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Virtual Child Pornography: The Children Aren't Real, But the Dangers Are; Why the Ashcroft Court Got it Wrong

Brian Goldblatt
Seton Hall Law

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*VIRTUAL CHILD PORNOGRAPHY: THE CHILDREN AREN'T REAL, BUT THE DANGERS ARE;
WHY THE ASHCROFT COURT GOT IT WRONG*

Brian Goldblatt Date Submitted: December 1, 2011

This paper is submitted to Professor Judson Jennings in partial satisfaction of the requirements of Law & Practice in Virtual Communities. This paper is submitted in satisfaction of the Seton Hall Law School's Advanced Writing Requirement. This paper is approved for AWR certification.

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I. INTRODUCTION

One need not look any further than the items in his own home to realize how much technology has progressed in the last two decades. In the world of televisions we have gone from the 1991 Zenith Advanced System 3 to now fifty plus inch high definition and 3D liquid crystal display (LCD) televisions. In video gaming we have progressed from the pixilated images in Sega Genesis and Nintendo to the XBOX360 and PlayStation3, with games such as Call of Duty and Madden NFL using motion-capture technology and state-of-the-art CGI technology to give us the most life-like humans to date. In Hollywood you have movies, such as this summer's blockbuster Rise of the Planet of the Apes, which used "CGI technology to create what looks to be the most realistic depiction yet of a humanised ape."¹ As technology has progressed, we are rapidly approaching a point, if not already there, where virtual images and videos are nearly indistinguishable from their real-life counterparts. In the realm of child pornography, this poses a dangerous and difficult problem. In the nine years since *Ashcroft v. Free Speech Coalition* we have gotten to a point where virtual child pornography can pose just as much harm to children as actual child pornography. Though virtual child pornography does not entail the abuse of real children, real children can still be victims. Because of the indirect harm to children that virtual child pornography causes, there are legitimate and compelling State interests in classifying virtual child pornography as a category of material wholly outside the protection of the First Amendment.

¹ Graham Smith, *Fans Go Bananas for New Planet Of The Apes Trailer Which Takes Humanised Monkey Effects to a Whole New Level*, MAIL ONLINE (April, 14 2011), <http://www.dailymail.co.uk/sciencetech/article-1376448/Rise-Of-The-Planet-Of-The-Apes-Fans-bananas-new-clip.html>.

This paper will first discuss the compelling State interests for prohibiting actual child pornography, as discussed in *New York v. Ferber*. Next it will discuss the Child Pornography Prevention Act of 1996 and how it was found unconstitutional by the Court in *Ashcroft v. Free Speech Coalition*. Part four will explain why the Court in *Ashcroft* got it wrong, and part five will give an alternative means of combating virtual child pornography under the analysis in *Brandenburg v. Ohio*. Finally part six will address the aftermath of *Ashcroft*, Congress' passing of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003, and the case that sustained it, *United States v. Williams*.

II. NEW YORK V. FERBER

The first case to tackle the issue of actual child pornography was *New York v. Ferber*. *Ferber* dealt with a New York statute that prohibited a person from “knowingly promoting a sexual performance by a child under the age of 16 by distributing material which depicts such a performance.”² In holding that the statute did not violate the First Amendment, the Supreme Court offered five reasons why the States were entitled to greater freedom in regulating child pornography.³

A. Compelling State Interests

First and foremost, the State has a “compelling” interest in “safeguarding the physical and psychological well-being of a minor.”⁴ After reviewing the legislative findings that accompanied the passage of the statute, the Court found that preventing the sexual exploitation and abuse of children “constituted a government objective of surpassing importance.”⁵ In passing the statute, the legislature found that using children as subjects in pornographic materials

² *New York v. Ferber*, 458 U.S. 747, 747 (1982).

³ *See id.* at 756.

⁴ *Id.* at 757.

⁵ *Id.*

was harmful to the emotional, physiological, and mental health of the children used in the production.⁶ When children are sexually exploited, studies have shown that they tend to be unable to develop healthy affectionate relationships later on in life, to become sexual abusers in adulthood, and to have a variety of sexual dysfunctions.⁷ These children are predisposed to self-destructive behavior such as drug and alcohol abuse or prostitution. In other words, being subjects of pornographic productions is both harmful to the children and to society as a whole.⁸ Therefore, as the legislature in NY found, the care of children, being a sacred trust, should not be abused by profit-seeking persons through a commercial network based on sexual exploitation of children, and for that reason the “public policy of the state demand[ed] the protection of children from exploitation through sexual performances.”⁹ The Court referred to its decision in *Prince v. Massachusetts*, saying that a “democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens,”¹⁰ and stated that as a result “we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.”¹¹ After mentioning that virtually all the States had passed legislation combating child pornography, the Court found that the regulation of child pornography “easily passes muster under the First Amendment.”¹²

⁶ See *Ferber*, 458 U.S. at 758.

⁷ See *id.* (citing Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J.AM.ACAD.CHILD PSYCHIATRY 289, 296 (1980)).

⁸ See *id.*

⁹ *Id.* at 757.

¹⁰ *Id.* (citing *Prince v. Massachusetts*, 321 U.S. 158, 168, (1944)).

¹¹ *Id.*

¹² *Ferber*, 458 U.S. at 758.

Second, the government has an interest in “closing the distribution network and drying up the market for child pornography.”¹³ The Court found the distribution of child pornography to be “intrinsically related” to the sexual abuse of children in at least two ways.¹⁴ “First, the materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation.”¹⁵ Pornography actually poses a greater threat to the child than does sexual abuse because of the fact that the misdeed is recorded and thus can haunt the child in future years, long after it originally took place.¹⁶ The child victim is most harmed by the fear of exposure and the tension of keeping what happened a secret and it is this knowledge of publication that “increases the emotional and psychic harm suffered by the child.”¹⁷ Secondly “the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.”¹⁸ It is nearly impossible to stop the progress of the exploitation of children by only going after the people who produce it.¹⁹ As Charles Rembar said during the Hearings before the Subcommittee on Crime of the House Judiciary Committee in 1977, “it is an impossible prosecutorial job to try and get at the acts themselves.”²⁰ Although the production of these materials is a low-profile, clandestine industry, “the need to market the resulting products requires a visible apparatus of distribution.”²¹ Therefore, “[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

¹³ Shepard Liu, Ashcroft, *Virtual Child Pornography and First Amendment Jurisprudence*, 11 U.C. DAVIS J. JUV. L. & POL’Y 1, 6 (2007) (citing *Ferber*, 458 U.S. at 760).

¹⁴ *See Ferber*, 458 U.S. at 759.

¹⁵ *Id.*

¹⁶ *See id.* at 760 (citing Shoumlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L.REV. 535, 545 (1981)).

¹⁷ *Id.* at 760.

¹⁸ *Id.* at 759.

¹⁹ *See id.* at 760.

²⁰ *Ferber*, 458 U.S. at 760

²¹ *Id.*

on persons selling, advertising, or otherwise promoting the product.”²² The Court compared child pornography with materials that are legally obscene under the *Miller* test²³, and said that while “some States may find that this approach properly accommodates its interests, it does not follow that the First Amendment prohibits a State from going further.”²⁴ The Court reasoned that the State has a “more compelling interest in prosecuting those who promote the sexual exploitation of children,” and thus, the standard adopted under *Miller* “bears no connection to the issue of whether a child has been physically harmed or psychologically harmed in the production of the work.”²⁵ The Court was not convinced that the *Miller* standard was a satisfactory solution to the problem of child pornography, so, for example, a sexually explicit depiction of a real child need not be “patently offensive” in order to be prohibited. Again, “a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography.”²⁶ The Court found that it “is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value.”²⁷

For its third reason, the Court said that “the advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation.”²⁸ In other words, the selling of child pornography is inherently linked with the production of child pornography, an activity that is illegal due to the

²² *Ferber*, 458 U.S. at 760.

²³ “Today we would add a new three-pronged test: ‘(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.’” *Miller v. California*, 413 U.S. 15, 39 (1973).

²⁴ *Ferber*, 458 U.S. at 760-61.

²⁵ *Id.* at 761.

²⁶ *Id.*

²⁷ *Id.* (citing Memorandum from Assemblyman Lasher in Support of N.Y. Penal Law § 263.15 (McKinney 2006)).

²⁸ *Id.*

numerous statutes that were in place that outlawed the employment of children in these kinds of films and photographs. The Court referred to *Giboney v. Empire Storage & Ice Co.*, saying that it has rarely “been suggested that the constitutional freedom for speech and press extends to immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.”²⁹ Therefore, if the constitutional freedom for speech and press did not extend to the production of child pornography, it certainly would not extend to the advertising and selling of child pornography.

The Court’s fourth reason for why the States were entitled to greater freedom in regulating child pornography was that the “value of permitting live performances and photographic reproductions” of minors engaged in sexual conduct “is exceedingly modest, if not *de minimis*,” and therefore considered it unlikely that child pornography “would often constitute an important and necessary part of a literary performance or scientific or educational work.”³⁰

As for the fifth reason, the Court found that “recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not, incompatible with our earlier decisions.”³¹ Child pornography “bears so heavily and pervasively on the welfare of children engaged in its production,” and is therefore “without the protection of the First Amendment.”³² As Justice Stevens said in *Young v. American Mini Theatres, Inc.*, “[t]he question whether speech is, or is not protected by the First Amendment often depends on the content of speech,” and “it is the content of [an] utterance that determines whether it is a protected epithet or an unprotected ‘fighting comment.’”³³ When it comes to content-based classifications, such as child pornography, the Court found that often times those classifications

²⁹ *Ferber*, 458 U.S. at 762 (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)).

³⁰ *Id.* at 762-63.

³¹ *Id.* at 763.

³² *Liu*, *supra* note 13, at 7 (citing *Ferber*, 458 U.S. at 763).

