# Computer-Generated Child Pornography—Exposing Prejudice in Our First Amendment Jurisprudence?

When confronted with the issue of child pornography,[1] most Americans find no problem with punishing those who create, sell, distribute, or possess visual images of children engaging in sexually explicit conduct.[2] Under normal circumstances, nonobscene, sexually explicit material would possess full First Amendment protection.[3] Actual, living children are used to create child pornography; thus,

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[1] For the purposes of this Note, child pornography is defined as any visual depiction of an actual minor engaging in any actual or simulated, sexually explicit conduct.

[2] *See* SETH L. GOLDSTEIN, THE SEXUAL EXPLOITATION OF CHILDREN 10-11 (1987).

[3] *See* Reno v. ACLU, 117 S. Ct. 2329, 2346 (1997) (applying strict scrutiny to legislation banning sexually explicit material from the internet); Sable Communications v. FCC, 492 U.S. 115, 126 (1989) ("Sexual expression which is indecent but not obscene is protected by the First Amendment . . . ."); Roth v. United States, 354 U.S. 476, 487 (1957) (emphasis in original) ("The portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.").

The First Amendment states, in pertinent part, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. Although the First Amendment was originally construed to protect political and social speech, the Court has consistently held that the First Amendment also protects artistic and other types of speech even if of a sexual nature. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981) (holding that nude dancing, as a form of expression, is within the purview of protected free speech); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952) (holding that motion pictures, despite being made for commercial motives, are protected by the First Amendment); Winters v. New York, 333 U.S. 507, 510 (1948) (holding that the distinction between informative speech and speech for entertainment purposes is "too elusive" to deny entertaining expression constitutional protection). Most First Amendment scholars have explained that the Court should protect artistic and sexual expression in order to serve the "self-fulfillment" purposes of the First Amendment. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970) (declaring that the purpose of the First Amendment is to enable each individual to realize his or her "character and potentialities as a human being"); RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 9 (1992) (claiming that free speech is not only a means to an end but also "an end itself, an end intimately intertwined with human autonomy and dignity"); *see also* Saxbe v. Washington Post Co., 417 U.S. 843, 862 (1974) (Powell, J., dissenting) (expressing the view that "the First Amendment protects important values of individual expression and personal self-fulfillment"); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972) (stating that free speech is necessary "to assure self-fulfillment for each individual").

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.[4] Until very recently, the sole congressional purpose behind the prohibition of child pornography has been to prevent the harms incurred by children who are used to create these visual materials.[5] The use of children to create even nonobscene pornographic materials has always been deemed a form of sexual abuse that our society refuses to tolerate.[6]

As it now stands, most child pornographers require actual children to pose and act in sexually explicit ways in order to create visual images of child pornography.[7] This involvement in the production of child pornography is what Congress has sought to prevent since 1977.[8] Over the past few years, however, computer technology has rapidly advanced, and it is now possible to create life-like images of people. For instance, using a scanner and certain inexpensive software, a computer user can scan a picture of a child onto the com-

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[4] *See, e.g.*, Osborne v. Ohio, 495 U.S. 103, 108 (1990) (holding that protection of children from sexual abuse is compelling enough to prohibit the possession of child pornography); New York v. Ferber, 458 U.S. 747, 756 (1982) (holding that the protection of "the physical and psychological well-being" of the child was sufficient to justify a prohibition of nonobscene child pornography).

[5] *See* 136 CONG. REC. S4729 (daily ed. Apr. 20, 1990) (statement of Sen. Thurmond) ("[P]rotecting our children from the heinous crime of sexual exploitation must be undertaken with strong resolve. . . . We cannot ignore the harm to these innocent victims as the loss to them and their families is immeasurable.").

[6] *See* GOLDSTEIN, *supra* note 2, at 10-11.

[7] See 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, 484 (1996). Most child pornographers will usually seek out and approach a child who appears vulnerable with the hopes of befriending him or her and developing a close, trusting relationship with the child. *See* Robert J. Clinton, Note, *Child Protection Act of 1984–Enforceable Legislation to Prevent Sexual Abuse of Children*, 10 OKLA. CITY U. L. REV. 121, 132 (1985). After a process of rewarding the child with various gifts, candy, or toys and showing the child various types and degrees of pornography, the pedophile attempts to desensitize the child and make him or her comfortable with the sexual nature of the relationship. *See id.* at 132-33. Once the offender is satisfied that the child is comfortable and desensitized, the child is persuaded to pose for the offender's photographs or participate in sexual activities with the adult. *See id.* at 133.

