THE CONSTITUTIONALITY OF VIRTUAL CHILD PORNOGRAPHY: WHY REALITY AND FANTASY ARE STILL DIFFERENT UNDER THE FIRST AMENDMENT

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I. INTRODUCTION

The ability to alter an image to look radically different from the original is no longer an impossibility. In movies, music videos, and animation, what appears to be one thing can easily turn into another with the right computer software and a little skill. With this ability to alter photographs or films, and even create material virtually indistinguishable from any other photograph or film has come new waves of federal legislation and First Amendment challenges in its wake.

A photo of a Penthouse model can be scanned and altered to look like a minor posing in a sexually explicit way.[1] Innocent images of a child are altered to portray that child in a sexual act.[2] A virtual child can be created to portray the same act.[3] Because such material is indistinguishable from actual child pornography, Congress has expanded the definition of child pornography to include images of altered and virtual children.[4] This expanded definition implicates the First Amendment in this new age of ever-advancing technology because such material may not harm actual children in its production, and may not even necessarily lead to future harm of real children.

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[1] Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439, 440 (1997).

[2] *Id.*

[3] *Id.*

[4] S. REP. NO. 104-358, at section 2 (1996).

This Comment will focus on the Child Pornography Prevention Act of 1996 ("CPPA")[5] that expanded the definition of child pornography to include images created wholly, or in part, through computers.[6] Under the CPPA, it is a crime to distribute or possess such material via computer.[7] Since its enactment, the statute has survived First Amendment challenges in four circuits and has lost in one. Part II provides a cursory overview of general First Amendment principles and statutory analysis. Part III will trace the history of Supreme Court jurisprudence in the area of child pornography, highlighting three main cases. In part IV, I discuss the CPPA itself and the past five circuit court decisions. Finally, part V contemplates the future of the CPPA, dissects the strongest arguments for and against the statute under the First Amendment, and concludes that the CPPA's expansion to include virtual child pornography is unconstitutional.

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[5] 18 U.S.C. § 2252A (2001).

[6] 18 U.S.C. § 2256(8) (2001). The statute defines "child pornography" as:

> . . .any visual depiction, including photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other mans, of sexually explicit conduct where—
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> > (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct; (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or (D) such visual depiction is 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. . .

Id.

[7] 18 U.S.C. § 2252A(a)(2)-(3) (2001). The statute applies to:

> any person who knowingly *receives* or *distributes*—(A) any child pornography that has been mailed, or shipped, or transported in interstate or foreign commerce by any means, *including by computer*; or (B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; (3) knowingly reproduces any child pornography for *distribution* through the mails. . . .

Id. (emphasis added).

II. FIRST AMENDMENT JURISPRUDENCE 101

Examining various Supreme Court precedents in conjunction, Professor Kevin O'Neill provided a comprehensive approach to First Amendment principles.[8] O'Neill presented a five part analytical framework for determining whether or not a speech regulation is allowed by the First Amendment.[9] The analysis begins with classification of the regulation and then proceeds to ask if, despite the classification, the speech regulation is subject to some specific constitutional infirmity. The analysis concludes with determining if the regulation falls into a special area. First, the statute must be examined to determine if it is "content-based" or "content-neutral."[10] Content-based restrictions are subject to strict scrutiny, meaning that such regulations survive only if they are "narrowly drawn to serve a compelling state interest."[11] For example, a content-based statute was at issue in *Boos v. Barry*[12] where the Supreme Court found a District of Columbia law prohibiting the display of a sign criticizing a foreign government within 500 feet of that government's embassy unconstitutional.[13]

Content-neutral statutes are analyzed under a more complex array of analyses, including an intermediate level of scrutiny where the regulation applies to the time, place, and manner of the speech.[14] Such content-neutral statutes include a city ordinance limiting parades to between 8:00 am and 8:00 pm.[15] O'Neill referred to Professor Laurence Tribe's description of content-neutral regulations and explained that such regulations pass constitutional muster where the regulation is "(1) content-neutral in that it must be justified by the government 'without reference to the content of the regulated speech, (2) must be nar-

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[8] Kevin Francis O'Neill, *A First Amendment Compass: Navigating the Speech Clause With a Five Step Analytical Framework*, 29 SW. U. L. REV. 223 (2000) (providing a general overview of O'Neill's five part analysis).

[9] *Id.* at 226-234.

[10] *Id.* at 225. O'Neill also cites to Laurence Tribe and summarizes Tribe's "two-track formulation" as "Track One analysis, requiring strict scrutiny for content-based restrictions, or Track Two analysis, requiring intermediate scrutiny for content-neutral time, place, and manner restrictions." *Id.* at 227.

[11] *Id.*

[12] 485 U.S. 312, 329-32, 334 (1988).

[13] O'Neill, *supra* note 8, at 227 n.14.

[14] *Id.* at 227.

[15] *Id.* at 227 n.15.

rowly tailored to serve a significant governmental interest, and (3) must leave open ample alternative channels for communicating the information."[16]

After concluding that the statute is content-based, the next inquiry is to ask whether the content-based regulations restricts or compels speech.[17] A classic example of compelled speech is found in *West Virginia State Bd. of Educ. v. Barnette*.[18] In *Barnette*, the Supreme Court invalidated a state statute requiring all the children in West Virginia's pubic schools to salute the flag and recite the pledge of allegiance.[19] For regulations that compel speech, a series of other questions must be answered that involve a closer look at compelled speech cases.[20] Determining the constitutionality of regulations that restrict speech, however, requires asking whether the regulation is direct or indirect.[21] This inquiry involves examining the regulations to see if it is targeting either a particular topic (direct) or targeting a "speaker for the reaction produced by a controversial message" (indirect and also called the "hostile audience case").[22]

Third, direct restrictions are further divided into two subdivisions: those restrictions which are invalidated as "presumptively unconstitutional" and those restrictions pertaining to what is called "low-level" speech.[23] Child pornography falls into the low-level speech category and is entitled to almost no First Amendment protection.[24] Thus, in order to find that virtual child pornography is entitled to First Amendment protection, it will have to be distinct from the already accepted definition of child pornography that is not constitutionally protected.

The fourth question in ONeill's five step analysis asks whether the regulation has characteristics of overbreadth, vagueness, or prior restraint.[25] As O'Neill

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[16] *Id.* at 227-28.

[17] *Id.* at 228.

[18] 319 U.S. 624, 642 (1943); O'Neill *supra* note 8, at 228 n.27.

[19] *Barnette*, 319 U.S. at 642.

[20] Such cases, however, are beyond the scope of this Comment.

[21] O'Neill, *supra* note 8, at 228.

[22] *Id.*

[23] *Id.* at 230.

[24] *Id.* at 227 n.21.

[25] *Id.* at 232.

noted, the common feature between the three doctrines is that "each is concerned with an impermissible method of regulating speech."[26] The overbreadth doctrine invalidates statutes that punish protected speech with unprotected speech.[27] Even where a law encompasses some protected speech, however, it will not be invalidated just because it might possibly punish an individual's protected speech.[28] The overbreadth doctrine has arisen in response to two concerns: one, concern about the chilling effect on speech and two, a concern that broad statutes will lead to broad or arbitrary government enforcement.[29]

O'Neill pointed out that there are four procedural "complexities" to overbreadth that emerge because of its unusual procedural aspects.[30] First, the overbreadth doctrine allows facial challenges that, if successful, can lead to invalidation of the statute.[31] Such claims arise when parties challenge the wording of the statute. Second, overbreadth "relaxes the normal standing rules governing who may bring a constitutional challenge."[32] A relaxation of standing in the overbreadth arena makes it possible for a party to enforce the rights of third parties who may be wrongfully punished under the statute in question.[33] Third, a statute can survive overbreadth because "a court has the power to save the statute through a narrow construction."[34] A narrow construction, however, can "be employed only if [the legislation] is readily susceptible to such a construction."[35]

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[26] *Id.*

[27] O'Neill, *supra* note 8, at 232 (stating that overbreadth "may be invoked to strike down restrictions on speech that are worded in such a way that even protected expression is left vulnerable to punishment").

[28] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 765 (1997) (discussing how overbreadth must be substantial in order to invalidate a statute). *See also*, Broadrick v. Oklahoma, 413 U.S. 601, 615-16 (1973) (holding that "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep").

[29] O'Neill, *supra* note 8, at 278-79.

[30] *Id.* at 279.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 279.

[35] O'Neill, *supra* note 8, at 281. An examination of the source of the statue is relevant in

Thus, courts can avoid invalidating an entire piece of legislation by crafting a narrow interpretation of the law and consequently take it out of the overbreadth arena. Fourth, this doctrine can invalidate a statute only where the overbreadth is "substantial."[36] Consequently, for an overbreadth challenge to be successful, the impact on First Amendment protection must be significant.[37]

Vagueness, on the other hand, invalidates statutes that are so unclear as to make it unreasonably difficult for one to understand the proscribed activity.[38] Three policy reasons supporting invalidation of a statute on vagueness grounds include:

> 1) that vague laws may trap the innocent by not providing fair warning of what is proscribed, 2) vague laws 'impermissibly delegate basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application,' and 3) when directed at expressive activity, vague laws may inhibit the exercise of First Amendment freedoms.[39]

The difficulty that lies in establishing a successful vagueness claim is that a statute must be shown to be "impermissibly vague in all of its applications."[40] Thus, in order to find a statute unconstitutional based on vagueness, the complaining party needs to demonstrate that there are no potentially constitutional applications of the challenged law.[41] This is a more difficult showing than in the overbreadth context: where overbreadth asks a party to demonstrate that there

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determining if a narrow construction is possible. *Id.* ("[F]ederal courts are free to narrow federal statutes, but state legislation should be narrowed by the courts of that state.").

[36] *Id*; *see also* CHEMERINSKY, *supra* note 28, at 765-67 (explaining the overbreadth doctrine in general).

[37] O'Neill, *supra* note 8, at 281-82.

[38] *Id.* at 278. O'Neill maintained that, "[vagueness] may be invoked to strike down restrictions on speech that are worded in such a way that citizens cannot reasonably discern what is prohibited." *Id.* (citations omitted).

[39] *Id.* at 282 (citing Grayned v. City of Rockford, 408 U.S. 104, 107-08 (1972) (upholding a city ordinance that prohibited any "person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, [to make] any noise or diversion which disturbs or tends to disturb the peace or good order of such school")).

[40] O'Neill, *supra* note 8, at 283.

[41] *Id.*

exist a substantial amount of situations where a statute will be unconstitutional, vagueness requires that no constitutional scenario exist.[42]

Finally, a statute can be overturned if it acts as a prior restraint on speech.[43] O'Neill divided prior restraint regulations into two categories: "(1) speech-restrictive injunctions, and (2) licensing systems that require a permit or fee as a prerequisite to engaging in expressive activity."[44] As far as virtual child pornography is concerned, the first category—speech restrictive injunctions—is most relevant since licensing is not available to generators of virtual child pornography.[45]

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[42] *Id.*

[43] *Id.* at 270.

[44] *Id.*

[45] New York v. Ferber, 458 U.S. 747, 763 (1982) (holding that child pornography is a category of speech without First Amendment protection). Speech restrictive injunctions have four basic characteristics. First, "a flat, pre-publication gag order is presumptively unconstitutional." O'Neill, *supra* note 8, at 271. Second, "injunctions that impose time, place, or manner restrictions are subject to a heightened form of intermediate scrutiny." *Id.* at 271. Third, "speech-restrictive injunctions must not be granted ex parte," limited to "the narrowest possible scope." *Id.* Fourth, pursuant to "the collateral bar rule," such restrictions "must be obeyed, even if they are unconstitutional." *Id.* The Supreme Court has been extremely hesitant to uphold speech restrictive injunctions unless the regulation has been painstakingly examined. *Id.* at 271-73.