³³ *Young v. American Mini Theatre, Inc.*, 427 U.S. 50, 66 (1976)

have “been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.”³⁴ In other words, child pornography is so repugnant that it significantly outweighs any expressive interests that may come from it, and therefore a bright-line rule prohibiting it is more appropriate than requiring a case-by-case analysis. “For child pornography, ‘the balance of competing interests is clearly struck . . . and it is permissible to consider’ it unprotected.”³⁵

B. Direct Harm v. Indirect Harm

The Court in *Ferber* discussed two types of harms that were caused by actual child pornography. There was the “direct harm” to the actual children who were the subjects of the child pornographic materials. “This harm to their physical, physiological, mental, psychological, and emotional well being is brutish and pervasive,” and “this harm also includes the additional trauma caused to these children when the pornographic materials are advertised, distributed, and circulated.”³⁶ There was also an “indirect harm” that the Court spoke of. Pedophiles often will use child pornography to exploit and abuse other children. In enacting certain child pornography statutes, Congress found that child pornography often was used by pedophiles to stimulate and whet their own sexual appetites, and furthermore they would often use it to seduce other children into sexual activity.³⁷ “[A] child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children ‘having fun’ participating in such activity.”³⁸ Often times, “one child’s memorialized incident of sexual abuse is . . . used to victimize additional children in the

³⁴ *Ferber*, 458 U.S. at 763-64.

³⁵ Liu, *supra* note 13, at 8 (citing *Ferber*, 458 U.S. at 764).

³⁶ *Id.*

³⁷ See Congressional Findings (3), (4), Pub. L. 104-208, notes following 18 U.S.C.A. § 2251.

³⁸ *Id.*

future.”³⁹ Therefore the creation and distribution of child pornography not only directly harms the subjects of those materials, but it promotes the infliction of indirect harm on new victims; this harm is facilitated by the network that is the market for child pornography.⁴⁰

C. Indirect Harm: The Link Between Child Pornography and Child Molesting

Exact percentages vary, but experts have come to a general conclusion that there is in fact some link between viewing child pornography and sexually molesting children. A study by the New Zealand Internal Affairs suggested that there was “an association between viewing child pornography and committing child sexual abuse.”⁴¹ A New York Times article in 2007 discussed a new controversial government study of convicted Internet offenders.⁴² The research was carried out by psychologists at the Federal Bureau of Prisons, and found that many men who claim to be “just looking at pictures” could, in fact, be predators.⁴³ In the study, 155 male inmates, all serving sentences for possession or distribution of child pornography, had volunteered for the 18 month treatment program at the Federal Correctional Institution in Butner, N.C.⁴⁴ More than 85 percent admitted to abusing at least one child, compared to the 26 percent that were known to have done so at the time of sentencing.⁴⁵ The psychologists who conducted the study, Andres E. Hernandez and Michael L. Bourke, concluded that “many Internet child pornography offenders may be undetected child molesters.”⁴⁶ One convicted pedophile serving a

³⁹ Candace Kim, *From Fantasy to Reality: The Link Between Viewing Child Pornography and Molesting Children*, CHILD SEXUAL EXPLOITATION UPDATE. VOL. 1(NO. 3) (2004), available at http://www.ndaa.org/publications/newsletters/child_sexual_exploitation_update_volume_1_number_3_2004.html.

⁴⁰ See Liu, *supra* note 13, at 9.

⁴¹ *Archive of Statistics on Internet Dangers*, ENOUGH IS ENOUGH (2006), <http://www.enough.org/inside.php?tag=stat%20archives#> (citing Caroline Sullivan, *Internet Traders of Child Pornography: Profiling Research*, NEW ZEALAND’S DEPARTMENT OF INTERNAL AFFAIRS (October 2005), [http://www.dia.govt.nz/pubforms.nsf/URL/Profilingupdate2.pdf/\\$file/Profilingupdate2.pdf](http://www.dia.govt.nz/pubforms.nsf/URL/Profilingupdate2.pdf/$file/Profilingupdate2.pdf)).

⁴² See Julian Sher and Benedict Carey, *Debate on Child Pornography’s Link to Molesting*, N.Y. TIMES (July 19, 2007), available at <http://www.nytimes.com/2007/07/19/us/19sex.html?ref=childpornography>.

⁴³ See *id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

14-year sentence said that viewing child pornography gave him no release from his desires, but instead the exact opposite, furthering the sentiment that some men convicted of sexually abusing children had their urges fueled by child pornography.⁴⁷ The pedophile was interviewed and quoted as saying:

[T]here is no way I can look at a picture of a child on a video screen and not get turned on by that and want to do something about it. I knew that in my mind. I knew that in my heart. I didn't want it to happen, but it was going to happen.⁴⁸

Although that controversial study put the number at 85 percent, most other studies have put the correlation rate in the 40 percent range. "Forty percent of people charged with child pornography also sexually abuse children. But finding the predators and identifying the victims are daunting tasks."⁴⁹ A 2000 study issued by the Federal Bureau of Prisons found that "76 percent of offenders convicted of internet-related crimes against children admitted to contact sex crimes with children previously undetected by law enforcement and had an average of 30.5 child sex victims each."⁵⁰ According to the Mayo Clinic of the U.S.A., studies and case reports put that correlation rate between child pornography and child molesting between 30 and 80 percent.⁵¹ During one study, the majority of men who had been charged with or convicted of child pornography offenses showed pedophilic profiles on phallometric testing.⁵²

⁴⁷ See Sher & Carey, *supra* note 42.

⁴⁸ *Id.*

⁴⁹ *Archive of Statistics on Internet Dangers*, *supra* note 41 (citing Reuters, 2003).

⁵⁰ Kim, *supra* note 39 (citing Internet Child Pornography: Before the House Subcomm. on Crime, Terrorism, and Homeland Security, Comm. on the Judiciary, 107th Cong. (2002) (statement of Michael J. Heimbach, Crimes Against Children Unit, Criminal Investigative Division, FBI)).

⁵¹ See Ryan C.W. Hall and Richard C.W. Hall, *A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues*, MAYO CLINIC PROCEEDINGS (Apr. 2007), <http://www.mayoclinicproceedings.com/content/82/4/457.full>.

⁵² See Michael C. Seto, James M. Cantor, and Ray Blanchard, *Child Pornography Offenses Are a Valid Diagnostic Indicator of Pedophilia*. JOURNAL OF ABNORMAL PSYCHOLOGY 115.3 (2006): 610-15. "Phallometric testing. Clinicians and researchers use phallometry to quantify the sexual interests of sexual offenders against children (e.g., Howes, 1995). A meta-analytic review of 61 sex offender follow-up studies found that phallometrically assessed sexual arousal to children was the strongest predictor of subsequent sexual offenses among all the variables that were examined (Hanson & Bussiere, 1998). The specific protocol in use at the Kurt Freund Laboratory over the

Our results indicate that child pornography offending is a valid diagnostic indicator of pedophilia. Child pornography offenders were significantly more likely to show a pedophilic pattern of sexual arousal during phallometric testing than were comparison groups of offenders against adults or general sexology patients. In fact, child pornography offenders, regardless of whether they had a history of sexual offenses against child victims, were more likely to show a pedophilic pattern of sexual arousal than were a combined group of offenders against children. Our results suggest that child pornography offending might be a stronger indicator of pedophilia than is sexually offending against a child.⁵³

A 1987 report by the U.S.A. National Institute of Justice said that there was a “disturbing correlation” between viewing child pornography and sexually abusing children.⁵⁴

From January 1997 through March 2004, 620 of the 1,807 child pornographers that were arrested, approximately 34 percent, were confirmed child molesters.⁵⁵ The United States Postal Inspection Service, which compiles data based upon evidence derived from child pornography crime scene investigations and police reports, found that at least 80 percent of purchasers of child pornography were active abusers and nearly 40 percent of the child pornographers investigated during the last few years had sexually molested children in the past.⁵⁶ Internet Crimes Against Children (ICAC) task forces in states such as Pennsylvania and Texas found that 51 percent and 32 percent, respectively, of individuals that were arrested for viewing child pornography were also molesting children, or had done so in the past, further confirming “the positive correlation between the possession of child pornography and the commission of crimes against children.”⁵⁷

Sexual predators will use child pornography as a means of assisting them in the grooming

course of the present investigation reliably distinguishes pedophilic from teleiophilic men (i.e., men who prefer sexually mature persons). Blanchard et al. (2001) have described the phallometric testing procedure and data preparation in detail. Briefly, a computer records penile blood volume while the patient observes a standardized set of stimuli that depict persons of potential sexual interest. Changes in penile blood volume (i.e., his degree of penile erection) indicate his relative sexual interest in each stimulus category.” *Id.* at 611.

⁵³ *Id.* at 613.

⁵⁴ See “Remarks of Arnold I Burns Before the Florida Law Enforcement Committee on Obscenity, Organized Crime and Child Pornography”. *NCJ 109133*. National Institute of Justice. 1987-12-03.

⁵⁵ See Kim, *supra* note 39.

⁵⁶ See Stopping Child Pornography: Protecting our Children and the Constitution: Before the Senate Comm. On the Judiciary, 107th Cong. (2002) (statement of Ernie Allen, Director, The National Center for Missing and Exploited Children).

⁵⁷ Kim, *supra* note 39.

process, helping break down the child’s barriers to sexual behavior, making the child feel at ease, and additionally communicating the predator’s sexual fantasies to the child.⁵⁸ Child pornography, while reinforcing fantasies, is often a precursor to acting out with real children, where “[m]any pedophiles acknowledge that exposure to child abuse fuels their sexual fantasies and plays an important part in leading them to commit hands-on sexual offenses against children.”⁵⁹ Evidence suggests that it is only a small leap from viewing child pornography to molesting children, and “[i]n light of the documented link between . . . [the two,] each child pornography case should be viewed as a red flag to the possibility of actual child molestation.”⁶⁰

Although no one can agree on the exact percentage of individuals that view child pornography and also sexually molest children, it seems that almost everyone agrees that some correlation does in fact exist. This type of correlation falls under the category of indirect harm, a category of harm that the government has a compelling interest in preventing, as found by the Court in *Ferber* and again in *Osborne v. Ohio*.⁶¹ However, although the Court in *Ferber* discusses both direct and indirect harms caused by the production and distribution of child pornography, it acted inconsistently when discussing the difference between actual and virtual child pornography. “Unfortunately, the Court did not consistently hold to its restriction against virtual child pornography. Instead it seemed to create a loophole through which virtual child pornography could escape the prohibition.”⁶² While at one point, the Court acknowledges the importance of preventing children from both direct and indirect harm, at another point the Court basically says that virtual child pornography could be utilized as a legal alternative to actual

⁵⁸ See Kim, *supra* note 39 (Grooming is the gradual process by which child molesters build trust with the child to transition from a nonsexual relationship to a sexual relationship. This is accomplished by seeking out, befriending, and manipulating a target, and seducing the child with attention, affection and gifts.).