[8] *See* H.R. REP. No. 98-536, at 1 (1983), *reprinted in* 1984 U.S.C.C.A.N. 492. In its report, Congress stated:

> The creation and proliferation of child pornography is no less than a national tragedy. Each year tens of thousands of children under the age of 18 are believed to be filmed or photographed while engaging in sexually explicit acts for the producer's own pleasure or profit. The Protection of Children Against Sexual Exploitation Act of 1977 was designed to address this inexcusable abuse of children.

*Id.*

puter screen and alter or "morph" the picture to make it appear that the child is nude or engaging in sexually explicit conduct.[9]

In addition, computer users can create realistic, three-dimensional animated images of humans that are merely figments of the user's imagination without even scanning photographs of actual people.[10] At the present time, the components necessary to create

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[9] *See* David B. Johnson, Comment, *Why the Possession of Computer-Generated Child Pornography Can Be Constitutionally Prohibited*, 4 ALB. L.J. SCI. & TECH. 311, 313, 314 (1994). This process of "morphing," stemming from the term metamorphosis, has been around for almost a decade and was first utilized to create animation and special effects in various blockbuster films, music videos, and television commercials. *See* Jeff Prosise, *Morphing: Magic on Your PC*, PC MAG., June 14, 1994, at 325. Although this computer process is mainly used by the large-scale entertainment industry, ingenious software companies have made this process available for many personal computer users. *See id.* Once a visual image is transferred into the computer's memory via a scanner, many relatively inexpensive and easy-to-use software packages can be used to animate the visual image or transform it into a completely different image. *See* Richard Core, *Morphing: It's Not Just for Michael Jackson Anymore*, SAN DIEGO BUS. J., Feb. 22, 1993, at 1, 24. By combining two highly technical processes called warping and cross-dissolving, the computer enables the user, without much computer skills or knowledge, to animate and transform photographs or other visual images. *See* Prosise, *supra*, at 325-27. This morphing process enables computer users to take innocent images of actual children and make them appear as if they are nude or participating in some type of sexual activity. *See* Johnson, *supra*, at 313-14. In addition, computer users are able to use this technology in order to scan photographs of adult pornography and transform them into images that appear to be of a child. *See* Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439, 440-41 (1997).

Most of these software packages are relatively inexpensive, very easy to install and apply, and can be used on most personal computers. *See* Johnson, *supra*, at 314. Programs such as Gryphon Software Corporation's "Morph" and Black Belt System's "WinImages Release 3.1," are available for under $100 and provide computer users with technologically advanced special-effects and morphing capabilities. *See* Core, *supra*, at 1, 24. Although these programs do not provide home users with the graphic and morphing capabilities used by the entertainment industry, the technology is rapidly advancing and most programs can produce images of "photo-realistic quality." *See* Johnson, *supra*, at 314.

For purposes of this Note, material created by the previously discussed process will be called computer altered or morphed images. This type of material, which has been prohibited by recent changes to the federal child pornography statute, may still be harmful to children if the photographs used to create the images are of actual, identifiable minors. Therefore, under the Supreme Court's holdings in both *New York v. Ferber*, 458 U.S 747 (1982) and *Osborne v. Ohio*, 495 U.S. 103 (1990), because actual children are the basis of these images, there are no constitutional problems with prohibiting the possession and creation of this type of material. *See infra* notes 67-74 and accompanying text for a more detailed discussion.