A prior restraint was upheld in *United States v. The Progressive, Inc.*, 467 F. Supp. 990, 1000 (W.D. Wis. 1979). *The Progressive* involved an injunction to prevent publication of the instructions on constructing a hydrogen bomb. *Id.* at 992-93. The district court stated that "[a] mistake in ruling against the United States [and thus allowing publication] could pave the way for thermonuclear annihilation for us all. In that even out right to life is extinguished and the right to publish becomes moot." *Id.* at 996.

The final question in O'Neill's First Amendment analysis asks whether a "speech regulation pertains to one of the setting for which the Supreme Court has created special rules." O'Neill, *supra* note 8, at 226. Examples of areas of special regulation include "speech on public property," "medium specific approach to areas of communications media," and speech by public employees. *Id.* at 283. For greater exploration of these and other areas see O'Neill, *supra* note 8, at 284-300.

Because the goal of this Comment is to discuss the meaning and interpretation of virtual child pornography in comparison to caselaw and legislative history, it is sufficient to be aware that the last question to consider when asserting a First Amendment challenge is whether the regulation is being applied in a special setting.

III. THE SUPREME COURT AND KIDDIE PORN: FROM *FERBER* TO *X-CITEMENT VIDEO*

While most speech is entitled to moderate to full protection under the First Amendment, the Supreme Court noted in *New York v. Ferber*[46] that child pornography is an exception to that rule.[47] In *Ferber*, the Court ruled on the constitutionality of a New York statute that punished the possession of child pornography.[48] The New York statute in *Ferber* made it a class D felony to promote the use of a child in a sexual performance.[49] Ferber was arrested after he sold two films of young boys masturbating to an undercover police office and was convicted of "promoting an obscene sexual performance" in violation of a New York statute.[50] The United States Supreme Court affirmed Ferber's conviction based on five reasons.[51]

Noting that the standard of obscenity set forth in *Miller v. U.S.*[52] was not applicable to the area of child pornography, the Court in *Ferber* first identified that preventing the sexual exploitation and abuse of children is an extremely importantly governmental interest.[53] Further, the Court found that the child pornography market, consisting of production and distribution is "intrinsically related to

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[46] 458 U.S. 747 (1982). "The test for child pornography is separate from the obscenity standard enunciated in *Miller*, but may be compared to it for the purpose if clarity." *Id.* at 764. *See infra* note 52.

[47] *Id.* at 757-63.

[48] *Id.* at 749.

[49] *Id.* at 751. In 1982, class D felonies were punishable up to seven years as to individuals and as to corporations a fine of up to $10,000.00. *Id.* (citing N.Y. PENAL LAW §§ 70.00, 80.10) (McKinney 1975)). Here, Ferber was sentenced to 45 days in prison in violation of the Class D category of the New York law. *Id.* at 751 n.3.

[50] *Id.* at 752. *See* N.Y. PENAL LAW § 263.15.

[51] *Id.* at 756-64.

[52] 413 U.S. 15 (1973) (holding that certain obscene material is not entitled to full First Amendment protection). Under the *Miller* standard, material not entitled to constitutional protection includes those "works, taken as a whole, appeal to the prurient interest in sex, which portray conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24.

[53] *Ferber*, 458 U.S. at 757. The Court wrote "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id.*

the sexual abuse of children."[54] Child pornography, the majority noted, is particularly harmful because such materials are a "permanent record of the children's participation" in the abuse and serve to exacerbate the initial harm.[55] The Court also recognized that to effectively combat child pornography, the market for such products must be curbed.[56] From this language, it is clear that the abuse and exploitation of children in creation and distribution of the same were of utmost concern to the Court.

Moreover, the *Ferber* Court concluded that the economic value of child pornography to distributors, if any, was not enough to invalidate the New York statute.[57] Having determined that New York could validly control child pornography since its production was already illegal "throughout the Nation,"[58] the Court explained that the First Amendment would not shield violators from liability.[59] The majority in *Ferber* maintained that any value in allowing children to engage in live or photography involving sexual conduct is "exceedingly modest, if not de minimis."[60] Adopting the state court's reasoning, the Supreme Court noted that should photos or performances of children be necessary, the use of an adult who looked younger or a simulation may be appropriate.[61] Finally, the Court

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[54] *Id.* at 759.

[55] *Id.*

[56] *Id.* The *Ferber* Court highlighted that the "distribution network must be closed if the production of material requir[ing] the sexual exploitation of children is to be effectively controlled." *Id.*

[57] *Id.* at 761-62 (citations omitted). The Court noted that "[i]t has rarely been suggested the constitutional freedom for speech. . .extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Id.*

[58] *Id.* at 761.

[59] *Ferber*, 458 U.S. at 761.

[60] *Id.* at 762.

[61] *Id.* at 763. The Court wrote:

> [i]f it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger and could be utilized. Simulation outside of the prohibition of the statute could provide another alternative. Nor is there any question here of censoring a particular literacy theme or portrayal of sexual activity. The First Amendment interest is limited to that of rendering the portrayal somewhat more 'realistic' by utilizing or photographing children.

pointed out that taking child pornography outside of constitutional protection was consistent with other First Amendment cases.[62] Having reached these five conclusions, the Court declared that statutes like the New York law, that provided clear definitions for the prohibited material, coupled with the serious state concerns in protecting children from abuse and exploitation in creating the material, warranted the exclusion of child pornography from First Amendment protection.[63]

The Court was careful to note that any law in "this sensitive area" would have to carefully define the prohibited conduct.[64] Although Ferber appealed his conviction on overbreadth grounds, this challenge failed partly because the overbreadth was not substantial.[65] Because the Court found the New York law provided a clear description of the conduct[66] and definitions for "sexual conduct"[67] and "promote," the Court also dismissed any vagueness concerns.[68] Thus, the

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Id. (emphasis added).

[62] *Id.* The Court stated, "[r]ecognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions." *Id.*

[63] *Id.* at 764. The Court wrote,

> [w]hen a definable class of material, such as that covered [by the New York law] bears so heavily and pervasively on the welfare of children *engaged in its production*, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.

Id. (emphasis added).

[64] *Id.*

[65] *Ferber*, 458 U.S. at 771. The Court stated that substantial overbreadth applies when the regulation "reaches a substantial number of impermissible applications." *Id.*

[66] *Id.* at 750. The statute provided that, "[a] person is guilty of promoting sexual performance by a child when, knowing the character and content thereof, he produces, directs, or promotes any performance which includes sexual conduct by a child less than sixteen years of age." N.Y. PENAL LAW § 263.15 (McKinney 1980).

[67] *Ferber*, 458 U.S. at 751. "Sexual conduct means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." N.Y PENAL LAW § 263.00(3) (McKinney 1980).

[68] *Ferber*, 458 U.S. at 751. Under the statute, "[p]romote means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same." N.Y

Court sustained Ferber's conviction and upheld the statute.[69]

In 1990, the Court again encountered a First Amendment challenge to a state child pornography statute in *Osborne v. Ohio*.[70] In *Osborne*, the petitioner[71] argued that Ohio could not constitutionally regulate possession of child pornography based on *Stanley v. Georgia*.[72] Osborne also argued that the Ohio statute was also unconstitutionally overbroad.[73] Writing for a majority of the Court,

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PENAL LAW § 263.00(5) (McKinney 1980).

[69] *Ferber*, 458 U.S. at 773.

[70] 495 U.S. 103 (1990). The Ohio statute at issue provided that:

(A) No person shall do any of the following:

(3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.

OHIO REV. CODE ANN. § 2907.323(A)(3) (Supp. 1989).

[71] *Osborne*, 495 U.S. at 107. The petitioner, Clyde Osborne, "was convicted of violating [the Ohio statute] and sentenced to six months in prison" when Columbus Ohio police found four photos in Osborne's home, each depicting a "nude male adolescent in a sexually explicit position." *Id.*

[72] *Id.* at 108. In *Stanley v. Georgia*, 394 U.S. 557, 564-68 (1969) the Court found a Georgia obscenity statute unconstitutional. The Court agreed that the state had "sought to proscribe the private possession of obscenity because it was concerned that obscenity would poison the minds of its viewers." *Stanley*, 394 U.S. at 565. The Court in *Stanley* specifically noted that "[w]hatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Id.* at 566.

[73] *Osborne*, 495 U.S. at 111-12.

Justice White rejected both arguments and held that Ohio could constitutionally prohibit child pornography.[74]

The Court began by noting that Stanley was "a narrow holding" and, reiterating language from *Ferber*, determined that Stanley did not limit Ohio's ability to criminalize possession of child pornography.[75] Justice White emphasized that if child pornography has any value, it is "exceedingly modest, if not de minimis."[76] Additionally, the Court recognized that the state enacted the statute pursuant to its interests in protecting victimized children and eliminating the child pornography market and acknowledged those as compelling state interests.[77] Those compelling interests satisfied the First Amendment requirements for content-based regulations.[78] The Court concluded that Ohio was reasonable in believing that penalizing those who consume child pornography would aid in eliminating the market as a whole.[79]

Justice White noted that in past cases, the Court has been committed to requiring substantial overbreadth before employing the overbreadth doctrine as a method for invalidating a statute.[80] The Court disagreed with Osborne's conten-

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[74] *Id.* at 126.

[75] *Id.* at 108.

[76] *Id.* (quoting New York v. Ferber, 458 U.S. 747, 762 (1982)).

[77] *Id.* at 109.

[78] *Id.*

[79] *Osborne*, 495 U.S. at 109. The Court noted, "[i]t is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand." *Id.* at 109-10. Further, the Court revisited language in *Ferber* and stated that:

> [i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'. . .The legislative judgment, as well as the judgment found in relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think easily passes muster under the First Amendment.

Id. at 109 (quoting *Ferber*, 458 U.S. at 756-58).

[80] *Id.* at 112. In the First Amendment arena, the Court has "repeatedly emphasized that where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only 'real but substantial as well, judged in relation to the statute's plainly legitimate sweep.'" *Id.* (quoting Broadrick v. Oklahoma, 413 U.S. 601,

tion that the language of the statute, prohibiting "nude" photos, was overbroad.[81] Justice White found the statute survived this challenge and adopted the Ohio Supreme Court interpretation of the statute which understood the prohibition therein as "the possession or viewing of material or performance of a minor who is in a state of nudity where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged."[82] By adopting this narrow interpretation, the Ohio Supreme Court enabled the majority to invalidate Osborne's overbreadth argument.[83] Accordingly, the Court found Ohio's interest in destroying the child pornography market compelling and capable of withstanding First Amendment scrutiny.[84] Thus, the Court limited the reach of the holding in *Stanley*, and emphasized that it was a narrow decision based on the specific circumstances of that case.[85]

The Court's next foray into the area of child pornography came in *United States v. X-Citement Video, Inc.*[86] In *X-Citement Video*, a majority of the Court determined the constitutionality of the Protection of Children Against Sexual Exploitation Act as amended.[87] The Ninth Circuit had reversed the respondents'

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615 (1973)).

[81] *Id.* at 121-22.

[82] *Id.* at 113 (quoting State v. Young, 525 N.E.2d 1363, 1368 (Ohio 1988)). Moreover, the Supreme Court recognized that the Ohio Supreme Court concluded that the purpose of the statute's exceptions, known as proper purpose exceptions, were to allow for "the possession or viewing of material depicting nude minors where that conduct is morally innocent." *Id.* at 114 n.10. Moreover, the Court stated that "[t]his is the only conduct prohibited by the statute is conduct which is not morally innocent." *Id.*

[83] *Id.* at 113.

[84] *Id.* at 125-26.

[85] *Osborne*, 495 U.S. at 108; *see supra* note 72 and accompanying text on *Stanley*.

[86] 513 U.S. 64 (1994).