⁵⁹ John Carr, *Child Abuse, Child Pornography and the Internet: Executive Summary* (NCH 2004).

⁶⁰ Kim, *supra* note 39.

⁶¹ In *Osborne*, the Court found that “pedophiles use child pornography to seduce . . . children into sexual activity.” *Osborne v. Ohio*, 495 U.S. 103, 111 (1990).

⁶² Liu, *supra* note 13, at 10.

child pornography, even though virtual child pornography causes the same indirect harms to children as its real-life counterparts.⁶³ “[T]he Supreme Court closed the front door to keep virtual pornography out; but at the same time, it opened the back door to let it in.”⁶⁴ In order to combat this loophole created by the Supreme Court in *Ferber*, Congress passed the Child Pornography Protection Act (CPPA) of 1996.

III. THE CPPA AND RELATED CASES

A. The CPPA

For the last several decades, “Congress has been trying to eliminate the scourge of child pornography. Each time Congress passes a law, child pornographers find a way around the law’s prohibitions. This cycle recently repeated itself and prompted Congress to enact the CPPA.”⁶⁵ In enacting the CPPA, Congress attempted “to close loopholes in our Federal child pornography laws caused by advances in our computer technology,”⁶⁶ by banning visual depictions that “appear[] to be of a minor engaging in sexually explicit conduct” or that are “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.”⁶⁷ The CPPA covered actual child pornography, morphed child pornography, child pornography made by using youthful-looking adults, and wholly computer-generated virtual child pornography. In enacting the CPPA, Congress included thirteen detailed legislative findings that gave its explanation for why it was imperative that virtual child pornography be prohibited.⁶⁸

Congress found it to be a compelling governmental interest to protect children from direct harm,

⁶³ See Liu, *supra* note 13, at 10 (citing *Ferber*, 458 U.S. at 763). “[I]f it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative.” *Ferber*, 458 U.S. at 763.

⁶⁴ Liu, *supra* note 13, at 10.

⁶⁵ *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1098 (Ferguson, J., dissenting) (internal citations omitted).

⁶⁶ Liu, *supra* note 13, at 15 (citing S. Rep. No. 104-338, at 28 (2006) (Additional Views of Senator Biden)).

⁶⁷ *Reno*, 198 F.3d at 1098 (Ferguson, J., dissenting) (citing 18 U.S.C.A. §§ 2256(8)(B), (d) (West Supp. 1999)).

⁶⁸ See *id.*

such as found in actual child pornography in *Ferber*, as well as indirect harm produced by actual or virtual child pornography.

B. The Constitutionality of the CPPA

1. Circuit Court Decisions

After Congress passed the CPPA, four Federal Circuit Courts upheld the constitutionality of it. However, the Ninth Circuit in *Free Speech Coalition v. Reno* held it to be unconstitutionally overbroad and vague.

In 1999, the First Circuit in *United States v. Hilton*, applied strict scrutiny in reviewing the CPPA, and held that the government had a compelling interest in protecting children from both direct and indirect harm.⁶⁹ The Court in *Hilton* observed that “the legislative record . . . [makes it] plain that the [CPPA] was intended to target only a narrow class of images—visual depictions ‘which are virtually indistinguishable to unsuspecting viewers’”⁷⁰ from actual child pornography. The Court found that virtual child pornography, similar to actual child pornography, had little, if any social value, yet “[t]he government’s interest in addressing these forms of child pornography is no less powerful than in instances where an actual child is actually used and abused during the production process.”⁷¹ The Court in *Hilton* found that although there might be some illegitimate applications of the CPPA, the “existence of a few possibly impermissible applications of the Act does not warrant its condemnation . . . [and w]hatever overbreadth may exist at the edges are more appropriately cured through a more precise case-by-case evaluations of the facts in a given case.”⁷² The Court stressed the fact that there was an affirmative defense available in scenarios where the CPPA might be impermissibly applied, and

⁶⁹ See Liu, *supra* note 13, at 16.

⁷⁰ *United States v. Hilton*, 167 F.3d 61, 72 (1999) (quoting S. Rep. No. 104-358, pt. 1, p. 7 (1996)).

⁷¹ *Id.* at 73.

⁷² Liu, *supra* note 13, at 17.

therefore, it was not substantially overbroad.⁷³ It also held that the CPPA was not unconstitutionally vague, finding that the “appears to be” standard was not purely subjective but instead was an objective standard: “[a] jury must decide, based on the totality of the circumstances whether an unsuspecting viewer would consider the depiction to be an actual individual under the age of eighteen engaging in sexual activity.”⁷⁴ Furthermore, the Court found an additional safeguard against arbitrary prosecutions, in that “[t]he element of scienter . . . must be satisfied by the prosecution before a valid conviction may be obtained – for instance, the government must prove beyond a reasonable doubt that an individual ‘knowingly’ possessed the child pornography,”⁷⁵ and this scienter requirement “extends to both the sexually explicit nature of the material and the to the age of the performers.”⁷⁶ As such, the Court came to the conclusion that “the statute’s provisions ‘suitably limit’ the reach of the Act so that a person of ordinary intelligence can easily discern likely unlawful conduct and conform his or her conduct appropriately.”⁷⁷

That same year the Eleventh Circuit in *United States v. Acheson* also upheld the CPPA. It found that “the CPPA’s overbreadth is minimal when viewed in light of its plainly legitimate sweep,” and that the ‘appears to be’ language does not impermissibly expand “the scope of the CPPA to the point where it captures so much constitutionally protected conduct as to render the statute invalid.”⁷⁸ The Court found that the “appears to be” language only targeted images that were “virtually indistinguishable to unsuspecting viewers from unretouched photographs of

⁷³ See Liu, *supra* note 13, at 17. The CPPA provided an affirmative defense which allowed defendants to avoid conviction by showing that the materials in question were produced using only adult subjects, and were not distributed in a manner conveying the impression that they depicted real children. This defense did not apply to morphed child pornography (see *infra* p. 39) or wholly computer-generated virtual child pornography. See 18 U.S.C. § 2252(A)(c) (2000) (amended 2003).

⁷⁴ *Hilton*, 167 F.3d at 75.

⁷⁵ *Id.*

⁷⁶ *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).

⁷⁷ *Hilton*, 167 F.3d at 76.

⁷⁸ Liu, *supra* note 13, at 22-23 (citing *United States v. Acheson*, 195 F.3d 645, 650-51 (11th Cir. 1999)).

actual children engaging in explicitly sexual conduct,”⁷⁹ and found that the suggestion in *Ferber* (that youthful-looking adults or simulations could be used as a legal alternative) should not be given much weight because the *Ferber* Court had also found virtual child pornography to be of “exceedingly modest, if not de minimis,” value and as such was unlikely to “constitute an important and necessary part of a literary performance or scientific or educational work.”⁸⁰ The Court agreed with the court in *Hilton*, that any potential overbreadth that may exist could be “cured through case-by-case analysis.”⁸¹ The Court also agreed with the court in *Hilton* that the scienter requirement protected against unscrupulous enforcement, in that “[i]f the government could not prove beyond reasonable doubt that the charged person ‘knowingly receives or distributes’ or ‘knowingly possesses’ materials prohibited by the Act, then the statute did not apply,”⁸² and concluded “that the CPPA passed the void-for-vagueness test.”⁸³

The following year, in *United States v. Mento*, the Fourth Circuit applied strict scrutiny to the CPPA and held that there was a compelling governmental interest in protecting children from sexual exploitation resulting from child pornography⁸⁴, and recognized the fact that virtual child pornography produced “the same negative effects on minors” as actual child pornography.⁸⁵ The Court agreed with both the *Hilton* and *Acheson* courts in that the Act was not constitutionally overbroad, for the “appears to be” language “prohibited only those images that were virtually indistinguishable from real child pornography,”⁸⁶ and did “not outlaw items such as drawings, cartoons, or paintings.”⁸⁷ The Court noted that when virtual child pornography “cannot be easily

⁷⁹ *United States v. Acheson*, 195 F.3d 645, 651 (11th Cir. 1999) (citing S. Rep. No. 104-358, at 3 (1996)).

⁸⁰ *Id.*

⁸¹ *Id.* at 652.

⁸² Liu, *supra* note 13, at 24.

⁸³ *Id.* (citing *Hilton*, 167 F.3d at 75).

⁸⁴ See *United States v. Mento*, 231 F.3d 912, 918 (4th Cir. 2000).

⁸⁵ *Id.* at 921.

⁸⁶ Liu, *supra* note 13, at 20. (*Mento*, 231 F.3d at 921).

⁸⁷ *Mento*, 231 F.3d at 921.

distinguished from the real thing . . . [it does] not deserve the protections of the First Amendment, because ‘like sexually explicit material produced with actual children, there is little, if any social value in this type of expression.’⁸⁸ The Court agreed with both the *Hilton* and *Acheson* courts and found that the CPPA was neither overbroad nor void for vagueness.

The year after *Mento* was decided, the CPPA was once again brought up in *United States v. Fox*. The Fifth Circuit agreed with the three courts above and found the Act to be neither overbroad nor void for vagueness. The Court referred to both *Ferber* and *Osborne* and held that regulation of virtual child pornography was justified due to its indirect harm to children.⁸⁹ The Court noted that the *Osborne* court had discussed not only the direct harm caused to minors who are used as subjects in child pornography, but also the indirect harm posed to future children when such pornography is used to seduce or coerce them into sexual activity, and that “[i]t makes no difference to the children coerced by such materials, or to the adult who employs them to lure children into sexual activity, whether the subjects depicted are actual children or computer simulations of children.”⁹⁰ Virtual child pornography fuels the child pornography market, and “the *Ferber* court expressly endorsed the destruction of . . . [this] market as a justification of banning sexually explicit images of children.”⁹¹

In the same year that *Hilton* and *Achelson* was decided, the Ninth Circuit split with the First, Fourth, Fifth, and Eleventh Circuits on the constitutionality of the CPPA in *Free Speech Coalition v. Reno*.⁹² Like the other courts, the Ninth Circuit applied strict scrutiny⁹³, but found the Act to be unconstitutional on three grounds. The Court found that the government did not

⁸⁸ *Mento*, 231 F.3d at 921. *See Hilton*, 167 F.3d at 73.