[10] *See* Kathleen K. Weigner & Julie Schlax, *But Can She Act?*, FORBES, Dec. 10, 1990, at 274. These computer-generated three-dimensional images are created by a relatively new computer imaging process. *See id.* The computer programmer, using a clay or human model, can digitize the model into the computer using video-type computer hardware. *See id.* at 278. Then, using technologically advanced computer

these images are quite expensive and the images and animation produced are easily distinguishable from actual persons and movements.[11] Many experts believe, however, that within a few years, due to the rapid advancement of computer technology, these computer-generated images will be impossible to distinguish from actual photographs. Additionally, industry insiders speculate that the requisite software and hardware will soon be inexpensive enough to be used on personal home computers.[12]

No actual children are involved or used in the creation of these computer-generated images; thus the production and possession of such material causes no direct harm to any child. As this Note will demonstrate, Congress's recent prohibition on computer-generated child pornography is a clear and blatant violation of our First Amendment principles.[13] Although Congress has consistently broadened the scope of its attack on child pornography, the Court has upheld this expansion because of the underlying sexual abuse involved.[14] The courts have consistently explained that the government's only compelling and permissible justification for prohibiting

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software, the individual can develop the computer image into a human-like image. *See id.*; Diana Phillips Mahoney, *Face Tracking*, COMPUTER GRAPHICS WORLD, Apr. 1997, at 23, 24 (discussing how computer animators are now even capable of recreating human facial expressions using facial motion capture systems). The computer user may also animate the computer-generated image by applying software that utilizes what is known as motion capturing systems. *See id.* at 24. During this process, retroreflective markers are placed in certain places on a motion actor. *See id.* The markers are then illuminated by lasers to produce reflected lights that are picked up by a digital video camera and transferred into the computer. *See id.* The computer then analyzes and calculates the movements and records them into memory. *See id.* The software then enables the computer user to apply the recorded motions to realistically animate computer-generated human-like images. *See id.*

This technology, at the present time, is very expensive and the images and animation produced do not appear entirely realistic. *See* Weigner & Schlax, *supra*, at 276 (discussing the entertainment industry's use of this technology to create synthetic actors for blockbuster motion pictures). Most computer experts estimate, however, that it will only be a few years before the technology is inexpensive enough to be used by personal computer users and advanced enough to create images and animation that will appear entirely humanistic. *See id.* at 274; *see also* Donna Coco, *Creating Humans for Games*, COMPUTER GRAPHICS WORLD, Oct. 1997, at 26 (discussing the problems software developers face in trying to create realistic-looking humans via computer generation and animation). For purposes of this Note, materials created pursuant to this previously discussed process will be referred to as computer-generated images.

[11] *See* Johnson, *supra* note 9, at 315-16.

[12] *See* Philip Elmer-Dewitt, *Through the 3-D Looking Glass*, TIME, May 1, 1989, at 65.

[13] See *infra* notes 76-81 and accompanying text for a discussion of the constitutional implications of the new statutory changes.

[14] *See, e.g.*, New York v. Ferber, 459 U.S. 747, 764 (1982).

child pornography is to prevent the harms associated with participating in the production of such material.[15] This recent legislative amendment does not serve or advance this sole compelling interest. The ban on computer-generated sexual material is therefore an unconstitutional violation of free expression.

## HISTORY OF CONGRESS'S ATTACK ON CHILD PORNOGRAPHY

Throughout the 1970s, the public grew concerned over rampant stories of child abuse, child prostitution rings, and the increased production and availability of child pornography.[16] Congressional committees blamed these increased incidents on the federal government's failure to pass legislation that directly prohibited the production, sale, or distribution of child pornography.[17] In response, Congress investigated the child pornography industry and determined that the existing federal laws did not adequately protect children from the harms associated with the creation of child pornography.[18] After numerous debates over the language to be employed, Congress passed the first federal child pornography statute in 1977.[19]

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[15] *See infra* notes 81-125 and accompanying text.

[16] *See* Annemarie J. Mazzone, Comment, United States v. Knox*: Protecting Children From Sexual Exploitation Through the Federal Child Pornography Laws*, 5 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 167, 174 (1994).

[17] *See* S. REP. NO. 95-438, at 9, 10 (1977), *reprinted in* 1978 U.S.C.C.A.N. 47. Up until this time, prosecutors throughout the country had been relying on obscenity and sexual abuse statutes to punish instances of child pornography and sexual exploitation. *See id.*; Mazzone, *supra* note 16, at 174.

