value is probably what kept the Court from applying the balancing test from *Miller* and *Ferber*.[501] After clearing the "value" hurdle, the Court may be persuaded that the asserted governmental interests outweigh the value of the material.[502] Virtual child pornography would become another category of unprotected speech.[503]

The advancements of technology have outstripped *Ferber*.[504] A continued reliance on *Ferber* as the justification for regulation of child pornography will never help lawmakers come to a constitutional conclusion on the regulation of virtual child pornography.[505] *Ferber* was a case that, at the time it was decided, could not provide justifications for bans on virtual child pornography because such a thing did not exist—the rationale of *Ferber* did not reject regulation of virtual child pornography because it did

494. *Id.* at 257.

495. *See id.*

496. *See* Pub. L. No. 108-21, § 501 (2003); H.R. 4623, 107th Cong. (2002). It may be ineffective for Congress to emphasize all the secondary harms associated with child pornography. *See* Statement of Anne M. Coughlin, *supra* note 176.

497. *See supra* notes 348-56 and accompanying text.

498. *See Ashcroft*, 535 U.S. at 246.

499. *See supra* notes 440-95 and accompanying text.

500. *See supra* notes 440-95 and accompanying text.

501. *See supra* notes 339-52 and accompanying text.

502. *See supra* notes 353-56 and accompanying text.

503. *See supra* notes 26-28 and accompanying text.

504. Pub. L. No. 108-21, § 501 (2003), Cong. Finding 4 (describing the technology which was not available in 1982 when *Ferber* was decided).

505. *See id.*

not contemplate it.[506] With the use of the internet, pornographers, whether peddling real or virtual images, can easily go undetected.[507] The problem, largely caused by technology, of detecting the pornography is compounded when there must be a showing that the pornography is real; identifying the original source to determine whether a real child was used is practically impossible.[508] As changes in technology occur, it becomes important for courts to step away from previous justifications and look ahead toward the changing needs of society. The first federal obscenity statute, enacted in 1842, did not cover photographs; the technology was not in widespread use at the time.[509] Subsequently, Congress amended the statute to include photographs, recognizing that as technology changes, the law must change.[510] A similar adjustment must occur here. As much as there must be a recognition that *Ferber* can no longer be the definitive word on child pornography, this progression can be done within a traditional legal framework—the framework that allows some categories of speech to be proscribed because they are completely without value.[511]

IV. CONCLUSION

Representative Nick Lampson of Texas commented after the *Ashcroft* decision that "[t]he Supreme Court has sent a terrible message, one that is terrible to send to the pornographic community that this behavior is okay."[512] It is unfortunate that this message was given because it is not true. The large amount of virtual child pornography that is obscene has never been, nor is it likely to ever be, protected by the First Amendment.[513] But Congress has nonetheless amended the CPPA, and this is probably laudable given the very plausible arguments that child pornography, whether it uses real children or not, causes some serious problems that are only going to grow with advancements in technology.[514] It is also unfortunate that the new statute still suffers from constitutional defects.[515] However, a statute that only proscribes materials undeserving of First Amendment protection will surely

506. *See id.*

507. JENKINS, *supra* note 68, at 215 ("Despite all the enforcement efforts in recent years, it is still remarkably easy for any reasonably discreet person to pursue this highly illegal conduct indefinitely.").

508. *See generally id.*

509. Donna I. Dennis, *Obscenity Law and the Conditions of Freedom in the Nineteenth Century United States*, 27 LAW & SOC. INQUIRY 369, 384 (2002).

510. *Id.*

511. *See* Miller v. California, 413 U.S. 15, 20-21 (1973).

512. 148 CONG. REC. H1344-07 (daily ed. Apr. 17, 2003) (statement by Rep. Lampson).

513. *See Miller*, 413 U.S. at 23.

514. *See, e.g.*, Statement of Anne M. Coughlin, *supra* note 176; Pub. L. No. 108-21, § 501 (2003), Cong. Findings 6-10.

515. *See supra* notes 411-39 and accompanying text.

not chip away at the First Amendment and yet will be able to remedy concerns about how virtual child pornography affects children, pedophiles, and prosecutors.

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