⁸⁹ *See United States v. Fox*, 248 F.3d 394, 401-402 (5th Cir. 2001).

⁹⁰ *Id.*

⁹¹ *Id.* at 402.

⁹² *See Reno*, 198 F.3d at 1097.

⁹³ *See id.* at 1091.

have a compelling interest in banning virtual child pornography⁹⁴, and held the Act to be unconstitutionally overbroad⁹⁵ and unconstitutionally vague⁹⁶. Unlike the other four Circuit courts, the Court in *Reno* interpreted *Ferber* as legitimizing only one kind of compelling government interest – the direct harm caused to children who are subjects of child pornography.⁹⁷ The Court in *Reno* did not recognize the fact that virtual child pornography could cause indirect harm to future children who are seduced by pedophiles, instead finding that “factual studies that established the link between computer-generated child pornography and the subsequent sexual abuse of children do not yet exist.”⁹⁸ The Ninth Circuit felt that without containing visual images of actual children, there was no compelling governmental interest in regulating virtual child pornography⁹⁹ and thus, found the CPPA to be invalid on its face.

C. Ashcroft v. Free Speech Coalition

After the *Reno* court found the CPPA to be unconstitutional, the Supreme Court granted certiorari and decided *Ashcroft v Free Speech Coalition* in 2002. The Supreme Court sided with the Ninth Circuit and found the CPPA to be unconstitutional.¹⁰⁰ In *Ashcroft*, the Supreme Court recognized the fact that “[t]he sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people.”¹⁰¹ Because of this, Congress is allowed to pass valid laws to protect children from abuse; however, “the prospect of crime . . . by itself does not justify laws suppressing protected speech.”¹⁰² Although the freedom of speech is one of our most fundamental rights, it does have its limits; certain categories such as defamation,

⁹⁴ *Reno*, 198 F.3d at 1092.

⁹⁵ *Id.* at 1097.

⁹⁶ *Id.*

⁹⁷ See Liu, *supra* note 13, at 25.

⁹⁸ *Reno*, 198 F.3d at 1093.

⁹⁹ See *id.*

¹⁰⁰ See Liu, *supra* note 13, at 32 (citing *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 258 (2002)).

¹⁰¹ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002).

¹⁰² *Ashcroft*, 535 U.S. at 245.

incitement, obscenity, and actual pornography are not embraced.¹⁰³ The Court found that none of those categories included the speech that was prohibited by the CPPA, and held that the CPPA goes beyond both *Ferber* and *Miller*. “The CPPA . . . extends to images that appear to depict a minor engaging in sexually explicit activity without regard to the *Miller* requirements,”¹⁰⁴ and “applies to a picture in a psychology manual, as well as a movie depicting the horrors of sexual abuse.”¹⁰⁵ The Court said that the CPPA prohibited speech without regard to its literary, artistic, political, or scientific value.¹⁰⁶

The Court held that under the CPPA’s literal terms, works such as Shakespeare’s *Romeo and Juliet* would fall within the statute’s prohibitions.¹⁰⁷ Academy Award winning movies such as *Traffic* and *American Beauty* “explore themes within the wide sweep of the statute’s prohibitions,” regardless of whether or not they violate the CPPA.¹⁰⁸ It is the Court’s view that if any of the hundreds of films or other literary works that explore these subjects “contain even a single graphic depiction of sexual activity within the statutory definition, the possessor of the film would be subject to severe punishment without inquiry into the work’s redeeming value.” According to the Court, this is not consistent with the First Amendment rule that “[t]he artistic merit of a work does not depend on the presence of a single explicit scene,” and because of that, “[t]he CPPA cannot be read to prohibit obscenity [I]t lacks the required link between its prohibitions and the affront to community standards prohibited by the definition of obscenity.”¹⁰⁹

The Government tried to address this deficiency by arguing that the only speech that the CPPA prohibited was speech that was “virtually indistinguishable” from child pornography,

¹⁰³ See *Ashcroft*, 535 U.S. at 245-46.

¹⁰⁴ *Id.* at 246.

¹⁰⁵ *Id.*

¹⁰⁶ See *id.*

¹⁰⁷ See *id.* at 248.

¹⁰⁸ *Id.*

¹⁰⁹ *Ashcroft*, 535 U.S. at 248.

which could be banned “without regard to whether it depicts works of value.”¹¹⁰ However, the Court found that the State had an interest in stamping out images without regard to any judgment about its content only in circumstances where the images were themselves the product of child abuse, as in *Ferber*.¹¹¹ The statute in *Ferber* targeted the production of the work, not the work’s contents. “The fact that a work contained serious literary, artistic, or other value did not excuse the harm it caused to its child participants.”¹¹² In *Ferber*, the prohibited speech had a “proximate link” to the crime from which it came.¹¹³

The Court in *Ashcroft* discussed *Osborne* and recognized that *Osborne* had noted “the State’s interest in preventing child pornography from being used as an aid in the solicitation of minors.”¹¹⁴ However the Court felt that *Osborne* had “anchored its holding in the concern for the participants, those whom it called the ‘victims of child pornography,’” and that absent direct harm, indirect harm alone would not suffice.¹¹⁵ The CPPA prohibited speech that created no victim in its production and recorded no crime, unlike the speech in *Ferber* which was the record of child sexual abuse.¹¹⁶ The Court found that virtual child pornography was not “intrinsicly related” to the sexual abuse of children, and that while images can lead to instances of actual child abuse, “the causal link is contingent and indirect.”¹¹⁷ Unlike in *Ferber*, where the harm follows from the speech, here it “depends upon some unquantified potential for subsequent criminal acts.”¹¹⁸

¹¹⁰ *Ashcroft*, 535 U.S. at 249.

¹¹¹ *See id.*

¹¹² *Id.*

¹¹³ *Id.* at 250.

¹¹⁴ *Id.* (citing *Osborne v. Ohio*, 495 U.S. 103, 111 (1990)).

¹¹⁵ *Id.* (citing *Osborne*, 495 U.S. at 110).

¹¹⁶ *See Ashcroft*, 535 U.S. at 250.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

The Government found those indirect harms to be sufficient, citing *Ferber's* acknowledgement that child pornography can rarely be valuable speech, but the Court found two flaws in that argument.¹¹⁹ The first flaw was that the *Ferber* court decided the way it did based on how the child pornography was made, not on the message that it communicated, something the Court stresses several times throughout its holding.¹²⁰ “The case reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.”¹²¹ Secondly, *Ferber* recognized that some works in the category of child pornography might have significant value, and it relied on virtual images as an “alternative and permissible means of expression.”¹²² It not only made the distinction between actual and virtual child pornography, but it relied on it as a reason for its holding, and as such it “provides no support for a statute that eliminates the distinction and makes the alternative mode criminal as well.”¹²³

The Supreme Court found the CPPA to be inconsistent with both *Miller* and *Ferber*, and found no weight in the Government's other justifications. The Government argued four other reasons for why the CPPA was necessary. First, pedophiles can use virtual child pornography to seduce children.¹²⁴ However, the Court found this concern no different than other innocent things that could be used for immoral purposes, such as cartoons, video games, and candy.¹²⁵ The Court said the government could of course punish these pedophiles for providing unsuitable materials to children, but that the Government “cannot ban speech fit for adults simply because it

¹¹⁹ See *Ashcroft*, 535 U.S. at 250.

¹²⁰ See *id.* at 251.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See *id.*

¹²⁵ See *Ashcroft*, 535 U.S. at 251.

may fall into the hands of children.”¹²⁶ In the case of using virtual child pornography to seduce children, the evil is dependent upon the actor’s unlawful conduct, conduct “defined as criminal quite apart from any link to the speech in question.”¹²⁷ The Court found that the CPPA went well beyond the interest in prohibiting illegal conduct “by restricting the speech available to law-abiding adults.”¹²⁸

Secondly, the Government contended that virtual child pornography “whets the appetites of pedophiles and encourages them to engage in illegal conduct,”¹²⁹ a sentiment that Congress had included in its Congressional findings following the passage of the CPPA. But the Court rejected that argument and held that the Government could not “constitutionally premise legislation on the desirability of controlling a person’s private thoughts.”¹³⁰ “The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.”¹³¹ In the Court’s view, the Government did not show that the speech in question incited or produced imminent lawless action, as required under *Brandenburg v. Ohio*¹³², and as such the Government could not “prohibit speech because it increases the chance an unlawful act will be committed ‘at some indefinite future time.’”¹³³

For its third justification, the Government argued that virtual child pornography needed to be prohibited in order to help eliminate the market for pornography produced using real children.¹³⁴ The Government found that virtual images are indistinguishable from real ones, and as such could be traded with pedophiles for actual child pornography, further fueling the market

¹²⁶ *Ashcroft*, 535 U.S. at 252.

¹²⁷ *Id.*

¹²⁸ *Id.* at 252-53.

¹²⁹ *Id.* at 253.

¹³⁰ *Id.* (quoting *Stanley v. Georgia*, 394 U.S. 557, 566 (1969)).

¹³¹ Liu, *supra* note 13, at 35-36 (citing *Ashcroft*, 535 U.S. at 253).

¹³² See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

¹³³ *Ashcroft*, 535 U.S. at 253 (citing *Hess v. Indiana*, 414 U.S. 105, 108 (1973)).

¹³⁴ *Id.* at 254.

for child pornography. However, the Court found this to be implausible. Instead, it felt that “[i]f virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes [and f]ew pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice.”¹³⁵ Unlike *Ferber*, where the creation of the speech was itself the crime of child abuse, here the Court said there was no underlying crime at all, and as a result the Government’s market deterrence theory did not justify this statute.¹³⁶

Finally, the Government argued that the “possibility of producing images by using computer imaging makes it very difficult for it to prosecute those who produce pornography by using real children.”¹³⁷ Experts can have a difficult time determining whether the pictures were produced using actual children or by using computer imaging, and so the Government argued that both kinds of images needed to be prohibited.¹³⁸ Rather than interpreting the CPPA as a measure suppressing speech, the Government wanted the Court to read the CPPA as a law that shifts the burden to the accused to prove the speech is not unlawful, and relied on an affirmative defense under the statute.¹³⁹ This affirmative defense “allows a defendant to avoid conviction for nonpossession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children.”¹⁴⁰ The Court likened the Government’s final argument to essentially an argument that says protected speech should be banned as a means to ban unprotected speech.¹⁴¹ This, the Court

¹³⁵ *Ashcroft*, 535 U.S. at 254.