[87] *Id.* at 66. In 1990, the Protection of Children Against Sexual Exploitation Act, 18 U.S.C. § 2252, read in pertinent part:

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce by any means including computer or mails, any visual depiction, if—

convictions under the Act, holding that the federal statute lacked a scienter requirement and was therefore unconstitutional.[88] In this case, the owner of X-Citement Video, Rubin Gottesman, sold pornographic films of a minor to an undercover police officer.[89] Gottesman challenged the statute as facially unconstitutional because it lacked a scienter requirement.[90] Alternatively, Gottesman claimed the statute was unconstitutional as applied, arguing that the tapes did not meet the definition of child pornography.[91]

Though the Ninth Circuit agreed with Gottesman's argument that the law lacked a form of scienter, the Supreme Court concluded that scienter could be found by referring to other parts of the statute.[92] Chief Justice Rehnquist, writ-

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(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; . . .shall be punished as provided in subsection (b) of this section.

18 U.S.C. § 2252 (West Supp. 1990).

[88] *X-Citement Video*, 513 U.S. at 66.

[89] *Id.*

[90] *Id.* at 66-67.

[91] *Id.*

[92] *Id.* at 69. Specifically, the Court stated,

If the term "knowingly" applies only to the relevant verbs in § 2252—transporting, shipping, receiving, distributing, and reproducing—we would have to conclude that

ing for the Court, suggested some situations where Congress did not intend for violations of the law to be found, including when a "Federal Express courier delivers a box" that might contain child pornography or where a "retail druggist returns an uninspected roll of film to a customer. . .[that was] later discovered [to] contain[] images of children engaged in sexually explicit conduct."[93]

The Chief Justice noted that both the *Ferber* and *Osborne* cases indicate that statutes missing a scienter requirement relating to the age of the performers in the photo or film would "raise serious constitutional doubts. . .[and that it is the duty of the Court to interpret the existence of scienter] so long as such a reading were not plainly contrary to the intent of Congress."[94] Thus, the Court concluded that scienter existed in the statute, and was satisfied in *X-Citement Video*.[95]

Ferber, *Osborne*, and *X-Citement Video* represent the constitutional guidelines that must be followed when drafting legislation to combat child pornography. *Ferber* is the seminal case that took child pornography out of the realm of First Amendment protection and classified it as low-level speech.[96] *Osborne* allows for the punishment of possession of child pornography, obscene or not.[97] In so holding, the Court distinguished the possession of obscene material in *Stanley* and further insulated child pornography from constitutional protection.[98] Finally, *X-Citement Video* preserved a scienter requirement for the possession and distribution of child pornography, making it possible for the unknowing distributor or receiver to avoid prosecution.[99]

> Congress wished to distinguish between someone who knowingly transported a particular package of film whose contents were unknown to him, and someone who unknowingly transported that package. It would seem odd, to say the least, that Congress [would make this distinction]. . .Some applications of respondents' position would produce results that were not merely odd, but positively absurd.

Id.

[93] *X-Citement Video,* 513 U.S. at 69.

[94] *Id.* at 78.

[95] *Id.*

[96] *Ferber*, 458 U.S. at 763.

[97] *Osborne*, 495 U.S. at 110-12.

[98] *Id.* at 108-10.

[99] *X-Citement Video*, 513 U.S. at 78.

IV. CONSTITUTIONAL CHALLENGES TO THE CHILD PORNOGRAPHY PREVENTION ACT OF 1996

Congress enacted the CPPA against this backdrop of federal case law in an era where technology facilitated creation and distribution of child pornography. In so doing, Congress amended the Sexual Exploitation of Children Act to combat the anonymity and security the Internet provides to pedophiles and child molesters.[100] Known as the Hatch Amendment after Senator Orrin Hatch, the 1996 Amendment expanded the definition of child pornography and included prosecution for production, distribution, and possession of computer-generated or virtual child pornography.[101]

The CPPA made it a federal crime for a person to "mail [], or transport [], or ship [] in interstate or foreign commerce. . .including by computer, any child pornography."[102] The statute also provided an affirmative defense for those who

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[100] *See* S. REP. NO. 104-358, section 10 (1996).

[101] Pub. L. No. 104-128, 110 Stat. 009-26 (1996) (amending 18 U.S.C. §§ 2251, 2252, and adding § 2252A).

[102] 18 U.S.C. § 2252(A)(a)(1) (2001). Child pornography is defined as:

> any visual depiction, including any photograph, film, video, picture or computer or computer-generated image of picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct; (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or (D) such visual depiction is 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[.]

§ 2256(8) (emphasis added).

The statute defines a minor as "any person under the age of 18 years" and also provides the following definitions for "sexually explicit conduct," "visual depiction," and "identifiable minor":

> (2) "sexually explicit conduct" means actual or simulated—(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (B) bestiality; (C) masturbation; (D) sadistic or masochistic abuse; or (E) lascivious exhibition of the genitals or pubic area of any person . . .

can show that the material in question was created either with a person who was actually an adult at the time of production[103] or that it was not distributed "in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct."[104] Additionally, the statute provided an affirmative defense for defendants who possess "less than three images of child pornography" and notify the authorities of the material.[105]

The addition of the Hatch Amendment to the CPPA has been challenged in five federal courts of appeals.[106] Four circuits have interpreted *Ferber* and *Osborne* to allow for regulation of virtual child pornography;[107] only one circuit has

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(5) "visual depiction" includes undeveloped film, and videotape, and data stored on a computer disk or by electronic means which is capable of conversion into a visual image. . .

(9) "identifiable minor" (A) means a person (i)(I) who was a minor at the time the visual depiction was created, or adapted or modified; or (II) whose image as a minor was used in creating, adapting or modifying the visual depiction; and (ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and (B) shall not be construed to require proof of the actual identity of the identifiable minor.

§ 2256(2), (5), (9).

[103] 18 U.S.C. § 2252A (c)(2).

[104] § 2252A(c)(3).

[105] § 2252A(d). The specific portion of the CPPA making it a crime to *advertise* material as actual child pornography, even if it is virtual, might pass constitutional muster because material touted as real child pornography would not logically fall within the bounds of First Amendment protection. *See* New York v. Ferber, 458 U.S. 747, 764 (1982). In those situations, it is arguable that the holding in *Ferber* applies since the virtual origin of the material is hidden and producers are claiming it to be of real children. Such "false advertising," particularly in the area of child pornography, is not entitled to constitutional protection. *Id.*

[106] United States v. Fox, 248 F.3d 394 (5th Cir. 2001); United States v. Mento, 213 F.3d 912 (4th Cir. 2000); United States v. Acheson, 195 F.3d 645 (11th Cir. 1999); Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999), *reh'g. denied* 220 F.3d 1113 (9th Cir. 2000), *cert. granted, sub nom.*, Eric Holder, Acting Attorney General v. Free Speech Coalition, 121 S. Ct. 876 (2001); United States v. Hilton, 167 F.3d 61 (1st Cir. 1999).

[107] United States v. Fox, 248 F.3d 394 (5th Cir. 2001); United States v. Mento, 213 F.3d 912 (4th Cir. 2000); United States v. Acheson, 195 F.3d 645 (11th Cir. 1999); United States v. Hilton, 167 F.3d 61 (1st Cir. 1999).

found the statute unconstitutional on First Amendment grounds.[108] The courts of appeals upholding the CPPA have accepted the argument that Congress has a compelling interest in regulating virtual material that can be used in the same way as real child pornography.[109] These circuits, emphasizing that virtual child pornography is speech devoid of First Amendment protection, have also held that the narrow class of protected material that might be censored based on the CPPA is so minimal that the Constitution allows for its suppression.[110]

A. *UNITED STATES V. HILTON*

In 1999, the United States Court of Appeals for the First Circuit found the CPPA constitutional in *United States v. Hilton*.[111] Hilton was indicted by a grand jury on December 17, 1997 for possession of more than three images of child pornography on computer disks.[112] In upholding defendant Hilton's conviction under the CPPA, the court began by outlining the legislative history of the statute.[113] The appellate court recognized that the CPPA's main purpose was to equip law enforcement with a way to maintain step with technological advances available to child pornography distributors.[114] The court also identi-

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[108] *Free Speech Coalition*, 198 F.3d at 1092.

[109] United States v. Fox, 248 F.3d 394 (5th Cir. 2001); United States v. Mento, 213 F.3d 912 (4th Cir. 2000); United States v. Acheson, 195 F.3d 645 (11th Cir. 1999); United States v. Hilton, 167 F.3d 61 (1st Cir. 1999).

The First, Eleventh, Fourth, and Fifth Circuits examined the CPPA in light of a defendant's appeal of a conviction under the statute. The Ninth Circuit, besides holding the CPPA unconstitutional, dealt with the CPPA in light of a coalition of plaintiffs who argued, *inter alia*, that the statute was a prior restraint on their speech. Each of the cases will be discussed in further detail in this Comment.

[110] *Free Speech Coalition*, 198 F.3d at 1092.

[111] 167 F.3d 61 (1st Cir. 1999).

[112] *Id.* at 67.

[113] *Id.*

[114] *Id.* at 65. The First Circuit noted:

> [I]mprove law enforcement tools to keep pace with technological improvements that have made it possible for child pornographers to use computers to 'morph' or alter innocent images of actual children to create a composite image showing them in sexually explicit poses. . .one can even create a realistic picture of an imaginary child engaged in sexual activity and pass off that creation as an image of a real child.

fied three additional congressional purposes of the CPPA: (1) "to ban computer-generated images that are 'virtually indistinguishable' from those of real children, but are made without live children;" (2) protect those children whose innocent photos provide the initial image that is later doctored, and (3) to "deprive child abusers of a 'criminal tool' frequently used to facilitate the sexual abuse of children."[115]

Hilton challenged the CPPA as vague and overbroad, arguing that the "appears to be" language of the statute would result in prosecution and conviction of those who possess photos of individuals who are dressed to portray the image that they are under 18.[116] Citing *Ferber* and *Osborne*, the First Circuit highlighted the Supreme Court's general hesitation to employ the overbreadth doctrine to overturn a statute.[117] In analyzing the "appears to be" language of the text, the court admitted that "[a]t first blush, potential problems threaten to doom the law."[118] Reading the "appears to be" language alone, the Court of Appeals conceded that the statutory language seemed to implicate overbreadth and vagueness concerns.[119] Nevertheless, the *Hilton* Court decided that a "correct interpretation of the [language]" merits the conclusion that the "language was intended to target only a narrow class of images—visual depictions 'which are virtually indistinguishable . . . from unretouched photographs of actual children engaged in identical sexual conduct."[120]

Instead of relying on the "appears to be language" of the statute, the First Circuit based its holding on a narrow construction of the CPPA's legislative his-

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Id.

[115] *Id.* at 66-67.

[116] *Hilton*, 167 F.3d at 67.

[117] *Id.* at 71.

[118] *Id.* The Hilton court wrote, "First and foremost, 'appears' to whom? The statute itself is silent as to whether the test is meant to be objective or subjective or some combination of the two." *Id.*

[119] *Id.*

[120] *Id.* at 71-72. This is a perfect example of the use of a narrow construction to salvage a law that might otherwise be found unconstitutional pursuant to overbreadth doctrine. As discussed in Part II of this Comment, the overbreadth doctrine can only be used to invalidate statutes where the overbreadth is real and substantial. *See Broadrick, supra* note 28, at 615-16. Courts are unwilling to invalidate statutes that might still be constitutionally applicable in a majority of situations. *Id.*

tory and focused on the "virtually indistinguishable" terminology.[121] Examining the statutory language in this manner, the court excluded "drawings, cartoons, sculptures, and paintings depicting youthful persons in sexually explicit poses" from the reach of the CPPA.[122] The court emphasized that it would be an "overly restrictive reading of precedent" to adopt the respondent's argument that *Ferber* and *Osborne* lead to the restriction of only that material which involves actual children in its production.[123] Instead, the court of appeals reasoned that *Ferber* and *Osborne* required that legislatures be allowed flexibility when crafting statutes designed to regulate the child pornography industry.[124] Finally, the court concluded that the mere possibility that there may be a small amount of protected material in the universe of potentially implicated photographs could not sustain Hilton's overbreadth argument.[125]

The First Circuit disposed of Hilton's vagueness challenge by concluding that concerns that possession of pornography of actual adults "dressed in a youthful manner" is an "overstated" danger.[126] The court also dismissed Hilton's concerns that the result of the statute would be prosecution of individuals dressed to portray one under 18 and found that most cases would involve prosecuting those who possess material depicting actors who looked much younger than eighteen.[127] Because a finding of vagueness depends on a showing that the statute is impermissibly vague in all aspects, the court declined to hold the statute vague.[128] Thus, the CPPA survived its first constitutional challenge in the First

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[121] *Id.* at 72.