[18] *See* Todd J. Weiss, *The Child Pornography Act of 1984: Child Pornography and the First Amendment*, 9 SETON HALL LEGIS. J., 327, 333 (1985). Based on its investigation, Congress concluded that child pornography had grown into a nationwide, multimillion dollar enterprise and that the children used to produce such material were being subjected to harmful effects. *See* S. REP. NO. 95-438, at 5 (1977), *reprinted in* 1978 U.S.C.C.A.N. 42-43. The Senate's report concluded that child pornography was physically and emotionally harmful to the child participants because it endangered their ability to develop normal, affectionate relationships and caused them to turn to drugs, prostitution, and molestation as adults. *See id.* at 9, *reprinted in* 1978 U.S.C.C.A.N. 46.

[19] *See* 18 U.S.C. §§ 2251-2253 (West Supp. II 1979) (1977 Act); Mazzone, *supra* note 16, at 176 (discussing congressional debates about potential child-protective legislation). The first provision of this new legislation criminalized the use of children, under the age of 16, to create or produce a visual or print medium involving sexually explicit conduct. *See* 18 U.S.C. §§ 2251(a), 2253(1) (West Supp. II 1979). This provision only applied to material known to have been transported by the mails or interstate commerce. *See* 18 U.S.C. §§ 2251(a), 2252(a)(2) (West Supp. II 1979). This section stems from Congress' limited ability to legislate under the Commerce Clause. *See* U.S. CONST. art. I, § 8 ("Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

For various reasons, this statute proved to be unsuccessful at reducing the amount of child pornography on the market.[20] Despite the failures of the 1977 Act, many states began enacting laws prohibiting the intrastate production, distribution, and receipt of child pornography.[21] Although some states followed Congress's lead in legislating only child pornography that satisfied the *Miller v. California* definition of obscenity, many states took a more aggressive step and enacted statutes prohibiting even nonobscene child pornography.[22] For example, New York prohibited the distribution of nonobscene child pornography.[23] Reviewing that New York statute, the Su-

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More importantly, however, Congress also made it a crime to transport or receive, for a commercial purpose, through the mails or interstate commerce, any obscene visual or print material involving "the use of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2252(a) (West Supp. II 1979). A "minor" was defined as a child under the age of 16. *See id.* "Sexually explicit conduct" included actual or simulated "lewd" poses or acts. *See* 18 U.S.C. § 2253(1) (West Supp. II 1979). Due to the Supreme Court's holding in *Miller v. California*, 413 U.S. 15 (1973), Congress believed that it could only prohibit child pornography that fit within the *Miller* standard for obscenity. *See* S. REP. NO. 95-438, at 11-13 (1977), *reprinted in* 1978 U.S.C.C.A.N. 49-50. Under the *Miller* standard for obscenity, a work is only deemed to be obscene if

> (a) [] "the average person applying contemporary community standards," would find that the work, taken as a whole, appeals to the prurient interest; (b) [] the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) [] the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

*Miller*, 413 U.S. at 24. Moreover, the Court held that materials not defined as obscene retained full First Amendment protection. *See id.* at 27; *see also* Roth v. United States, 354 U.S. 476, 487 (1957).

In addition, these provisions required prosecutors to prove that the defendant had an intent to sell the child pornography. *See* 18 U.S.C. § 2252(a) (West Supp. II 1979). These provisions did not prohibit the noncommercial distribution of child pornography. *See* Weiss, *supra* note 18, at 335.

[20] *See* Clinton, *supra* note 7, at 128-29; Mazzone, *supra* note 16, at 182. Over the first six years, despite the increases in incidents of child sexual exploitation, less than 30 people were convicted for violating either of these federal provisions. *See* H.R. REP. NO. 98-536, at 2 (1983), *reprinted in* 1984 U.S.C.C.A.N. 493.

[21] *See* Weiss, *supra* note 18, at 337.

[22] *See id.* By 1982, 20 states had criminalized both the distribution and receipt of nonobscene, sexually explicit depictions of children. *See* New York v. Ferber, 458 U.S. 747, 749 & n.2 (1982). These statutes did not require that the material appeal to the prurient interest and did not provide an exception for material containing serious literary, scientific, educational, or political value. *See* Weiss, *supra* note 18, at 338.