¹³⁶ *See id.*

¹³⁷ *Id.*

¹³⁸ *See id.*

¹³⁹ *See id.* at 255.

¹⁴⁰ *Id.* (citing 18 U.S.C. § 2252A(c)).

¹⁴¹ *See Ashcroft*, 535 U.S. at 255.

says, turns the First Amendment upside down.¹⁴² Protected speech does not lose First Amendment protection simply because it resembles unprotected speech; instead the opposite is true. “[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,”¹⁴³ and consequently the Government is prohibited “from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.”¹⁴⁴ The Court also found the affirmative defense to be incomplete and insufficient, leaving unprotected “a substantial amount of speech not tied to the Government’s interest in distinguishing images produced using real children from virtual ones.”¹⁴⁵

The Supreme Court found that the CPPA covered materials beyond the recognized categories in *Ferber* and *Miller*, and that it abridged the freedom to engage in a substantial amount of lawful speech.¹⁴⁶ As a result, it held that the CPPA was overbroad and unconstitutional.¹⁴⁷

IV. THE COURT IN *ASHCROFT* GOT IT WRONG

In holding that the CPPA was unconstitutional, the Court in *Ashcroft* got it wrong for several reasons. In 1995, Congress opined that apparent child pornography was equally as dangerous as real child pornography, yet technology back then was not even a fraction of what it is today. Justice Thomas conceded in his concurring opinion in *Ashcroft*, that “technology may evolve to the point where it becomes impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children.”¹⁴⁸

¹⁴² *Ashcroft*, 535 U.S. at 255.

¹⁴³ *Id.* (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 256.

¹⁴⁶ *See id.*

¹⁴⁷ *Ashcroft*, 535 U.S. at 256.

¹⁴⁸ *Id.* at 259 (Thomas, J., concurring).

Thomas was of the opinion that if advances in technology thwarted prosecution of “unlawful speech,” then “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.”¹⁴⁹ This future time period that Justice Thomas speaks of is upon us now. It has been nine years since the Court decided *Ashcroft*, and in that time technology has improved tenfold. At the time of *Ashcroft*’s decision, Congress had evidence demonstrating “that technology already exists to disguise depictions of real children to make them unidentifiable and to make depictions of real children appear computer-generated. The technology will soon exist, if it does not already, to computer generate realistic images of children.”¹⁵⁰ Almost a decade ago, Congress correctly predicted that technology would soon exist that was capable of creating life-like and realistic images of children. One need not look any further than Hollywood and the video game industry to see how far our CGI technology has come.

The Court in *Ashcroft* disregarded most of the Congressional findings that were filed with the CPPA. The Court instead decided that if virtual pornography was as indistinguishable from actual pornography as Congress said it was, then no pornographer would ever risk prosecution by abusing real children when creating virtual ones would suffice. But much as the Court felt about the Government’s market deterrence theory, it is in fact the Court’s judgment that is highly implausible. For one, it relies on a “false assumption of pragmatic rationality. The opinion assumes that child pornographers are pragmatically rational.”¹⁵¹ But this is a false assumption, for no pragmatically rational person would use or create child pornography in the first place.

¹⁴⁹ *Ashcroft*, 535 U.S. at 259 (Thomas, J., concurring).

¹⁵⁰ Congressional Finding (5), Pub. L. 108-21, notes following 18 U.S.C.A. § 2251.

¹⁵¹ Liu, *supra* note 13, at 39.

The Court was mistaken as to the reasons and motivations behind producing actual child pornography.

Child pornography results from the abuse of real children by sex offenders; the production of child pornography is a *byproduct of*, and *not the primary reason for*, the sexual abuse of children. There is no evidence that the future development of easy and inexpensive means of computer generating realistic images of children would stop or even reduce the sexual abuse of real children or the practice of visually recording that abuse.¹⁵²

The *Ashcroft* Court essentially decided that if a child pornographer could choose between abusing a child and digitally creating a virtual one, he would almost always choose the latter. “If virtual images were identical to illegal child pornography . . . few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice.”¹⁵³ But this is a baseless assumption. “[M]any experts on child molesters explain that these individuals derive sexual gratification from the pain inflicted on actual children, and the recording of it. These producers of child pornography would not be interested in virtual pornography.”¹⁵⁴ Child pornographers do not abuse children for the primary goal of making child pornography. Instead, abusing children is an activity that child molesters like to take part in. Recording that abuse is something else that they like to do. Being given an alternative means of creating child pornography would not make a child molester stop abusing children. This argument that the Supreme Court puts forth is akin to saying the following: a boy likes to skateboard with his friends; he enjoys filming himself perform skateboard tricks; he then likes to go on the computer and trade his videos with other skateboarders to view their videos and enjoy. If at some point technology came around where it was easy and efficient to produce those same skateboarding videos, but without actually having to skateboard, it is the Court’s opinion that that boy, and

¹⁵² Congressional Finding (12), Pub. L. 108-21, notes following 18 U.S.C.A. § 2251 (emphasis added).

¹⁵³ *Ashcroft*, 535 U.S. at 254.

¹⁵⁴ Liu, *supra* note 13, at 39-40.

others like him, would almost always choose that alternative method. But the Court is missing the main point: the boy *likes* to skateboard, so even if he was given another means of producing a skateboarding video, he still is going to skateboard. The same logic follows with child molesters. Child molesters *have a propensity* to molest children, and they *derive pleasure* from recording that abuse, so even if they are given another means of producing videos of children being sexually molested, they are still going to want to molest children.

Another reason for why *Ashcroft* was incorrectly decided was that the Court's reasoning was inconsistent with *Osborne* and *Ferber* because the Court in *Ashcroft* changed its view on indirect harm. In *Osborne*, the Court found that pedophiles will sometimes use child pornography to help seduce other children into sexual activity. Therefore it recognized the fact that there were two types of harms stemming from child pornography: direct and indirect. The *Osborne* Court was aware that child pornography not only caused direct harm to the children who were used as subjects in the pornographic material, but also caused indirect harm to other children. It "indicated that protecting children who are not actually pictured in the pornographic image is a legitimate and compelling state interest."¹⁵⁵ The Court in *Ferber* admitted to there being an "intrinsic relationship" between child pornography and indirect harm to children, and held that "[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children."¹⁵⁶ Yet in *Ashcroft*, the Court changed its stance and found that indirect harm caused to children did not suffice as a compelling state interest for banning virtual child pornography.

¹⁵⁵ *Reno*, 198 F.3d at 1099 (Ferguson, J., dissenting) (citing *Osborne*, 495 U.S. at 111). See also *Hilton*, 167 F.3d at 70 (recognizing the Supreme Court's "subtle, yet crucial, extension" of valid state interests to include protecting children not actually depicted).

¹⁵⁶ *Ferber*, 458 U.S. at 749.

Virtual child pornography is by definition virtually indistinguishable from actual child pornography. Therefore, the CPPA would not cover materials such as *Romeo and Juliet*, or *Traffic*, or *American Beauty*, or everyday artistic expressions like paintings, drawings, and sculptures that depict youthful looking subjects in a sexual manner, something that the majority in *Ashcroft* seems to think is very probable. In his dissent in *Reno*, Judge Ferguson felt that it was important to consider the findings that Congress had filed with the CPPA. In them, “Congress repeatedly stated that the law is targeted at visual depictions that are ‘virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct’”¹⁵⁷ and that the language in the statute covers “the same type of photographic images *already* prohibited, but which do[] not require the use of an actual minor.”¹⁵⁸ As the Court in *Hilton* said, “drawings, cartoons, sculptures, and paintings depicting youthful persons in sexually explicit poses plainly lie beyond the Act [because b]y definition they would not be ‘virtually indistinguishable’ from an image of an actual minor.”¹⁵⁹ The CPPA simply extends the prohibitions that already exist on actual child pornography to a narrow class of computer-generated images that could easily be mistaken as real children, and therefore contrary to what the Court in *Ashcroft* believes, the “CPPA . . . does not pose a threat to the vast majority of every day artistic expression, even to speech involving sexual themes.”¹⁶⁰ Further, the chill felt by the majority, that “few legitimate movie producers . . . would risk distributing images in or near the uncertain reach of this law,” was never actually felt by those who make movies.¹⁶¹ Movies such as *Traffic* and *American Beauty* won their Academy Awards

¹⁵⁷ *Reno*, 198 F.3d at 1102 (Ferguson, J., dissenting) (citing Congressional Findings (5), (8), (13), Pub. L. 104-208, notes following 18 U.S.C.A. § 2251).

¹⁵⁸ *Id.* (alteration in original) (quoting S.Rep. No. 104-358, at 21).

¹⁵⁹ *Hilton*, 167 F.2d at 72.

¹⁶⁰ *Id.*

¹⁶¹ *Ashcroft*, 535 U.S. at 271 (Rehnquist, C.J., dissenting).

in 2001 and 2000, respectively; yet, the CPPA had been on the books, and had been enforced, since 1996.¹⁶² Clearly, the CPPA did not discourage or prevent those movie producers from making their movies.

Because virtual child pornography is virtually indistinguishable from actual child pornography, it follows then that it causes the same indirect harm to children as actual child pornography does. “Thus, if the prevention of child pornography’s indirect harm suffices to be a compelling government interest [something the Court recognized in both *Ferber* and *Osborne*], the prevention of the indirect harm caused by virtual child pornography also suffices.”¹⁶³ However, to reconcile the difference in its opinions, the *Ashcroft* Court denied that it had ever held indirect harm to be a compelling interest in *Ferber*, consequentially denying that the protection of children from virtual child pornography is a compelling interest.¹⁶⁴ “In order to serve its purpose of invalidating the CPPA, the Court changed its position from *Ferber* and *Osborne* to *Ashcroft* without admitting the change.”¹⁶⁵

The Court in *Ashcroft* failed to see the similarities between virtual and actual child pornography and the indirect harm it can cause. Unfortunately it did not give enough weight to the dangers that virtual child pornography can pose. First of all, viewing child pornography stimulates pedophiles and causes them to go out looking for actual child victims. Pedophiles view the child pornography and then want to commit similar acts on real children. Secondly, pedophiles often use the child pornography to seduce those other children into sexual activity. This is something that Congress stressed heavily in its findings accompanying the CPPA, in part relying on what the Court said in *Osborne*. When a child views a video of a similarly-aged child

¹⁶² See *Ashcroft*, 535 U.S. at 271 (Rehnquist, C.J., dissenting).