[122] *Hilton*, 167 F.3d at 72.

[123] *Id.*

[124] *Id.* at 72-73. The *Hilton* court wrote, "government [must] be permitted a certain degree of flexibility in how it chooses to grapple with new problems presented by the evolving nature of the child pornography industry." *Id.* The court of appeals also characterized Hilton's overbreadth argument as one that "amounts to an effort to draw a bright line in an area of law in which courts have resisted creating clear-cut categories." *Id.*

[125] *Id.* at 74. The court noted, "the existence of a tiny fraction of material that could conceivably qualify for heightened protection but might nevertheless fall within the purview of the [CPPA] does not render the statute as a whole substantially overbroad." *Id.*

[126] *Id.* at 73.

[127] *Hilton*, 167 F.3d at 73. The *Hilton* court stated that it was "satisfied that the vast majority of prosecutions under the appears to be a minor provisions would involve images of prepubescent children or persons who otherwise clearly appear to be under the age of 18." *Id.*

[128] *See supra* notes 38-42 and accompanying text.

Circuit.[129]

B. *UNITED STATES V. ACHESON*

The Eleventh Circuit encountered the CPPA in *United States v. Acheson*.[130] In *Acheson*, the defendant originally pled guilty to violating the CPPA, having received over 500 images of child pornography on his computer.[131] Like the defendant in *Hilton*, Acheson also argued that the CPPA was facially invalid, as well as unconstitutional based on overbreadth and vagueness grounds.[132] Unfortunately for Acheson, the *Hilton* court's reasoning easily persuaded the Court of Appeals for the Eleventh Circuit.[133]

The Eleventh Circuit disposed of Acheson's overbreadth claim as meritless by citing *Hilton* and the CPPA's legislative history.[134] For the Acheson court, the CPPA was constitutional, regardless of the use of real or virtual minors in the creation of the material.[135] Acheson also argued that the language in *Ferber* accepted the use of younger looking adults would render the statute overbroad.[136] The Eleventh Circuit was persuaded that the affirmative defense, for defendants can prove the material is actually of a person over eighteen,[137] would protect those who could prove that they did not use individuals under the age of 18 in producing the disputed material.[138]

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[129] *Hilton*, 167 F.3d at 76-77.

[130] 195 F.3d 645 (11th Cir. 1999).

[131] *Id.* at 648.

[132] *Id.* at 650.

[133] *Id.* at 653.

[134] *Id.* at 649-50.

[135] *Id.* The court stated, the "rationale for enacting the CPPA rests on solid footing even where no minor is harmed in the production of the child pornography, [and thus] the CPPA legitimately captures a large amount of constitutionally proscribable conduct." *Id.* at 651.

[136] *Acheson*, 195 F.3d at 650-51.

[137] *Id.* at 651. *See also* 18 U.S.C. § 2252A(c) (providing an affirmative defense where the defendant can prove the material depicts a person who is actually over eighteen).

[138] *Acheson*, 195 F.3d at 651.

The Eleventh Circuit also rejected Acheson's vagueness argument.[139] The court noted that the average person could understand the nature of the prohibited conduct.[140] Similarly, the court determined that a jury is capable of determining how the "reasonable unsuspecting viewer" would perceive an image as one that "depict[s]. . .an actual individual under the age of 18 engaged in sexual activity."[141] The court also concluded that the CPPA does "not encourage arbitrary and discriminatory enforcement."[142] Because the scienter requirement required the government to show that defendants "purposely acquired or distributed the material" and that "he did so believing that the material was sexually explicit in nature and that it depicted a person who appeared" or was thought to be "under 18 years of age," the court concluded that fears of arbitrary enforcement were minimal.[143] Having discredited all of Acheson's arguments, the Eleventh Circuit held the CPPA constitutional.

C. *UNITED STATES V. MENTO*

In *United States v. Mento*,[144] the United States Court of Appeals for the Fourth Circuit similarly rejected constitutional challenges to the CPPA and sustained the Act.[145] Defendant Joseph Mento was arrested for possession of over one hundred images of child pornography.[146] These images were found on computer disks and Mento's computer hard drive.[147] Like the defendants in *Hilton* and *Acheson*, Mento argued that the CPPA was unconstitutional on its face, as overbroad and vague.[148] Mento's argument uniquely incorporated a reference to

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[139] *Id.* at 652-53.

[140] *Id.* at 652. The court wrote, "the CPPA defines the criminal offense with enough certainty to put an ordinary person on notice of what conduct is prohibited." *Id.*

[141] *Id.* (citing *Hilton*, 167 F.3d at 61).

[142] *Id.* at 653.

[143] *Id.* (citing *Hilton*, 167 F.3d at 75).

[144] 231 F.3d 912 (4th Cir. 2000).

[145] *Id.* at 923.

[146] *Id.* at 915.

[147] *Id.* Mento pled guilty to the charges, but reserved the right to appeal the constitutionality of the regulation. *Id.* at 915.

[148] *Id.* at 917.

American Booksellers Ass'n Inc. v. Hudnut.[149] *Hudnut*, a 1985 Seventh Circuit decision, resulted in the invalidation of a local ordinance designed to censor adult pornography that portrayed women as subordinate.[150] Mento sought to demonstrate that the same reasoning in *Hudnut* should be applied in his case.[151] Specifically, Mento argued that regulation of "bad ideas" was "per se unconstitutional."[152]

The Fourth Circuit reasoned that the decision in *Hudnut* was inappropriate because adult pornography enjoys some First Amendment protection, whereas child pornography is not entitled to any protection in light of *Ferber* and *Osborne*.[153] Further, the court added that it would be too narrow a view to interpret *Ferber* as limiting Congress to proscribe only actual child pornography.[154] The *Mento* court emphasized that the reason *Ferber* dealt only with actual children was because the technology to create virtual child pornography did not exist.[155]

The Fourth Circuit acknowledged that the effects of virtual child pornography on the target child were the same as the effects of real child pornography when a child molester used such material to seduce a child.[156] Consequently, the court

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[149] 771 F.2d 323 (7th Cir. 1985); *Mento*, 231 F.3d at 919 n.7.

[150] *Hudnut*, 771 F.2d at 333-34.

[151] *Mento*, 231 F.3d at 919 n.7.

[152] *Id.*

[153] *Id.*

[154] *Id.* at 919.

[155] *Id.* "Viewed in the proper context, *Ferber* in no way stands for the proposition that permissible governmental interests in the realm of child pornography would be forever restricted to the harm suffered by identifiable children participating in its production." *Id.*

[156] *Id.* at 920. The court reasoned:

> The effect of visual depictions of child sexual activity on a child molester or pedophile using that material to stimulate or whet his own sexual appetites, or on a child where the material is being used as a means of [seduction]. . .is the same whether the child pornography consists of photographic depictions of actual children or visual depictions produced wholly or in part by. . .computer. To the viewer, there is no difference between a picture of an actual child and what "appears to be a child. Similarly, depictions that are represented to be minors *are harmful in the same way as any child pornography, except that there is no minor involved in their production.*"

Id. (citations omitted) (emphasis added).

explained that virtual child pornography should be analyzed in the same manner as real child pornography, regardless of the method of creation.[157] Accepting Congress' finding that such material can be used to further the abuse of children, the court concluded that the CPPA satisfied the compelling governmental interest of protecting children from sexual exploitation and needed to be regulated in order to effectively combat the child pornography market.[158]

Finally, the court found the CPPA was neither overbroad nor vague since it provided definitions for the proscribed conduct.[159] Specifically, the CPPA was not overbroad because the court determined that the persons convicted for possessing or distributing material that actually used adults was slight.[160] Further, the court suggested that this slight risk could be "eliminated if the statute were to offer safe harbor to possessors of teen pornography where the actors are not identifiable."[161] Simultaneously, the Fourth Circuit acknowledged that "[s]uch an approach would do nothing to prevent the sexual exploitation of teenagers and other minors, and it would permit the market for child pornography to thrive."[162]

The court articulated four reasons why the CPPA is not unconstitutionally vague.[163] The court stated that the statute specifically listed the elements required for prosecution, created an affirmative defense for those who can show the material was actually created through the use of an adult, that the words "appears to be a minor" applies only to images that are "virtually indistinguishable" from photos of real children engaging in sexual conduct, and that this same language "connotes an objective standard" that requires the government to prove scienter.[164] These four reasons, along with the rejection of Mento's overbreadth argument, convinced the Fourth Circuit to uphold the CPPA.[165]

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[157] *Mento*, 213 F.3d at 921.

[158] *Id.*

[159] *Id.* at 921-23.

[160] *Id.* at 922.

[161] *Id.* at 921.

[162] *Mento*, 231 F.3d at 921.

[163] *Id.* at 922-23.

[164] *Id.* at 922.

[165] *Id.* at 923.

D. *UNITED STATES V. FOX*

The Fifth Circuit Court of Appeals aligned itself with the *Mento*, *Hilton*, and *Acheson* courts and found the CPPA constitutional in *United States v. Fox*.[166] In Fox, the court encountered a defendant with a slightly unique factual scenario. The defendant was an employee at a private investigation firm and claimed that he had been trafficking in child pornography on the Internet as part of "his own 'investigation' into Internet pornography, with the intention of turning over any 'evidence' collected to the proper authorities."[167] A grand jury indicted Fox on one count of knowingly receiving child pornography via computer.[168] He was found guilty by a jury and subsequently challenged the CPPA as unconstitutionally vague and overbroad.[169]

The Fifth Circuit accepted that the government had established a compelling interest in expanding the definition of child pornography to include that material which "'appears to be' or 'conveys the impression' of a minor engag[ed] in sexually explicit conduct."[170] The court emphasized that *Osborne* recognized that child pornography is a tool that can be used by pedophiles to further abuse children because such material may be used to entice children to engage in sexual behavior.[171] The *Fox* court continued by stating that *Ferber* recognized a compelling interest in controlling the use of child pornography as a seduction tool and a compelling interest in the destruction of the child pornography market as a whole.[172] These two interests accepted in *Ferber*, taken together with the decision in *Osborne*, satisfied the compelling governmental interest portion of strict scrutiny.[173]

The court additionally concluded that the statute was narrowly tailored to address Congress' concerns about how advancing technology makes it extremely

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[166] 248 F.3d 394, 397 (5th Cir. 2001).

[167] *Id.* at 398 (quotations omitted).

[168] *Id.*

[169] *Id.*

[170] *Id.* at 400.

[171] *Id.* at 401-02.

[172] *Fox*, 248 F.3d at 402-03.

[173] *Id.* at 402.

difficult to differentiate between real and virtual child pornography.[174] The court of appeals agreed with Congress' concern that extensive developments in technology necessitate laws that can parallel such developments.[175] Citing *Mento*, the Fifth Circuit concluded that "[w]ithout the 'appears to be' language in the statute 'there is frequently a built-in reasonable doubt argument as to the age of the participant, unless the government can identify the actual child involved.'"[176] The court also noted that the availability of an affirmative defense as to the age of the portrayed individuals added to the satisfaction of the narrowly tailored requirement.[177]

Finally, the court returned to the affirmative defense of the CPPA in reaching the determination that the statute was not overbroad.[178] This portion of the statute, in conjunction with the scienter requirement, convinced the Fifth Circuit that the *Hilton* court had been correct in concluding that the statute would not reach a substantial part of lawful conduct.[179] The court concluded that Fox's vagueness

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[174] *Id.* at 403.