[23] *See* N.Y. PENAL LAW § 263.15 (McKinney 1989); Weiss, *supra* note 18, at 337-38. The New York statute prohibited the production of material that contained sexual conduct "by a child less than 16 years old." N.Y. PENAL LAW § 263.15. The statute failed to define sexual conduct in accordance with the Supreme Court's standard of obscenity. *See* N.Y. PENAL LAW § 263.00(3) (McKinney 1989).

preme Court in 1982 made its first decision regarding the constitutionality of laws dealing with the production and distribution of nonobscene child pornography.

### *NEW YORK V. FERBER*: NONOBSCENE CHILD PORNOGRAPHY IS NOT PROTECTED BY THE FIRST AMENDMENT.

In *New York v. Ferber*,[24] New York convicted the defendant of selling child pornography to an undercover police officer.[25] Based on *Miller*, Mr. Ferber challenged the law as a violation of the First Amendment.[26] Although the New York Court of Appeals found the statute unconstitutional,[27] an unanimous Supreme Court reversed, holding that the state could, consistent with First Amendment principles, prohibit the sale, dissemination, and distribution of nonobscene child pornography.[28] Even after recognizing the constitutional concerns presented by such statutes, the Court determined that the state had a compelling interest in protecting children from the effects of being used to create child pornography.[29] As a result, non-

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[24] 458 U.S. 747 (1982).

[25] *See id.* at 752.

[26] *See id.*

[27] *See* People v. Ferber, 422 N.E.2d 523, 526 (N.Y. 1981).

[28] *See Ferber*, 458 U.S. at 774. The Court did not determine whether mere possession of child pornography could be constitutionally prohibited. *See* John Quigley, *Child Pornography and the Right to Privacy*, 43 FLA. L. REV. 347, 351 (1991) (claiming that the Court avoided this issue because the New York statute did not explicitly prohibit mere possession).

[29] *See Ferber*, 458 U.S. at 764. Initially, the Court determined that the state had a compelling interest in protecting the physical and psychological well-being of children. *See id.* at 756-57. Based on legislative findings, the Court concluded that the production of child pornography physiologically, mentally, and emotionally harms the children employed as subjects for the creation of such material. *See id.* at 758; S. REP. NO. 95-438, at 5, 9 (1977), *reprinted in* 1978 U.S.C.C.A.N. 43, 46. Experts have concluded that involvement in the creation of child pornography caused children to incur many problems later in life including: sexual disfunctions, problems with affection, sexual abuse of others, drug and alcohol addictions, and prostitution. *See Ferber*, 458 U.S. at 758 n.9. The Court also determined that the *Miller* test bore no relation to whether the children involved in producing child pornography suffered these harms. *See id.* at 761.

In addition, Justice White, writing for the Court, reasoned that the distribution of child pornography was inextricably correlated with the sexual abuse of children. *See id.* at 759. Because child pornography created a "permanent record" of that child's victimization, distribution and circulation of such depictions exacerbated the harm incurred by the child. *See id.* The Court also reasoned that the child had some privacy interest not to have his picture circulated among the pedophilic subculture. *See id.* at 759 n.10. More importantly however, the Justices agreed with the legislatures in most states that the production of child pornography could not be effectively controlled by merely investigating and prosecuting the producers of

obscene visual depictions of children engaging in sexual conduct retained no First Amendment protection.

Although *Ferber* held child pornography to be unprotected speech under the First Amendment, limits were put on the government's ability to proscribe such material.[50] Most pertinent to the area of computer-generated imaging, the Court stated: "We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection."[51]

In light of *Ferber*, and because the 1977 Act proved to be quite ineffective, Congress re-opened its investigation into the child pornography industry in 1982.[52] After two years of research and debate and several proposed amendments, Congress passed the Child Protection Act of 1984 (1984 Act)[53] as an amendment to the 1977 Act.[54] This new amendment made several important changes.

Initially, the 1984 Act changed the definition of minor to include all children under age eighteen.[55] Due to the Supreme Court's holding in *Ferber*, Congress also dropped the obscenity requirement in the prohibition provision of the receipt and transportation section of the child pornography statute.[56] In addition, the 1984 Act re-

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child pornography. *See id.* at 759-60. The Court opined that in order to adequately reduce the amount of child pornography being produced, and thus the amount of children being sexually abused, it was necessary "to dry up the market" for such material by criminalizing its sale and distribution. *See id.* at 760.