¹⁶³ Liu, *supra* note 13, at 37.

¹⁶⁴ See *Ashcroft*, 535 U.S. at 251.

¹⁶⁵ Liu, *supra* note 13, at 37.

engaging in sexual activity with an adult, the child sees this activity as being acceptable and thus is more willing to engage in sexual acts with the pedophile. These pedophiles are using this child pornography in order to make the child feel comfortable in turning their relationship into a sexual one. What the Court in *Ashcroft* failed to understand is that from the perspective of the child, he could care less whether the image is of a real or virtual person. To the child, it makes no difference. That is not to say that if a pedophile was using a cartoon such as *Spongebob Squarepants* to seduce a child, that *Spongebob* should now be prohibited. But Congress found that “when child pornography is ‘used as a means of seducing or breaking down a child’s inhibitions,’ the images are equally effective regardless of whether they are real photographs or computer-generated pictures that are ‘virtually indistinguishable.’”¹⁶⁶ Bruce Taylor, Chief Counsel for the National Law Center for Children and Families, stated during the Hearings before the Senate Judiciary Committee in 1995 that “real and apparent [child pornography] . . . are equally dangerous because both have . . . the same seductive effect on a child victim.”¹⁶⁷ The children that are being molested by pedophiles can range anywhere from the age of one to a pre-pubescent child. Obviously, if a pedophile were to victimize a one-year old, he would not need child pornography to seduce that child. But that does not necessarily make the dangers of child pornography fall by the wayside, for the fact remains that the child pornography is still making that child molester want to go out and seek future victims in the first place.

As virtual child pornography becomes more and more life-like, it can be used to promote the market for child pornography, the destruction of which is something that the Court specifically recognized as a legitimate interest in *Osborne* and *Ferber*. Congress, in enacting the

¹⁶⁶ *Reno*, 198 F.3d at 1102 (Ferguson, J., dissenting) (citing Congressional Finding (8), Pub. L. 104-208, notes following 18 U.S.C.A. § 2251).

¹⁶⁷ *Child Pornography Prevention Act of 1995: Hearings before the Senate Judiciary Committee*, 104th Cong., 2d Sess. at 70 (1996) (statement of Bruce Taylor, Chief Counsel for the National Law Center for Children and Families).

CPPA, stated that the statute would “encourage people to destroy all forms of child pornography, thereby reducing the market for the material.”¹⁶⁸ Contrary to what the Court believes in *Ashcroft*, “persons who trade and sell images that are indistinguishable from those of actual children engaged in sexual activity ‘keep the market for child pornography thriving.’”¹⁶⁹ Pictures that look like children engaging in sexual activities can be exchanged for actual child pornography, and thus, by “limiting the production and distribution of images that appear to be of children having sex, the CPPA helps rid the market of all child pornography.”¹⁷⁰ It is “undoubtedly true” that “somewhere in this chain of computer-generated production there are going to be real children . . . involved.”¹⁷¹

The majority in *Ashcroft* also failed to address Congress’ concern that “computer-imaging technology is making it increasingly difficult in criminal cases for the government ‘to meet its burden of proving that a pornographic image is of a real child.’”¹⁷²

In the absence of congressional action, the difficulties in enforcing the child pornography laws will continue to grow increasingly worse. The mere prospect that the technology exists to create composite of computer-generated depictions that are indistinguishable from depictions of real children will allow defendants who possess images of real children to escape prosecution; for it threatens to create a reasonable doubt in every case of computer images even when a real child was abused. This threatens to render child pornography laws that protect real children unenforceable. Moreover, imposing an additional requirement that the Government prove beyond a reasonable doubt that the defendant knew that the image was in fact a real child—as some courts have done—threatens to result in the de facto legalization of the possession, receipt, and distribution of child pornography for all except the original producers of the material.¹⁷³

¹⁶⁸ *Child Pornography Prevention Act of 1995: Hearings before the Senate Judiciary Committee*, 104th Cong., 2d Sess. at 12 (1996) (statement of Bruce Taylor, Chief Counsel for the National Law Center for Children and Families).

¹⁶⁹ *Id.* at 91.

¹⁷⁰ *Reno*, 198 F.3d at 1099 (Ferguson, J., dissenting).

¹⁷¹ *Child Pornography Prevention Act of 1995: Hearings before the Senate Judiciary Committee*, 104th Cong., 2d Sess. at 122 (1996) (testimony of Professor Frederick Schauer, Frank Stanton Professor of the First Amendment, Kennedy School of Government, Harvard University).

¹⁷² *Reno*, 198 F.3d at 1100 (Ferguson, J., dissenting) (citing S.Rep. No. 104-358, at 20).

¹⁷³ Congressional Finding (13), Pub. L. 108-21, notes following 18 U.S.C.A. § 2251.

In fact, in one case, *United States v. Kimbrough*, the defendant relied on advances in computer technology in arguing that the government had failed to meet its “burden that each item of the alleged child pornography did, in fact, depict an actual minor rather than an adult made to look like one.”¹⁷⁴ Although no defendant at the time of *Ashcroft* had ever successfully employed this argument, “given the rapid pace of advances in computer-graphics technology, the Government’s concern is reasonable.”¹⁷⁵ Even in 2002, Justice O’Connor gave credence to the fact that “[c]omputer-generated images lodged with the Court by *amici curiae* National Law Center for Children and Families et al. bear a remarkable likeness to actual human beings.”¹⁷⁶ The Government’s concern becomes far more reasonable, given that computer-graphics technology has advanced exponentially since *Ashcroft* was decided. As computer imaging software progresses and defendants become able to use that in order to raise a “built-in reasonable doubt argument in every child exploitation/pornography prosecution,” Congress felt it was necessary to close this loophole using the CPPA. The majority in *Ashcroft* should have taken this into consideration.¹⁷⁷

The *Ashcroft* Court also failed to meet the contention that child pornography, whether real or virtual, has little or no social value. There is no logical reason to treat virtual child pornography differently than real child pornography. Virtual child pornography is not more valued speech. “Both real and virtual child pornography contain visual depictions of children engaging in sexually explicit activity. The only difference is that real child pornography uses actual children in its production, whereas virtual child pornography does not.”¹⁷⁸ Although this

¹⁷⁴ S.Rep. No. 104-358, at 17 (citing *United States v. Kimbrough*, 69 F.3d 723, 733 (5th Cir. 1995)).

¹⁷⁵ *Ashcroft*, 535 U.S. at 264 (O’Connor, J., concurring in judgment in part and dissenting in part).

¹⁷⁶ *Id.*

¹⁷⁷ *Reno*, 198 F.3d at 1100 (Ferguson, J., dissenting) (citing S.Rep. No. 104-358, at 16-17).

¹⁷⁸ *Id.* (Ferguson, J., dissenting).

distinction is of some importance, it “does not somehow transfer virtual child pornography into meaningful speech.”¹⁷⁹

[T]he effect of visual depictions of child sexual activity on a child molester or pedophile using that material to stimulate or whet his own sexual appetite, or on a child where the material is being used as a means of seducing or breaking down the child’s inhibitions to sexual abuse or exploitation, is the same whether the child pornography . . . [is real child pornography, or virtual child pornography that is] virtually indistinguishable to the unsuspecting viewer from photographic images of actual children.¹⁸⁰

Because the danger to the molested child is just as great when the child pornographer uses virtual child pornography as when the material used consists of actual children engaging in sexually explicit conduct, “[v]irtual child pornography, like its counterpart real child pornography, is of ‘slight social value’ and constitutes ‘no essential part of the exposition of ideas.’”¹⁸¹ Thus, the *Ashcroft* Court should never have accorded virtual child pornography the full protection of the First Amendment. Instead, it should have realized that “Congress’ interests in destroying the child pornography market and in preventing the seduction of minors outweigh virtual child pornography’s exceedingly modest social value.”¹⁸² “Since the balance of competing interests tips in favor of the government,”¹⁸³ virtual child pornography, like real child pornography, should be as a class of speech outside the protection of the First Amendment.

The Supreme Court in *Ashcroft* emphasized the fact that the speech prohibited by the CPPA created no victim in its production and recorded no crime, and that the causal link between virtual child pornography and the sexual abuse of children was contingent and indirect, unlike the speech in *Ferber* that had a proximate link to the crime from which it came.¹⁸⁴

¹⁷⁹ *Reno*, 198 F.3d at 1100-01 (Ferguson, J., dissenting) .

¹⁸⁰ Congressional Finding (8), Pub. L. 104-208, notes following 18 U.S.C.A. § 2251.

¹⁸¹ *Reno*, 198 F.3d at 1101 (Ferguson, J., dissenting). *See also* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

¹⁸² *Reno*, 198 F.3d at 1101 (Ferguson, J., dissenting).

¹⁸³ *Id.*

¹⁸⁴ *See Ashcroft*, 535 U.S. at 250.

However, this causal link theory is “inadequate and unsupported by the Court’s prior cases.”¹⁸⁵ It is inconsistent with First Amendment jurisprudence to restrict speech only if it records a crime. As the Court in *Chaplinsky v. New Hampshire* held, fighting words could be regulated, “not because they ‘record’ or have ‘caused’ an independent crime, but because doing so is necessary to prevent a crime.”¹⁸⁶ If we were to adopt the Court’s causal link theory, then fighting words would never be regulated. While discussing actual causal link, the Court failed to recognize the second type of causal link: potential. “Potential causal link stems from Justice Holmes’ clear and present danger test.”¹⁸⁷ It serves a preventative purpose, in that the speech can be regulated to prevent the potential crime associated with that speech from happening. Justice O’Connor recognized this potential causal link in her dissent, saying that “this Court’s cases do not require Congress to wait for harm to occur before it can legislate against it.”¹⁸⁸ In *Turner Broadcasting System, Inc. v. FCC*, the Court said that “[a] fundamental principle of legislation is that Congress is under no obligation to wait until the entire harm occurs but may act to prevent it.”¹⁸⁹ Consequently, the fact that virtual child pornography does not record a crime or create a victim does not imply that there is no causal link between virtual child pornography and the sexual abuse of children. The CPPA helps prevent future crimes from occurring, and the Court in *Ashcroft* should have given deference to Congress in determining that.