[175] *Id.* The court noted, "the need to address the law enforcement problem created by tremendous advances in computer technology since *Ferber* and *Osborne* were decided, advances that have greatly exacerbated the already difficult prosecutorial burden of proving that an image is of a real child." *Id.*

[176] *Id.* (citing *Mento*, 231 F.3d at 920).

[177] *Fox*, 248 F.3d at 403-04. The Fifth Circuit summarized as follows:

> The statute's inclusion of these affirmative defenses, together with the prosecutorial necessity of the "appears to be" language and the nearly identical nature of the harms generated by both real and virtual child pornography, convince us that the statutory language cannot be improved upon while still achieving the compelling governmental purpose of banning child pornography.

Id. at 403.

Despite its reliance on the affirmative defense portion of the CPPA, the court noted "[i]n candor we must nevertheless recognize that, as this is an affirmative defense which places the burden of proving the models' majority on defendants who are virtually certain not to be able to track down producers and actors to adduce evidence of age, the defense is likely illusory." *Id.* at 405 n.45.

[178] *Id.* at 404.

[179] *Id.* at 404-05. The Fifth Circuit also stated that:

argument also failed based on the same reasoning employed by the other U.S. courts of appeals that found the CPPA constitutional.[180] Accordingly, the Fifth Circuit upheld Fox's conviction and found the CPPA constitutional.

E. PROTECTING VIRTUAL CHILD PORNOGRAPHY: *FREE SPEECH COALITION V. RENO*

The Ninth Circuit is the only Court of Appeals to find the CPPA unconstitutional. In *Free Speech Coalition v. Reno*,[181] the plaintiffs, a trade association that defended First Amendment rights against censorship, argued in the district court that the CPPA violates the First Amendment.[182] Departing from its sister circuits, the court reversed the district court's finding for the government on motions for summary judgment[183] and concluded that the CPPA was unconstitutional based on the vague and overbroad statutory phrases of "appears to be" and "conveys the impression."[184]

The Free Speech Coalition introduced slightly different arguments than those advanced in *Hilton* and *Acheson*.[185] In particular, plaintiffs argued: (1) that the district court erred in classifying the CPPA as a content-neutral regulation and thereby subjected it to the improper constitutional analysis; (2) that the affirma-

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> Any imprecision that may remain at the margins after employing this limiting construction [that material must be virtually indistinguishable from unretouched photos] say, whether the statute would ban images akin to the work of renowned contemporary artist Chuck Close, whose ultrarealistic paintings can be indistinguishable from close-up photography is more appropriately handled not by invalidating the statute but rather by case-by-case analysis of the fact situations to which its sanctions assertedly, may not be applied.

Id. at 405 (quotations omitted).

[180] *Fox*, 248 F.3d at 397.

[181] 198 F.3d 1083 (9th Cir. 1999).

[182] Free Speech Coalition v. Reno, No. C97-0281 SC, 1997 U.S. Dist. LEXIS 12212 (N.D.Cal 1997).

[183] *Free Speech Coalition*, 198 F.3d at 1087.

[184] *Id.* at 1086. The "appears to be" and "conveys the impression" language is the controversial language set out in the CPPA to combat the technology that allows for the creation of virtual child pornography. *See supra* note 103 and accompanying text.

[185] *Id.* at 1087.

tive defense portion of the CPPA was also wrongly found valid; and (3) that the CPPA poses a "prior restraint on protected speech, which chills free expression."[186] Like the previous two circuit courts dealing with CPPA challenges, the Ninth Circuit also traced the history of child pornography legislation.[187] The court emphasized that prior legislation had "defined the problem of child pornography in terms of real children" and that the CPPA marked a shift in definition which signified "a [congressional] determination that child pornography was evil in and of itself, whether it involved real children or not."[188] Such a determination was, according to the court of appeals, impermissible in light of the principles represented by the First Amendment.[189]

The court agreed with the First Circuit's classification of the CPPA as a content-based regulation.[190] Accordingly, the court noted that a compelling state interest was needed to justify the CPPA.[191] The court recognized three potentially

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[186] *Id.*

[187] *Id.* at 1087-89. The Court summarized almost 20 years of legislation with the following:

> Up until 1996, the actual participation and abuse of children in the production or dissemination of pornography involving minors was the *sine qua non* of the regulating scheme. The legislation tracked the decisions of the Supreme Court as well as the swift development of technology and its nearly infinite possibilities. The statutory odyssey was from adult pornography secured or not by the First Amendment, to child pornography permitted or not, to pseudo child pornography protected or not, until in 1996 the law was amended to prohibit virtual child pornography.

Id. at 1089.

[188] *Free Speech Coalition*, 198 F.3d at 1089.

[189] *Id.* at 1094. The court concluded, "[b]ecause the 1996 Act attempts to criminalize disavowed impulses of the mind, manifested in illicit creative acts, we determine that censorship through the enactment of criminal laws intended to control an evil idea cannot satisfy the constitutional requirements of the First Amendment." *Id.*

[190] *Id.* at 1091.

[191] *Id.* In order for a statute to be held constitutional, it must satisfy the corresponding level of analysis as dictated by the Supreme Court in its First Amendment jurisprudence. CHEMERINSKY, *supra* note 28, at 760. Laws that are viewpoint neutral "apply to all speech, regardless of the message." *Id.* In situations where the law is content neutral, the Court applies "an intermediate level of scrutiny." *Id.* at 758 (citing Tuner Broadcasting System v. FCC, 512 U.S. 622, 642 (1994)).

Laws which regulate speech based on its content are subject to strict scrutiny and require the

compelling interests. First, the court identified that the goal of eradicating the participation of real children to create child pornography might be compelling.[192] Second, the court found that distribution of child pornography could potentially encourage and increase the sexual abuse of children by " whet[ting] the appetite of pedophiles" could be compelling.[193] Third, the court acknowledged that child pornography consists of images that are "morally and aesthetically repugnant" and consequently may not merit constitutional protection.[194] These three interests taken together illustrate the main concerns of CPPA advocates.

Relying on *Ferber*, Judge Molloy, writing for the court, concluded that Supreme Court case law could not support the new definition found in the CPPA.[195] The Court in *Ferber* had noted that child pornography statutes were passed to combat harm to children.[196] The nature of the original harm visited on the child at the time the photograph is taken, the court explained, is arguably enhanced because the image serves as a "permanent record of the child's participation" the reproduction and distribution of the original photograph exacerbates the harm, existing as a reminder of a painful act.[197] Because the *Ferber* Court set parameters regulating child pornography based in part on the use of real children in its creation, the Ninth Circuit concluded that the new definitions of child pornography contained in the CPPA deviated substantially from precedent and was unconstitutional.[198] Thus, the Ninth Circuit concluded that the interest of the real children in creating child pornography do not exist to the same degree in the vir-

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State to show a compelling interest for regulation of the speech. *Id.* at 758-64. Once a compelling interest is demonstrated, the statue must be narrowly tailored so as to further that interest. *Id.* Moreover, various categories of speech have been found to merit less First Amendment protection, including the "fighting words" doctrine found in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), obscenity, as in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), and, as has been discussed, child pornography.

[192] *Free Speech Coalition*, 198 F. 3d at 1091-92.

[193] *Id.*

[194] *Id.*

[195] *Id.* at 1092.

[196] *Id.* The court noted that, "state statutes criminalizing child pornography [were enacted] to limit the offense to 'works that visually depict explicit sexual conduct by children below a specified age" and "focused on the harm to children." *Id.*

[197] *Id.*

[198] *Free Speech Coalition*, 198 F. 3d at 1094-95.

tual child pornography context as it does in the production of actual child pornography.[199]

As to the second State interest regarding the increase of pedophiles' urges to entice and abuse children, the Ninth Circuit did not find this compelling.[200] The court of appeals found guidance in *American Booksellers Association v. Hudnut*.[201] Relying on *Hudnut*, the Ninth Circuit explained that "'[i]f the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech.'"[202] Accordingly, the court determined that the use of such materials by pedophiles to entice children to participate in sexual behavior fails to satisfy the compelling interest component.[203]

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[199] *Id.* at 1092. The Ninth Circuit indicated that, "the case law demonstrates that Congress has no compelling interest in regulating sexually explicit *materials that do not contain visual images of actual children*." *Id.* (emphasis added).

[200] *Id.* at 1093.

[201] *Id.* A Seventh Circuit decision dealing with a local statute prohibiting adult pornography that depicted women in a submissive or degrading manner. *Id.* (citing American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985)). In *Hudnut*, the Seventh Circuit struck down a "city ordinance prohibiting pornography that portrayed women submissively or in a degrading manner." *Free Speech Coalition,* 198 F.3d at 1093 (citing *Hudnut*, 771 F.2d at 334). Moreover, "the unhappy effects of pornography depend on mental intermediation." *Id.* The court continued, "[t]his is particularly so when the images are not of real human beings, but are representations of a loathsome mind reduced to virtual reality by the technology of computer graphic art." *Id.*

In *Hudnut*, the Seventh Circuit found that even if such material played a "role, if any, in preserving systems of sexual oppression, [that] 'simply demonstrated the power of pornography as speech. . . . Pornography affects how people see the world, their fellows, and social relations." *Id.* at 1093 (quoting *Hudnut*, 771 F.2d at 329).

[202] *Free Speech Coalition*, 198 F. 3d at 1093 (quoting *Hudnut*, 771 F.2d at 330 (emphasis added)).

[203] *Id.* at 1093. This argument, referred to by the Ninth Circuit as the secondary effects argument, was rejected by the court. *Id.* "To accept the secondary effects argument as the gauge against which the statute must be measured requires a remarkable shift in the First Amendment paradigm. Such a transformation, how speech impacts the listener or viewer, would turn First Amendment jurisprudence on its head." *Id.* at 1094-95.

The court explained that, "any victimization of children that may arise from pedophiles' sexual responses to pornography apparently depicting children engaging in explicit sexual activity is not a sufficiently compelling justification for CPPA's speech restrictions" and that "to hold otherwise enables the criminalization of foul figments of creative technology that do not involve any human victim in their creation or in their presentation." *Id.* at 1093.

Additionally, the court concluded that justifying for the CPPA on the claim that the images are morally repugnant also falls short of compelling.[204] The court shifted its focus and stressed that the "critical ingredient of our analysis is the relationship between the dissemination of fabricated images of child pornography and additional acts of sexual abuse."[205] The court noted that the extent to which virtual child pornography contributed or exacerbated this relationship is unclear.[206] The lack of any information as to the link between virtual child pornography and the abuse of children convinced the court to reject this state interest.[207] Accordingly, the court found the CPPA failed to meet the constitutional test for content-based restrictions.[208]

The Ninth Circuit also found the CPPA to be void-for-vagueness and overbroad.[209] The court found the law vague because of the lack of definition as to the terms "appears to be" and "conveys the impression."[210] Moreover, the court found the CPPA overbroad because regulation of child pornography is based on the harm it causes to real children, not because of the potential consequences of its creation.[211] As a result, the court determined that "[t]he CPPA's inclusion of constitutionally protected activity as well as legitimately prohibited activity

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[204] *Id.* at 1094.

[205] *Id.* at 1093.

[206] *Id.* The court stated that "[f]actual studies that establish the link between computer-generated child pornography and the subsequent sexual abuse of children apparently do not yet exist." *Id.* The court added,

> [t]he legislative justification for the proposition was based upon the Final Report of the Attorney General's Commission on Pornography, a report that predates the existing technology. The Final report emphasized the victimization of real children by adult distribution of the pornographic material. The report shows that the use of sexually explicit photos or films of actual children to lure other children played a small part in the overall problem involving harm to children.