Moreover, the Court described the social value in the dissemination of child pornography as "exceedingly modest, if not *de minimis*." *Id.* at 762. *But see* FCC v. Pacifica Found., 438 U.S. 726, 745-46 (1978) (stating that the First Amendment protections given to speech do not depend on its offensiveness, content, or social value). Justice White reasoned that if a depiction of a child engaging in lewd conduct was necessary for a serious literary, scientific, or educational work, an artist could use alternative means of creating this depiction without actually using a minor. *See Ferber*, 458 U.S. at 762-63. The Court proffered that an artist could use a young looking adult or some other means of simulation to achieve the depiction of a child. *See id.* Finally, the Court held that when the government's interest in restricting speech "overwhelmingly outweighs the expressive interests" involved, such material may be deemed to be without First Amendment protection. *See id.* at 763-64.

[50] *See Ferber*, 458 U.S. at 764 ("As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed.").

[51] *Id.* at 764-65.

[52] *See* Weiss, *supra* note 18, at 342.

[53] 18 U.S.C. §§ 2251-2256 (West Supp. III 1986).

[54] *See* Mazzone, *supra* note 16, at 185-86.

[55] *See* 18 U.S.C. § 2256(1) (West Supp. III 1986).

[56] *See* H.R. REP. NO. 98-536, at 2, 5, 7 (1983), *reprinted in* 1984 U.S.C.C.A.N. 492-

moved the commercial purpose requirement of the 1977 Act.[37] Congress also decided that the original prohibition against nonobscene print material depicting child pornography was most likely unconstitutional.[38]

## *STANLEY V. GEORGIA*: FIRST AMENDMENT RIGHT TO POSSESS OBSCENE MATERIALS

After a thorough investigation of the child pornography industry, the Attorney General recommended that states pass legislation that prohibited the private possession of child pornography.[39] As several states began passing and enforcing these statutes, defendants started challenging these laws as inconsistent with *Stanley v. Georgia*.[40]

In *Stanley*, the state convicted the defendant under a statute that criminalized the possession of obscene material in the privacy of his

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93, 496, 498. The 1984 amendment only required that the material in question be "sexually explicit." *See* 18 U.S.C. § 2252(a)(2)(A) (West Supp. III 1986).

[37] *See* H.R. REP. NO. 98-536, at 7 (1983), *reprinted in* 1984 U.S.C.C.A.N. 498. Because child pornography tended to be "home-made," for personal use, and was usually traded or given away without monetary exchange, the commercial purpose requirement of the 1977 Act made it very difficult to prosecute these offenders. *See* Weiss, *supra* note 18, at 344. Several cases upheld this change in the law and have applied it broadly. *See* United States v. Andersson, 803 F.2d 903, 907 (7th Cir. 1986) (holding that 18 U.S.C. § 2252 prohibits even purely private transfers or exchanges of child pornography); United States v. Miller, 776 F.2d 978, 979-80 (11th Cir. 1985) (holding that the defendant could be convicted for receiving material even if the state did not show that he had an intention to distribute it).

[38] *See* H.R. REP. No. 98-536, at 3, 7 (1983), *reprinted in* 1984 U.S.C.C.A.N. 494, 498. Because the creation of these print materials did not involve the use of children, Congress felt that it could not criminalize such material under the reasoning in *Ferber* without a finding of obscenity. *See id.* These changes in the federal government's attempt to eradicate sexual abuse and child pornography proved to be much more effective. *See* Susan G. Caughlan, Note, *Private Possession of Child Pornography: The Tensions Between* Stanley v. Georgia *and* New York v. Ferber, 29 WM. & MARY L. REV. 187, 199-200 (1987) (discussing how the changes in the 1984 Act increased prosecutions under the federal statute and helped reduce the flow of child pornography). Congress' power to regulate child pornography was limited, however, by its powers under the Commerce Clause because the 1984 Act only reached child pornography that traveled or was meant to travel across state lines. *See* Mazzone, *supra* note 16, at 187. In 1990, however, Congress made another amendment to the 1977 Act that prohibited the knowing possession of child pornography, but only if the depictions were sent by mail or interstate commerce or were produced with materials that were mailed or shipped in interstate commerce. *See* 18 U.S.C. § 2252(a)(4)(B) (West Supp. II 1991).