¹⁸⁵ Liu, *supra* note 13, at 37.

¹⁸⁶ *Id.* See also *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

¹⁸⁷ Liu, *supra* note 13, at 38 (discussing *Schenck v. United States*, 249 U.S. 47, 52 (1919)). “We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words are used in such circumstances and are of such a nature so as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.” (emphasis added)).

¹⁸⁸ *Free Speech Coalition*, 535 U.S. at 264 (O’Connor, J., concurring in judgment in part and dissenting in part). See also *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 212 (1997).

¹⁸⁹ *Turner Broadcasting System, Inc.*, 520 U.S. at 212.

V. USING *BRANDENBURG V. OHIO* AS AN ALTERNATIVE MEANS OF COMBATING VIRTUAL CHILD PORNOGRAPHY

Traditionally, Courts have upheld laws banning child pornography because real children were used in its production. Virtual child pornography upsets this traditional rationale because no actual child actors are used in its creation. However, there is an alternative, and largely unexplored, means of combating digital child pornography. A “more in-depth analysis shows how virtual child pornography should still lack First Amendment protection under the ‘advocacy of illegal conduct’ exception to free speech, [in that] . . . it incites imminent lawless action, specifically whetting the appetites of pedophiles to seduce and harm real children.”¹⁹⁰

In *Brandenburg v. Ohio*, the defendant invited a news reporter to tape, and later replay on the evening news, portions of a KKK rally that was filled with hateful remarks towards black people and Jewish people.¹⁹¹ The Court in that case said that his speech was nothing more than a mere advocacy of illegal conduct. The Court held that “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action,”¹⁹² the speech will not be protected by the First Amendment. There is a strong argument to be made that the CPPA’s ban of digital child pornography is constitutional under the *Brandenburg* analysis.

Although never specifically mentioned by the *Brandenburg* Court, the “audience” of the concerned speech has an effect on whether the speech is likely to incite imminent lawless action. There is an argument to be made that it’s possible the Court did not think the defendant’s hateful comments would incite lawless action on the part of the general public because there was a good

¹⁹⁰ Justin Leach, *Reacting to Ashcroft v. Free Speech Coalition and the Burial of the CPPA: An Argument to Regulate Digital Child Pornography Because It Incites Imminent Lawless Action*, 5 VAND. J. ENT. L. & PRAC. 114 (2002).

¹⁹¹ See *Brandenburg*, 395 U.S. at 445.

¹⁹² *Id.* at 448.

chance that most of the television viewers did not share the same views and feelings of hatred as the KKK leaders, and thus would not be incited to go out and harm black people and Jewish people. Because the views expressed in the video were so radical, it was unlikely that it would have any effect of “encouraging violence similar to that encouraged in the video, especially among the general public.”¹⁹³

In looking at the CPPA under the *Brandenburg* analysis, it becomes helpful to analogize the facts of *Brandenburg* to the ban on digital child pornography. Unlike in *Brandenburg*, where the “audience” was the general public, imagine if instead the “audience” was only members of the KKK. Because the “audience” would share the same radical views and feelings of hatred as the KKK leaders in the video, it is more likely that they would have been incited to go out and harm black people and Jewish people. If that were the case, the Court most likely would have found the speech in *Brandenburg* to be beyond just “mere advocacy of illegal conduct,” and instead inciting imminent lawless action. Analogizing that to the CPPA’s ban on digital child pornography, the “audience” in question here is very similar to the “audience” in the hypothetical above.

In the case of digital child pornography, the “audience” is likely just made up of pedophiles or other sexual abusers who know how to find child pornography on the Web. Because the “audience” is made up specifically of the type of people who are likely to take part in the crime depicted in the digital photographs, there seems to be a much greater likelihood of “inciting imminent lawless action” than if those photographs were shown to the general public over the nightly news like in *Brandenburg*.¹⁹⁴

Furthermore, where the video footage in *Brandenburg* only encouraged lawless action, the material banned by the CPPA actually depicts lawless action taking place. So imagine then back to our hypothetical above, if the video that was sent around to KKK members did not contain a

¹⁹³ Leach, *supra* note 190, at 121.

¹⁹⁴ *Id.* at 122.

speech by the KKK leaders encouraging lawless action, but instead showed digitally created images of them killing or torturing blacks and Jews. Now imagine this resulted in the further commission of those same digitally depicted acts perpetrated against real blacks and Jews. “Under this scenario, it seems likely that the Court in *Brandenburg* would have considered the advocacy of illegal conduct much more ‘imminent,’ such that the digital photographs depicting violence toward blacks and Jews would not be protected by the First Amendment.”¹⁹⁵ If the speech that is banned by the CPPA was changed instead to look like the facts in *Brandenburg*, it would be as such: pedophiles create, and distribute to the general public, a video of a speech encouraging members of the public to go out and sexually molest children. Obviously, because a majority of the population would not share in these feelings, and thus would not be incited to go out and actually molest children, the Court would find that to be merely advocating illegal conduct, and therefore constitutional under the First Amendment, like the speech in *Brandenburg*. However, that is not the type of speech banned by the CPPA. It bans digitally created material that portrays actual lawless action. Further, this material is being distributed solely to an “audience” who shares the same radical feelings as the pedophiles in the videos. Therefore, they are much more likely to be incited to go out and take part in the same acts portrayed in the films. “[D]ue to the evidence suggesting that pedophiles use digital photographs to ‘whet their appetites,’ there seems to be a strong argument that the CPPA’s ban on digital child pornography should withstand First Amendment scrutiny.”¹⁹⁶

Virtual child pornography incites several types of lawless action. These include downloading, distributing, and sharing files of actual child pornography, and sexually molesting actual children. As discussed earlier, virtual child pornography can be used to whet the appetite

¹⁹⁵ Leach, *supra* note 190, at 122.

¹⁹⁶ *Id.*

of pedophiles and fuel the market for actual child pornography. The Court in *Osborne* recognized that child pornography was used by pedophiles to “seduce other children into activity” by breaking down their inhibitions.¹⁹⁷ “Congress found that child pornography can have that effect, regardless of whether the pornography takes the form of computer-generated images or photographs of real children.”¹⁹⁸ “Clearly, one of the primary uses of child pornography, and, thus virtual child pornography, is for the systematic desensitization, as part of an insidious process, to induce children to engage in the acts depicted.”¹⁹⁹ Congress also heard evidence that often times pedophiles will exchange images of digitally created child pornography for pictures of real children engaging in sexually explicit conduct.²⁰⁰ The Court in *Hilton* found, as discussed above, that distributing virtual child pornography would encourage the production of real child pornography, and believed that the main purpose of the CPPA was to deprive child abusers of a “criminal tool” frequently used to facilitate the sexual abuse of children.²⁰¹

In sum, as opposed to other forms of media that depict lawless action, but are distributed to the general public, virtual child pornography is a depiction and encouragement of lawless action that is presented to and sought out by a very narrow, specific audience that is likely to be stimulated to react to it.²⁰² The way pedophiles use digital child pornography is “likely to incite”²⁰³ them to seduce and harm children. “Specifically, evidence that digital child pornography ‘whets the appetite’ of pedophiles supports the conclusion that such images ‘incite

¹⁹⁷ See *Osborne*, 495 U.S. at 111. See also Congressional Finding (8), Pub. L. 104-208, notes following 18 U.S.C.A. § 2251.

¹⁹⁸ Leach, *supra* note 190, at 122. See also Congressional Finding (8), Pub. L. 104-208, notes following 18 U.S.C.A. § 2251.

¹⁹⁹ Leach, *supra* note 190, at 123. See also *State v. Meadows*, 503 N.E.2d 697, 706 (1986) (Holmes, J., concurring).

²⁰⁰ See *Child Pornography Prevention Act of 1996, Hearings on S1237 Before the Senate Committee on the Judiciary*, 104th Cong. 20, 23, 30, 35, 90 (1996).

²⁰¹ See *Hilton*, 167 F.3d at 66-67.

²⁰² See Leach, *supra* note 190, at 124.

²⁰³ *Brandenburg*, 395 U.S. at 447.

imminent lawless action,’ causing pedophiles to be stimulated into action, resulting in harm to real children.”²⁰⁴

VI. THE FUTURE OF VIRTUAL CHILD PORNOGRAPHY AND THE PROTECT ACT OF 2003

A. The PROTECT Act of 2003

In response the Supreme Court’s ruling that the CPPA was unconstitutional, many bills were drafted by the Senate and House to address the issue. On April 10, 2003 the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act (herein referred to as the Act) was passed by Congress and was signed by the president on April 30, 2003.²⁰⁵ The purpose of the Act was to further fight against virtual child pornography, while addressing the deficiencies that the Court said existed in the CPPA.

One of the problems that the *Ashcroft* Court found with the CPPA was that the affirmative defense provided for in § 2252A(c) – that the burden would shift to the defendant to prove that the alleged child pornography was produced using an adult, and therefore that his speech was not unlawful – was incomplete and insufficient on its own terms, in that it allowed “persons to be convicted in some instances where they can prove children were not exploited in the production [i.e., computer generated virtual minors].”²⁰⁶ The Act amended this section by expanding the defense to include computer-generated child pornography. This affirmative defense, however, still cannot be asserted with respect to “morphed” child pornography, as the minor in those materials are real, not virtual. The statute defines “morphed” child pornography as visual depictions that have “been created, adapted, or modified to appear that an identifiable

²⁰⁴ Leach, *supra* note 190, at 121 (internal citations omitted).

²⁰⁵ Joseph J. Beard, *Virtual Kiddie Porn: A Real Crime? An Analysis of the Protect Act*, ENT. & SPORTS LAW., 3, 4 Summer 2003.