Id. at 1093 (internal citation omitted).

[207] *Id.*

[208] *Free Speech Coalition*, 198 F. 3d at 1095.

[209] *Id.* at 1095-97.

[210] *Id.*

[211] *Id.* at 1096.

makes it overbroad."[212] Having focused on these specific definitional concerns, Judge Molloy concluded that the statute was severable and that the language of "appears to be a minor" and "conveys the impression" was unconstitutional.[213]

Litigants challenging the CPPA in all five cases repeated the same arguments: that the CPPA's expansion of the definition of child pornography is either invalid under overbreadth doctrine, vagueness principles, or First Amendment jurisprudence in general.[214] Only the Ninth Circuit valued the argument, and even then was faced with the constitutional question in a slightly different capacity since the plaintiffs in Free Speech Coalition were challenging the statute not as possessors of child pornography, but rather as those wishing to avoid future prosecution should their materials meet the new, technologically sensitive definition of child pornography.[215]

V. THE FUTURE OF THE CPPA

A significant difference between real child pornography and virtual child pornography is that virtual child pornography, created from one's imagination, does not document a history of sexual abuse or does it necessarily involve the use of a real child.[216] Technological advances allow users to create images solely from one's imagination that do not require the use of a real child or necessarily result in harm to a real child.[217] Congress sought to bridge the gap be-

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[212] *Id.*

[213] *Id.* at 1097.

[214] *See* Part IV of this Comment.

[215] *Free Speech Coalition*, 198 F.3d at 1086.

[216] Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439, 440 (1997).

[217] Lydia W. Lee, Note, *Child Pornography Prevention Act of 1996: Confronting the Challenges of Virtual Reality*, 8 S. CAL. INTERDISC. L.J. 639, 642-48 (1999) (tracing the emergence of virtual child pornography, detailing the use of new photographic and imaging technology that make it possible to create child pornography without using a real child).

Prior to the passage of the CPPA, scholars predicted that computer-generated child pornography was on the horizon, but would not be entitled to First Amendment protection because the state has a compelling interest in the protection of its children. *See* David B. Johnson, Comments, *Why the Possession of Computer-Generated Child Pornography Can Be Constitutionally Prohibited*, 4 ALB. L.J. SCI. & TECH. 311, 325-28 (1994) (advocating that the CPPA is constitutional because of the harm the material can cause children). Further, such material might "induce viewers to commit sex crimes on children" and that "enforcement of child pornography laws will be hampered if the market is flooded with computer-generated child por-

tween harm to a real child versus the exercise of one's imagination by enacting the CPPA.[218]

At the core of the arguments in support of the CPPA are: (1) the suggestion that child pornography and virtual child pornography are nearly identical and thus should be wholly without First Amendment protection,[219] and (2) that if child pornography and virtual pornography have the same effects on real children, such effects necessitate the constitutional proscription of virtual child pornography.[220] The first theory, child pornography as a category of speech devoid of First Amendment protection, has been adopted in the four circuit decisions upholding the CPPA.[221] The readings of *Ferber* and *Osborne* taken in those cases reflect the view that virtual child pornography, as a species of child pornography, is not entitled to constitutional protection.[222] This view depends on the fact that virtual child pornography portrays children in sex acts and since such portrayal is essential to the definition of child pornography, virtual child pornography should also be proscribed.

The categorization of virtual child pornography as child pornography based solely on the type of visual depiction misses the mark. To ignore the emphasis of the Court in *Ferber* upon the harm to real children in the production of actual child pornography is to ignore a key element in the Supreme Court's reasoning supporting the New York statute.[223] Obscenity law seemed an inadequate method for the *Ferber* Court to accomplish its goal of divesting child pornogra-

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nography." *Id.* at 327-28.

[218] 18 U.S.C. § 2256 (2001)

[219] Michael J. Eng, Note, *Free Speech Coalition v. Reno: Has the Ninth Circuit Given Child Pornographers a New Tool to Exploit Children?*, 35 U.S.F.L. REV 109, 128 (2000) (citing United States v. Kimbrough, 69 F.3d 723 (5th Cir. 1995) and explaining that prohibition of virtual child pornography is in line with banning real child pornography).

[220] Clay Calvert, *The Enticing Images Doctrine: An Emerging Principle in First Amendment Jurisprudence?*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 595, 605-10 (2000) (describing that one of the major arguments supporting CPPA includes the view virtual child pornography will be used by child molesters and pedophiles in the same way that real child pornography can be used to seduce children).

[221] *See* Part IV(A)-(D) of this Comment.

[222] For a complete discussion of the arguments in the circuit courts' decisions, see Part IV of this Comment.

[223] *See* New York v. Ferber, 458 U.S. 747, 759-65 (1982).

phy of any First Amendment protections.[224] Banning virtual child pornography, simply as a species of already unconstitutional child pornography, is a meritless argument because virtual child pornography fails to fit the Court's reasoning in the controlling child pornography case law.[225]

The second First Amendment infirmity of the CPPA lies in Congress' attempt to control the secondary effects of child pornography.[226] This argument for the regulation of virtual child pornography seems to directly conflict with general First Amendment doctrine.[227] A major motivation behind Congress' passage of the CPPA was to stop the sexual exploitation of children by those who manufacture child pornography (real or virtual), and cease the consumption of child pornography altogether. Part of this motivation stems from the claim that viewers of child pornography will theoretically use the virtual material as a tool to convince children to engage in sexual conduct.[228]

During Senate hearings for the CPPA, Congress made several specific findings before passing the law.[229] In particular, Congress noted that easily attain-

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[224] Vincent Lodato, *Computer-Generated Child Pornography—Exposing Prejudice in Our First Amendment Jurisprudence?*, 28 SETON HALL L. REV. 1328, 1329 (1998) ("Actual, living children are used to create child pornography; thus, the government's interest in protecting children from sexual abuse is sufficiently compelling to justify a prohibition on nonobscene materials seemingly protected by our Constitution."); Eng, *supra* note 220, at 112 (noting that "pre-CPPA federal law [is] ineffective. . .because real children are no longer needed to produce child pornography. . .[and] image-altering software can transform sexually explicit material in such a way that it is impossible for prosecutors to identify the persons in the material or to prove that real children were use in producing the material").

[225] Lee, *supra* note 217, at 648 (stating that the Court's original definition of child pornography announced in *Ferber* fails to deal with virtual child pornography because "the technology needed for creating virtual child pornography was either unavailable or still in its infancy.") *Id.* (citations omitted). Lee further notes that child pornography statutes and case law in the wake of *Ferber* "were largely based on the 1986 Attorney General's Pornography Commission Report's emphasis that in child pornography a child is sexually abused." *Id.* (citations omitted).

[226] S. REP. NO. 104-358, section 2 (10)-(13) (1996).

[227] *See* Calvert, *supra* note 220, at 611-16 (arguing that Congress' reasoning that virtual child pornography will lead to greater abuse of children is reminiscent of the "bad tendency test" that the Supreme Court discredited in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (requiring that speech be directed and likely to incite imminent lawless action before it lose its First Amendment protection)).

[228] S. REP. NO. 104-358, section 2 (10)-(13) (1996).

[229] S. REP. NO. 104-358, section 2 (1996).

able and highly sophisticated technology makes it difficult to determine whether material was created with a minor or was simply altered to appear to involve the use of minors.[230] Congress also found that the effect of child pornography, virtual or otherwise, is used by pedophiles and child molesters "to stimulate or whet their own sexual appetites" and seduce victims.[231] In attempting to eradicate the child pornography market, Congress also noted that "prohibiting the possession and viewing of child pornography will encourage the possessors of such material to rid themselves of or destroy the material. . . ."[232] Finally, Congress adopted First Amendment jurisprudence language and asserted that destroying the child pornography market and preventing sexual exploitation of children are compelling interests that support the regulation of both real and virtual child pornography.[233]

Congress' finding that images depicting children in sexual situations are used to seduce children and thus can be proscribed finds support in *Osborne*.[234] Recalling that *Osborne* suggested that possession of child pornography could be criminalized because possession could lead to further abuse of other children, proponents of the CPPA argue that the regulation of virtual child pornography is implicit in Osborne's reasoning because virtual child pornography might be used to facilitate sexual abuse.[235] In fact, the argument suggests, virtual child pornog-

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[230] *Id.* at (5)-(6).

[231] *Id.* at (8).

[232] *Id.* at (12).

[233] *Id.* at (13). Congress noted:

> [T]he elimination of child pornography and the protection of children from sexual exploitation provide *a compelling governmental interest* for prohibiting the production, distribution, possession, sale, or viewing of. . .depictions produced by computer or other means which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children engaging in such conduct.

Id. (emphasis added).

[234] Osborne v. Ohio, 495 U.S. 103, 111 (1990).

[235] *Id*; S. REP. NO. 104-358, section X (1996). "Child pornography is used by pedophiles and child molesters as a facilitator or 'training manual' in acquiring their own deviation, and also as a device to break down the resistance and inhibitions of their victims or targets of molestation, especially when these are children." *Id.*; *See also* Lee, *supra* note 217, at 653-54. Lee noted:

raphy is arguably an even more dangerous seduction tool since the molester could alter innocent pictures of the target child's friends in order to more effectively seduce the child.[236] This theory is one of the stronger arguments available to the proponents of the CPPA.[237] Because the Court generally will defer to legislative findings in a statute, it is possible that Congress' conclusions that virtual child pornography is a potent tool for the future abuse of children will sustain the CPPA.[238]

The argument that pedophiles will use virtual child pornography to whet their sexual appetites and find legitimacy in their behavior, leading to sexual exploitation of real children, at first glance seems to be a compelling governmental interest. However, while there "may be a strong correlation between the consumption of pornography and the perpetration of sexual crimes against children, there is not necessarily a causal relationship."[239] Rather, there seems to be a step be-

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> The *Osborne* court indicated that the state's interest in protecting children extended to material other than child pornography, i.e., depictions that might facilitate the sexual abuse of children. Moreover, by justifying possession prohibitions based on the assertion that child pornography is used as a tool in the commission of sexual crimes against children, it appears that the Court permitted the prevention of anticipatory criminal offenses.

Id. at 653 (citations omitted). One commentator has maintained, "[w]ith computer-generated child pornography, there is a victim. The child who gets seduced by a pedophile using computer-generated child pornography is a victim when computer-generated child pornography prevents the law from being enforced." Johnson, *supra* note 217, at 330.

[236] Burke, *supra* note 216, at 466. Burke concedes that the use of virtual child pornography to seduce a child where the pictures are of the child's friends produces a stronger nexus between the abuse and the pornography, but also notes that adult pornography is used in the same way. *Id.* Burke further notes that Congress could claim that the more efficient the tool, the more compelling the state interest in regulating that tool. *Id.* For this same argument as to the use of virtual child pornography as a more effective seduction tool, *see* Adelman, *infra* note 237, at 490-91.

[237] Ronald W. Adelman, *The Constitutionality of Congressional Efforts to Ban Computer-Generated Child Pornography: A First Amendment Assessment of S.1237*, 14 J. MARSHALL J. COMPUTER & INFO. L. 483, 490-92 (1996). Adelman's discussion is based on the CPPA's status as a Senate bill, but his description of the arguments available to proponents of the CPPA remains cogent. *Id.* He explains that, "the Hatch Bill can be justified, if at all, by a sufficient showing that dissemination of even fabricated images of child pornography will lead to additional acts of sexual abuse. . . ." *Id.* at 488.

[238] *See id.*

[239] Burke, *supra* note 216, at 472 (challenging the CPPA and concluding that if the purpose of the CPPA is to ban all images of minors appearing to engage in sexually explicit con-

tween the viewing of child pornography and the act of molestation.