²⁰⁶ *Id.* at 4-5 (citing *Ashcroft*, 535 U.S. at 255-56).

minor is engaging in sexually explicit conduct.”²⁰⁷ In other words, morphed child pornography occurs when an innocent image of a real child is altered to depict something sexually explicit. This is not virtual child pornography because “the minor is not virtual – only the pose is.”²⁰⁸ A defendant would not be able to allege here that an adult was used in the image’s production or that the image was computer generated. Therefore, the affirmative defense cannot be asserted with regard to “morphed” child pornography.

The Act also made changes to § 2256(8)(B), one of the two sections that the *Ashcroft* Court had found unconstitutionally overbroad. It replaced the language in § 2256(8)(B) from “is, or appears to be of a minor” to “is, or is indistinguishable from, that of a minor.” The Act defined “indistinguishable” in subsection (11) as such: “[indistinguishable] 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.”²⁰⁹ The statute further goes on to note that the “definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults,”²¹⁰ something that was a key concern for the Court in *Ashcroft*. In addition to changing the language in § 2256(8)(B), it gave that subsection a new, somewhat narrower, definition of “sexually explicit conduct.” When a real actual child is involved, “sexually explicit conduct” is defined by subsection (2)(A) as “actual or simulated (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any

²⁰⁷ 18 U.S.C.A. § 2256(8)(C) (West).

²⁰⁸ Beard, *supra* note 205, at 5.

²⁰⁹ 18 U.S.C.A. § 2256(11) (West).

²¹⁰ *Id.*

person.”²¹¹ However for purposes of virtual child pornography as defined by § 2256(8)(B), “sexually explicit conduct” is controlled by subsection (2)(B) which defines it as

- (i) graphic sexual intercourse, including genital-genital, oral- genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;
- (ii) graphic or lascivious simulated: bestiality; masturbation; or sadistic or masochistic abuse; or
- (iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person.²¹²

Thus, conduct that is sexually explicit under § 2256(2)(A) is only sexually explicit under subsection (2)(B) if it is lascivious.

The Act deleted § 2256(8)(D), the second of the two sections that the Court in *Ashcroft* had found unconstitutionally overbroad, which had defined child pornography as “a visual depiction advertised, promoted, presented, described or distributed in such a manner that *conveys the impression* that the material is or contains a visual depiction of a minor engaged in sexually explicit conduct.”²¹³ It moved the “pandering” language to a revised § 2252A(a)(3)(B), which would find someone guilty if he

- (3) knowingly . . .
- (B) advertises, promotes, presents, distributes, or solicits through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any material or purported material *in a manner that reflects the belief*, or that is *intended to cause another to believe*, that the material or purported material is, or contains—
- (i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or
- (ii) a visual depiction of an actual minor engaging in sexually explicit conduct.²¹⁴

²¹¹ 18 U.S.C.A. § 2256(2)(A) (West).

²¹² 18 U.S.C.A. § 2256(2)(B) (West).

²¹³ 18 U.S.C.A. § 2256(8)(D) (West) (emphasis added).

²¹⁴ 18 U.S.C.A. § 2252A(a)(3)(B) (West) (emphasis added).

This replaced the “conveys the impression” language from subsection (8)(D) of the CPPA with the more narrowly circumscribed “in a manner that reflects the belief, or that is intended to cause another to believe” language of § 2252A(a)(3)(B).

The Act also added a new subsection to § 2252A. Subsection (a)(6) prohibits “knowingly distributing, etc., a visual depiction *to a minor* where such visual depiction is, or *appears to be*, of a minor engaging in sexually explicit conduct, for purposes of inducing or persuading a minor to participate *in any activity that is illegal*.”²¹⁵ This includes virtual child pornography; i.e. if virtual child pornography was distributed to a minor for purposes of inducing or persuading the minor to participate in an illegal activity, that would be in violation of § 2252A(a)(6). This is consistent with what Justice Kennedy said in *Ashcroft*, that “[t]he Government . . . may punish adults who provide unsuitable materials to children,” citing *Ginsberg v. New York* [390 U.S. 629 (1967)].²¹⁶

The Act also added § 1466A, which was later held to be unconstitutional by the Court in *U.S. v. Handley*, 564 F.Supp.2d 996 (2008).

B. United States v. Williams

In 2008, the constitutionality of the PROTECT Act’s pandering provision was addressed in *United States v. Williams*. The defendant, after posting links of child pornography in a public Internet chat room, was charged with one count of pandering child pornography under § 2252A(a)(3)(B) and one count of possessing child pornography under § 2252A(a)(5)(B)²¹⁷. He challenged the pandering provision, which was added under the PROTECT Act, discussed supra. This section was added by Congress because it “was concerned that limiting the child-pornography prohibition to material that could be *proved* to feature actual children . . . would

²¹⁵ Beard, *supra* note 205, at 6 (referring to 18 U.S.C.A. § 2252A(a)(6) (West)).

²¹⁶ *Id.* (citing *Ashcroft*, 535 U.S. at 251-52).

²¹⁷ *U.S. v. Williams*, 553 U.S. 285, 292 (2008).

enable many child pornographers to evade conviction.”²¹⁸ Congress felt that with new technology and pictures being repeatedly transmitted over the internet, it could make it almost impossible to prove that a particular picture was produced with real children as the subjects.²¹⁹

The pandering statute promulgated in PROTECT differs from the statutes that were covered in *Ferber*, *Osborne*, and *Ashcroft*, in that it does not target the underlying material, but instead “bans the collateral speech that introduces such material into the child-pornography distribution network.”²²⁰ Therefore if a person possesses virtual child pornography, which is allowed under *Ashcroft*, but advertises it as depicting actual children, he violates the statute.²²¹

The Court in *Williams* concluded that the words in the pandering statute that dealt with transactions, did not just relate to commercial transactions, but in many cases could be “carried out by individual amateurs who seek no financial reward. To run afoul of the statute, the speech need only accompany or seek to induce the transfer of child pornography from one person to another.”²²² Because the statute was not limited to commercial transactions, the Court subjected “the content-based restriction of the PROTECT Act pandering provision to strict scrutiny.”²²³

The *Williams* Court noted as a rationale for the statute “the principle that offers to give or receive what it is unlawful to possess have no social value and thus, like obscenity, enjoy no First Amendment protection.”²²⁴ In other words, because it is unlawful to possess real child pornography, it is also unlawful to offer to give or request to receive it. The Court distinguished between a proposal to engage in illegal activity and the abstract advocacy of illegality. For example, if someone went online and said “I think possessing child pornography should be legal

²¹⁸ *Williams*, 553 U.S. at 290.

²¹⁹ *See id.* at 290-291.

²²⁰ *Id.* at 293.

²²¹ *See id.*

²²² *Id.* at 295 (internal quotations omitted).

²²³ *Id.* at 298.

²²⁴ *Williams*, 553 U.S. at 298.

because it is fun to look at,” this would merely be advocating child pornography. However, if he then went on to say “I have images of actual child pornography, who wants to trade,” this would be a proposal to engage in illegal activity. The Court found that the Act did “not prohibit advocacy of child pornography, but only offers to provide or requests to obtain it.”²²⁵ This, the Court said, fell well within constitutional bounds, unlike the pandering provision that was at issue in *Ashcroft*, which the Court found to be constitutionally defective for going “beyond pandering to prohibit possession of material that could not otherwise be proscribed.”²²⁶ The Court held that “offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment.”²²⁷ As long as the defendant “hold[s], and make[s] a statement that reflects, the belief that the material is child pornography; or that he communicate[s] in a manner intended to cause another so to believe,”²²⁸ his actions will implicate the statute.

While the PROTECT Act makes the pandering of virtual child pornography as real child pornography illegal, the Court made sure to note that its decision did not overrule *Ashcroft*. It in no way provided Congress with an “end run around the First Amendment’s protection of virtual child pornography by prohibiting proposals to transact in such images rather than prohibiting the images themselves.”²²⁹ The Court stressed the fact that the statute did not prohibit the offer to provide or request to receive virtual child pornography, so long as it was not being pandered as containing actual children.

A crime is committed only when the speaker believes or intends the listener to believe that the subject of the proposed transaction depicts *real* children. It is simply not true that this means “a protected category of expression [will]

²²⁵ *Williams*, 553 U.S. at 299.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 306.

²²⁹ *Id.* at 303.

inevitably be suppressed,” []. Simulated child pornography will be as available as ever, so long as it is offered and sought *as such*, and not as real child pornography.²³⁰

While the PROTECT Act takes the right step forward, it unfortunately does not go far enough. The Court in *Williams* held that the statute criminalizing the pandering or solicitation of child pornography was not overbroad under the First Amendment, and was not impermissibly vague under the Due Process Clause. Regrettably though, the Court still reiterated its holding in *Ashcroft* that the mere possession of virtual child pornography is protected free speech under the First Amendment.

VII. CONCLUSION

Technology in general seems to be advancing at an ever increasing speed. Computer technology in particular has gotten to a point where it has become increasingly difficult to differentiate between virtual images and their real-life counterparts. Although the Court in *Ashcroft* found no compelling interests for prohibiting the possession of virtual child pornography, due to technological advances in the nine years since that decision, the Court would be wise to readdress the issue once more. As discussed above, virtual child pornography poses just as much indirect harm to children as the harm posed by actual child pornography. Although no real children are used in the production of digital child pornography, it can still be used by pedophiles to harm future children. While the Court briefly touched on the subject in *Williams*, where it upheld the pandering provision found in the PROTECT Act of 2003, it unfortunately once again reaffirmed its position in *Ashcroft*, stating that so long as it is not offered and sought as real child pornography, virtual child pornography would be protected under the First Amendment and be “as available as ever.”²³¹ If the Court truly feels that

²³⁰ *Williams*, 553 U.S. at 303 (first alteration in original) (internal citations omitted).

²³¹ *Id.*

“safeguarding the physical and psychological well-being of a minor”²³² and preventing the sexual exploitation and abuse of children “constitute[s] a government objective of surpassing importance,”²³³ then it needs to overturn its decision in *Ashcroft*. The only way to close the distribution network and dry up the market for child pornography is for the Court to no longer distinguish between actual and virtual child pornography, but instead prohibit both. Just like real child pornography, virtual child pornography has little to no social value, and thus has no place in a society as advanced and civilized as ours. As such, the Court should classify virtual child pornography as a category of material wholly outside the protection of the First Amendment.

²³² *Ferber*, 458 U.S. at 757.

²³³ *Id.*