Professor Adler examines the nature of this gap. Adler suggests that the reasoning adopted by the courts of appeals upholding the CPPA is the same reasoning rejected by the Seventh Circuit in *Hudnut*.[240] More precisely, Adler explains that the arguments mounted by Professor Catharine MacKinnon[241] in her advocacy of the ordinance at issue in Hudnut are mirrored and adopted by the courts of appeals upholding the CPPA and its regulation of virtual child pornography.[242] In comparison to adult pornography at issue in *Hudnut*, the courts seem more receptive to the "speech leads to action" argument when it comes to child pornography.[243] Accepting the view that pictures of children in sexual situations, encourage viewers to solicit children for the same sexual situations, Adler argues, implies the view that "pornography inevitably begets a pornographic society; it conjures up and reproduces itself, spurring pedophiles to reenact its images, or transforming 'normal' people into pedophiles."[244]

Adler cautions that while speech is a powerful tool in society, it is not so powerful as to negate the ability to control one's actions.[245] Thus, according to

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duct, the law cannot survive constitutional scrutiny).

[240] Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 996-1002 (2001) [hereinafter, Adler, *Inverting*]. Adler's primary thesis is that the CPPA has "extended the law of child pornography in a direction that has sweeping constitutional repercussions: by banning speech based on its social construction effects the legislation represents a sharp break with modern free speech doctrine." *Id.* at 927.

[241] Adler divides MacKinnon's argument against pornography into two elements. First, that "[p]ornographic images. . .are inseparable from the violent action that produced them: 'they document traffic in female sexual slavery;'" [s]econd, that "pornography causes a social construction. . .a world in which all women are victimized." *Id.* at 979 (citing ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY at 46 (1988)). Transferring this argument to child pornography, the CPPA arguably leads to the following transposition: "[child] pornography causes a social construction. . .a world in which all [children] are victimized." Adler, *Inverting*, *supra* note 240, at 979.

[242] *See* Adler, *Inverting*, *supra* note 240, at 999-1000. "In the language of linguistic theory, both child pornography law and MacKinnon's work rely on a belief that pornography is 'illocutionary,' that it will automatically 'perform' what it depicts." *Id.*

[243] Further, Adler observed that "[t]he principle that underlies [MacKinnon's theory], the idea that certain speech is better seen as action, has surreptitiously found refuge in another place in the First Amendment: the law of child pornography." *Id.* at 972.

[244] *Id.* at 1000.

[245] *Id.* Adler explained:

Adler, the secondary effects argument leads to "internal incoherence in child pornography law."[246] Adler offers the example of a ten-year-old girl who is photographed from a distance while playing at the beach with her mother.[247] This child, Adler points out, is a far cry from the child who is kidnapped, abused, and then photographed.[248] She admits that while "[w]e may not like the [beach picture] that was taken of the girl," this dislike for the photo does not place it automatically within the realm of child pornography.[249]

To take Adler's point even further, suppose that the same picture serves as a muse for the graphic designer who decides to alter the photograph and place the girl in a sexual situation. Even further, suppose that the same picture that started out as a simple picture of a girl at the beach was transformed into a girl with entirely different facial features in a sexual scenario that has never occurred. It is doubtful that this picture can really be classified as child pornography because it probably looks very similar to the average child's bathing suit advertisement seen in any department store catalog. It is also doubtful whether the perverted graphic designer, or anyone capable of using readily available image editing software, must be punished under a federal criminal statute.

Moreover, in order to pass strict scrutiny, the Court must find that the state has a compelling interest in protecting children, and society as a whole, from the negative effects of child pornography.[250] Most people agree that there is something immoral about the portrayal of children in sexual situations, regardless of whether or not the image is of an actual child. Even if it can be agreed that child pornography as a category of material is bad for society, that is not a sufficient

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there is a crucial distinction between observing the illocutionary potential of an utterance and viewing that illocutionary aspect as inevitable, as if an image or a statement must perforce enact what it represents. The view of language embedded in child pornography law ignores the complexity of social construction. It ignores the way that any utterance or image inevitable produces multiple interpretations and, therefore, multiple and fluctuating effects. To believe otherwise is to magically conflate speech and its effects.

Id.

246 *Id.* at 936.

247 *Id.* at 941-42.

248 *Id.*

249 Adler, *Inverting*, *supra* note 240, at 942.

250 Calvert, *supra* note 220, at 599-600.

reason to ban an entire class of speech that would be protected under the First Amendment. Suppression of speech based on the theory that it sends an undesirable message, by itself, does not warrant the conclusion that it is automatically devoid of constitutional protection.[251] The argument that virtual child pornography may be used by some pedophiles to potentially seduce other children into future sex acts is too tenuous to be the basis for upholding the CPPA.

Since actual child pornography has already been found to be beyond the scope of the First Amendment, Congress is entitled to a certain amount of deference as to its findings in support of the CPPA.[252] Deference, however, does not mean the Court will blindly accept Congress' reasons for passage of certain legislation.[253] The Court will still inquire into the articulated motivations of statutes to make sure that such reasons are not mere pretext.[254] Thus, in order to conform to First Amendment jurisprudence, the Court must examine the reasons behind the CPPA.[255] At the time the CPPA was passed, no factual studies "concerning the link between computer-generated child pornography and subsequent abuse of children" existed.[256] Thus, proponents of the CPPA were relying in part on the Attorney General's report from 1986 to support their argument that pedophiles used such images to victimize real children.[257]

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[251] *See supra* note 191 and accompanying text.

[252] Adelman, *supra* note 237, at 489 (citing Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 321 (1985)(warning that courts must bear in mind "the deference owed to Congress" when evaluating statutes).

[253] *Id.*

[254] *Id.*

[255] *Id.*

[256] Adelman, *supra* note 237, at 490. During hearings on S. 1237, the Judiciary Committee heard testimony from Dr. Victor Cline, emeritus professor of psychology at the University of Utah, as to the potential effects of virtual child pornography on children whose innocent pictures were morphed. S. REP. NO. 104-358, section X (1996). Dr. Cline testified that the ability to create child pornography to meet one's specific interests and desires would serve to "heighten the materials effect on the viewer and thus increase the threat this material poses to children." *Id.*

[257] *See* Adelman, *supra* note 237, at 490. This reliance on the 1986 report is misplaced because that report dealt only with moving images and still pictures—the existence of virtual child pornography was not considered at the time. *Id.* The 1986 report is additionally inadequate because "the structure of the Final Report's discussion of child pornography demonstrates that the use of sexually explicit photos or films of children to lure other children played a relatively small part in the Commission's view of the overall problem." *Id.* at 491. Finally, the report "specifically considered the issue of sexually explicit *fictional depictions* of chil-

Even if reliance on a ten-year-old report is misplaced, Congress' interest in destroying a market designed to exploit children is compelling under *Osborne* and *Ferber*.[258] To that end, it can be said that the general concern that the mere existence of child pornography is harmful to society satisfies the compelling interest requirement of the First Amendment.[259] It is unlikely anyone would challenge the argument that the objectification of children coupled with abuse has "a detrimental effect on the moral fiber of society as a whole."[260]

According to one scholar, the argument that virtual child pornography should be banned because it degrades society is "neither sufficiently verifiable nor compelling on its own to justify the ban on speech."[261] Moreover, the statute only reaches visual depictions that are virtually indistinguishable from a photograph. The statute has been interpreted to not reach computer-generated cartoons or animation that portray minors in sexual poses.[262] Because these materials are not "virtually indistinguishable"—it is clear they are animation—those who possess and distribute such material are not subject to the CPPA.[263] These materials are likely to be just as effective, if not more so, to seduce young children as they are already familiar with cartoons and drawings.[264] Many children seek to emulate

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dren, and determined that such depictions fell outside the category of 'child pornography.'" *Id.*

[258] *Osborne*, 495 U.S. at 110 (holding that destruction of the child pornography market is a compelling interest as articulated in *Ferber*, 458 U.S. at 479).

[259] Burke, *supra* note 216, at 466. Burke notes that "the sexualization and eroticization of minors through any form of pornographic images" has a "deleterious effect on all children" is a legitimate state concern. *Id.*

[260] *Id.* at 467.

[261] *Id.* at 468. Moreover, arguments have been advanced as to the potential benefits of virtual pornography in general. *See generally*, Carlin Meyer, *Reclaiming Sex From the Pornographers: Cybersexual Possibilities*, 83 GEO. L.J. 1969, 1999-2000 (1995) (arguing that the Internet can provide a forum for open discussion about sex and sexuality in a way that can benefit society as a whole and that the viewing of images available on the Internet is as "likely to alleviate the need or desire to pursue actual children as it is to encourage taking real action in real space rather than cyberspace").

[262] United States v. Hilton, 167 F.3d 61, 72 (1st Cir. 1999) (holding that "drawings, cartoons, sculptures, and paintings depicting youthful persons in sexually explicit poses plainly lie beyond the reach of the Act").

[263] S. REP. NO. 104-358 section 2(5) (1996).

[264] *See* Calvert, *supra* note 220, at 608-612 (discussing the use of cartoons to persuade children to smoke and how X-rated cartoons may be used in the same manner).

the cartoon characters and comic book heroes they watch and read about,[265] making a picture of a favorite character in a sexually explicit pose a convincing method to seduce a young child.

The expanded definition of child pornography to include those images created by the computer user's imagination stemmed from the unavoidable advancement of technology. Software programs have become so sophisticated as to make it almost impossible for one to differentiate between a picture of an actual child and of a child who does not exist.[266] Based on this prosecutorial challenge, Congress decided that amending the definition would solve the problem.[267] Unfortunately for Congress, amending the definition of child pornography has ushered in a new set of problems—problems meeting the standards set forth in the First Amendment and child pornography case law.[268] Assuming that the secondary effects argument is accepted as a compelling interest, the CPPA must still be narrowly tailored to achieve those ends.[269] Here Congress' "ends" are to cease the sexual exploitation of children and the consumption of child pornography, virtual or otherwise.[270] The argument that virtual child pornography must be banned because it is an effective seduction tool for further sexual abuse, however, fails the narrowly tailored portion of the strict scrutiny analysis because adult pornography can be used in the same way.[271] Because adult pornography is protected under *Miller* where it is not obscene, the seduction tool argument includes material that is constitutionally protected.

While the Supreme Court concluded that the *Miller* test did not apply to child

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[265] *See* Free Speech Coalition v. Reno, 198 F.3d 1083, 1094 (9th Cir. 1999) (disagreeing with the *Hilton* Court's view regarding children and drawings). *See also supra* note 263 and accompanying text.

[266] Burke, *supra* note 216, at 440-41.

[267] S. REP. NO. 104-358 section 2 (1996) (enumerating Congress' findings and purpose in passing the CPPA).

[268] *See Free Speech Coalition*, 198 F.3d at 1094 (holding that Congress failed to satisfy the narrow tailoring requirement of the First Amendment).

[269] *See supra* note 192 and accompanying text.

[270] S. REP. NO. 104-358 section 2 (1996).

[271] Burke, *supra* note 216, at 468. Accordingly, Burke writes, "[a]s technology presents greater challenges to the preservation of fundamental freedoms, opening the doors to the punishment of virtual crimes, based upon a fear that actual crimes will occur, or that society as a whole will denigrate, is frightful." *Id.*

pornography as a whole,[272] commentators have suggested that virtual child pornography might best be regulated under an extension of the *Miller* test for obscenity.[273] Perhaps only virtual child pornography materials that fit the *Miller* definition would be deemed obscene and would lose First Amendment protection. Such an application might result in the following scenario. A defendant charged with violating the CPPA would assert that the material in question was actually virtual child pornography and thus had never involved the abuse of a real child. Working from this assumption, judges and juries would then have to decide if such material is obscene. It is likely that material depicting particularly young children, especially if they are engaged in hard core sex acts, will result in a conviction under the *Miller* test.[274]

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[272] *Miller*, 413 U.S. at 24. The Court in *New York v. Ferber*, 458 U.S. 747, 763 (1982) based three of its five reasons for making child pornography an unprotected category specifically on the harms that real child pornography does to real children. Specifically, the Court stated:

> When a definable class of material, such as that covered by [the New York statute] bears so heavily and pervasively on the welfare of children *engaged in its production*, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment. . . . The test for child pornography is separate from the obscenity standard enunciated in *Miller*, but may be compared to it for the purpose of clarity. . .A trier of fact need not find that the material appears to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole.

Ferber, 458 U.S. at 761-64 (emphasis added).

[273] Samantha Friel, Note, *Porn By Any Other Name? A Constitutional Alternative to Regulating "Victimless" Computer-Generated Child Pornography*, 32 VAL. U.L. REV. 207, 225 (1997). Friel suggests that a "healthy skepticism of visual images" is needed in order to deal with the relationship between advanced technology and the creation of virtual child pornography. *Id.* at 256. Further, she advocates for amendment of the CPPA to include a "limited, implied affirmative defense for those defendants who have not possessed actual child pornography" by allowing defendants to rebut the presumption that the material is actual child pornography. *Id.* at 260. The defendant would thus be able to put forth evidence that the material in question did not involve the use of a real child.

However, Friel's amendment to the CPPA fails the possessor of virtual child pornography who does not have evidence to prove that the material did not involve an actual child. Only the original creator of the material might be able to demonstrate that the image was a virtual one. Because most child pornography consumers use the Internet as a way to trade images with others, the material may be so far removed from its original creator that the future defendant has no practical benefit from Friel's suggested amendment.

[274] Assuming, of course, that a jury would find such material fit the requirements of

The harder case is one where the pictures are of teenagers, maybe even 16 or 17 years old, engaged in sexual activity that might not seem to the average person to fit the *Miller* test for obscenity. In this more difficult situation, the defendant might avoid conviction simply because he or she is a child pornographer with more conservative tastes. Moreover, the simple possession of virtual child pornography would not be punishable based on the Court's reasoning in *Stanley v. Georgia*.[275] As a result, only those who manufacture obscene virtual child pornography would be punishable under a *Miller/Stanley* controlled CPPA. If that were Congress' real intent, then convictions of this narrow class of criminals might be satisfactory.

The three child pornography cases[276] discussed earlier were written to carefully address a very sensitive and very serious area of First Amendment concern. Recognizing that children need to be protected from sexual exploitation, the Court concluded that child pornography involving actual children involves harms that must be addressed.[277] Over a decade later, the Supreme Court has agreed that the possession of child pornography involving real children could be criminalized.[278] The Court later reaffirmed that child pornography distributors must still satisfy a scienter requirement in order to be convicted of violating child pornography statutes.[279] These cases, interpreted together, do not necessarily imply that Congress is free to sweep virtual child pornography into the mix of other unprotected material. To the contrary, the cases serve as markers for the boundary of material the Court has been willing to place outside First Amendment protection. Virtual child pornography falls outside the bounds of these cases and should be entitled to some First Amendment protection.

A significant part of the argument for the constitutionality of the CPPA depends upon the validity of the secondary effects of child pornography and the claim that such effects necessarily flow from virtual child pornography.[280] Yet,

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Miller.

[275] 394 U.S. 557 (1969); *see supra* note 72 and accompanying text.

[276] New York v. Ferber, 458 U.S. 747 (1982); Osborne v. Ohio, 495 U.S. 103 (1990); United States v. X-Citement Video, 513 U.S. 64 (1994).

[277] *Ferber*, 458 U.S. at 761-63.

[278] *Osborne*, 495 U.S. at 124-26.

[279] *X-Citement Video*, 513 U.S. at 78.

[280] The notion that Congress is trying to legislate later effects of speech was termed the "enticing images" doctrine by Professor Clay Calvert. Calvert, *supra* note 220, at 597. Professor Calvert challenges the CPPA as a statute attempting to criminalize the production and

commentators have challenged this secondary effects argument and warned that to accept such a theory in the area of child pornography in order to constitutionally prohibit virtual child pornography contradicts fundamental views of the First Amendment and may ultimately infect other areas of speech that do not elicit the same visceral response found in the child pornography area.[281]

Offering a more provocative view of child pornography law, Professor Adler argues that the elevation of virtual child pornography to federal criminal status has created precisely the opposite effect that Congress intended.[282] Approaching the entire spectrum of child pornography regulation in a loftier context, with references to the theories of Foucault and Freud as a way of illustrating her warnings to legislators and judges alike in their quest to regulate child pornogra-

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possession of images that might "entice children to engage in illegal conduct." *Id.* Moreover, Calvert argues that to control virtual child pornography is tantamount to criminalizing toys or candy that can also be used to seduce or coerce children to participate in illegal acts. *Id.* at 601. He writes:

> Therein lies the heart of the enticing images doctrine: images that might entice a person to engage in illegal conduct—in this case, sexual conduct between adults and minors or the use of children in the creation of actual child pornography—may be prohibited. The images, in brief, are like eye candy, tempting a child to engage in illicit behavior by making the conduct seem attractive or even desirable. They are akin to the proverbial lollipop that a pedophile might use to seduce or entice a young child, gaining his or her trust and cooperation in the production and creation of child pornography.

Id.

Focusing on the images themselves, Calvert reasoned that since it is up to the adult viewer of the images to take the virtual images and use them to seduce children, banning child pornography could lead down a slippery slope, resulting in regulation of violent movies and other images that might entice children to engage in unlawful behavior. *Id.* at 607-09. In sum, for Calvert, the regulation of virtual child pornography is uncomfortably similar to the "abandoned 'bad tendency' test in which speech could be punished if it might at some indefinite point now have an undesirable consequence." *Id.* at 612. Virtual child pornography in and of itself can be narrowly classified simply as "a very realistic portrayal of illegal conduct involving minors." *Id.* at 611.

[281] *See supra* notes 220, at 605-10, and 280 and accompanying text.

[282] Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 212 (2001) [hereinafter Adler, *Perverse*]. Adler writes: "[C]hild pornography law and the eroticization of children exist in a dialectic of transgression and taboo: The dramatic expansion of child pornography may have unwittingly heightened pedophilic desire." *Id.*

phy,[283] Adler suggests that the quest to discourage deviant behavior and eliminate sexual abuse of children, has forced judges and juries to place themselves in the mind of the pedophile.[284] The expansion of child pornography regulation, especially through the CPPA, makes judges and juries examine photos of children in sexual scenarios to determine if material was marketed as child pornography or involved the use of an actor under the age of 18.[285] This examination will lead to a different type of secondary effects that Congress likely did not intend—the elevated perception of children as sexual objects.[286]

The emphasis on combating child pornography, Adler posited, "may produce perverse, unintended consequences and that the legal battle we are waging may have unrecognized costs," reaching into real concerns about censorship.[287] After tracing the history of child pornography law and describing the historical development of society's concern for child sexual abuse, Adler indicated that "[i]nherent in all regulation, but particularly in regulation of sexual desire, there is the possibility that legal taboos will invite their own violation . . . The most basic myths of western culture tell of contravening prohibitions: Think of Adam and Eve, or Prometheus, or Psyche."[288] It is this danger of inviting violation, coupled with the need for factfinders to examine material in such a way as to seek out the sexualization of the depicted minor, that may be undermining the goal of eradication child pornography.

In formulating her hypothesis, Adler's argument focuses on the Dost test.[289] The six part Dost test provides a method for deciding whether certain photos qualify as child pornography based on whether or not they involved a lascivious exhibition.[290] Among the six factors of the Dost test, the factfinder must determine "whether the visual depiction is intended or designed to elicit a sexual re-

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[283] *Id.* at 246-51.

[284] *Id.* at 255-72.

[285] *Id.* at 257-67.

[286] *Id.*

[287] *Id.* at 213.

[288] Adler, *Perverse*, *supra* note 282, at 245.

[289] *Id.* at 262-265.

[290] *Id.* at 262 (citing United States v. Dost, 636 F. Supp. 828, 832 (S.D.Cal. 1986), *aff'd sub nom.* United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987)).

sponse in the viewer."[291] In order to proceed with the Dost analysis, the viewer must consider what effect, if any, the material would have on an audience of pedophiles.[292] While the adoption of what Adler calls the "pedophilic gaze" might have always been part of child pornography regulation, it has become central to child pornography law based on the evolution of the law.[293] Thus, Adler argues that

> [t]he process by which we root out child pornography is part of the reason that we can never fully eliminate it; the circularity of the solution exacerbates the circularity of the problem. . .As everything becomes child pornography in the eyes of the law—clothed children, coy children, children in settings where children are found—perhaps everything really does become pornographic.[294]

I suggest that Adler's concerns as to the circularity of child pornography law in general is equally applicable to the language used in the CPPA designed to combat virtual child pornography. The affirmative defense available to distributors of virtual child pornography only succeeds where a defendant can show that the persons in the photograph are adults and that it was not distributed "as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct."[295] Thus, the virtual child pornographer will be unable to show that the persons in the picture are adults because they do not in fact exist in reality. Further, the judge will be inquiring as to whether the photo was "advertised, promoted, presented, described or distributed" to convey the impression that the photo is of a minor.[296] In order to make such a determination, the judge will be looking at the photo in the same manner as one who is seeking such material. Put differently, the judge will have to adopt that same pedophilic gaze that Adler warns us about.

It is arguable that the CPPA has in fact added to the trend to further sexualize children.[297] As Adler pointed out, "[n]o matter how well-meaning our goals in

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[291] Adler, *Perverse*, *supra* note 282, at 262.

[292] *Id.* at 262.

[293] *Id.* at 261.

[294] *Id.* at 264.

[295] 18 U.S.C. §2252A(c) (1996).

[296] *Id.*

[297] Adler, *Perverse*, *supra* note 282, at 256-65.

fashioning child pornography law, we have still created a space for the perpetual discussion of children and sex where children and sex are bound together and where sex extends its grip on children."[298] Extending child pornography regulation all the way to images that did not initially involve children tightens this grip.

VI. CONCLUSION

Virtual child pornography should not be treated the same as actual child pornography based on the crux of the holdings in both *Ferber* and *Osborne*, which involved harm in production and possession of such material to actual children. While the courts of appeals that upheld the CPPA viewed this as an overly restrictive reading of precedent, the Ninth Circuit viewed this as the requisite reading of *Ferber* and *Osborne*.[299] Given that the *Ferber* and *Osborne* cases all involved real children, there can no doubt that the Court was concerned about the real children in those cases.

Invalidating the portion of the CPPA extending the definition of pornography to include virtual images is not an endorsement of child pornography as a whole. While it may be unpopular, prohibiting Congress from criminalizing virtual fantasies and the imaginations of sophisticated computer users remains consistent with both the Court's jurisprudence in the area of child pornography and the First Amendment.[300]

Moreover, to accept the underlying secondary effects policy of the CPPA suggests that we as humans have lost control of our ability to distinguish between real and make-believe, between thought and action. This ability to know and appreciate the difference between reality and fantasy is a key component of what it means to be self-conscious beings. As a result, legislation like the CPPA, while aimed at eradicating a societal evil, has managed to eliminate a part of

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[298] *Id.* at 267. However, Adler is also willing to recognize that regulation is preferable to the exploitation of children. *Id.*

> It still seems better to have proliferating discourses about the danger of child exploitation than the exploitation itself. But if we take the argument seriously—that speech can expand what is critiques, that they very act of putting child sexuality into a pedophilic web—then the benefits gained from this shift seem less obvious than they once did. Given the choice, child pornography law still remains preferable to child pornography. But the two have more in common than we might like to think.

Id. at 272-73.

[299] Free Speech Coalition v. Reno, 198 F. 3d 1083 (9th Cir. 1999).

[300] *See* Part V of this Comment.

human thought and experience, diminishing that part of us which is capable of drawing distinctions and recognizing that an appreciable distinction exists between thought and action.