[39] *See* ATTORNEY GEN. COMM. ON PORNOGRAPHY, U.S. DEP'T OF JUSTICE, FINAL REPORT 648-49 (1986). By 1990, 19 states had banned the mere possession of child pornography in the home. *See* Mazzone, *supra* note 16, at 188.

[40] 394 U.S. 557 (1969); *see also* Mazzone, *supra* note 16, at 188 (noting that commentators suggested that the criminalization of possession of child pornography violated the right to privacy).

own home.[41] The Supreme Court held that a prohibition of the mere private possession of obscene material violated the First Amendment's guarantee of "free thought and expression."[42] Although the government could criminalize the distribution or sale of obscene material, the Supreme Court held that a person's right to view and read material in the privacy of his own home, regardless of its social value, was a fundamental guarantee protected by our Constitution.[43]

The Court's holding was grounded in a mixture of First Amendment principles and privacy rights guaranteed by the Fourth Amendment.[44] In a footnote at the conclusion of his opinion, Justice Marshall stated, "Nor do we mean to express any opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials."[45] Thus, until 1990 the government could not outlaw the mere private possession of sexually explicit material, regardless of whether it fell within the *Miller* standard.[46]

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[41] *See Stanley*, 394 U.S. at 558-59.

[42] *See id.* at 568.

[43] *See id.* at 563-65. The Court stated:

> "The right of the individual to read, to believe or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his own private library seems to the writer to be a clear infringement of his constitutional rights as an individual."

*Id.* at 562 n.7 (quoting State v. Mapp, 166 N.E.2d 387, 393 (Ohio 1960)).

[44] *See id.* at 564-65.

[45] *Id.* at 568 n.11.

[46] *See* Osborne v. Ohio, 495 U.S. 103, 108 (1990). Although the *Stanley* Court recognized a constitutional right to possess obscene material, the Supreme Court has held this does not create correlative rights to receive or distribute such material. *See* United States v. Orito, 413 U.S. 139, 143 (1973) (holding that *Stanley* cannot be extended to include a correlative right to receive, transport, or distribute obscene material); United States v. 12 200-Ft. Reels of Super 8MM Film, 413 U.S. 123, 128 (1973) (holding that the government may, consistent with *Stanley*, prohibit the foreign importation of obscene material); United States v. Reidel, 402 U.S. 351, 356 (1971) (holding that *Stanley* did not affect the government's power to prohibit the use of the mail to distribute obscene materials); *see also* Bowers v. Hardwick, 478 U.S. 186, 195 (1986) (holding that *Stanley* could not be extended to prohibit the government from banning homosexual sodomy even if it occurs in the privacy of one's home). Although many commentators have questioned whether the *Bowers* Court effectively overruled and discarded the *Stanley* holding, *Bowers* did not implicate First Amendment interests as *Stanley* did. *See id.* (stating that *Stanley* was "firmly grounded in the First Amendment"); *see also* Claudia Tuchman, Note, *Does Privacy Have Four Walls? Salvaging* Stanley v. Georgia, 94 COLUM. L. REV. 2267, 2286-87 (1994) (distinguishing *Bowers* from *Stanley* by describing *Bowers* as a rejection of sexual privacy rights for homosexuals); Brett J. Williamson, Note, *The Constitutional Privacy Doctrine After* Bowers v. Hardwick: *Rethinking the Second Death of Substantive Due Process*, 62 S. CAL. L. REV. 1297, 1299-1301 (1989) (discussing the *Bowers* deci-

### *OSBORNE V. OHIO*: AN EXCEPTION FOR CHILD PORNOGRAPHY

As states began prosecuting citizens for merely possessing or viewing child pornography in their homes, defendants unsuccessfully argued that the prosecutions violated their First Amendment rights enunciated in *Stanley*.[47] The Court finally resolved the issue in *Osborne v. Ohio*.[48] In *Osborne*, the state convicted the defendant of possessing several pictures of child pornography in his home.[49] The defendant challenged his conviction based on *Stanley*, arguing that Ohio's law violated his First Amendment right to possess and view obscene materials in the privacy of his home.[50] Although the Court did not overrule *Stanley*, Justice White held that Ohio's interest in preventing the sexual abuse of children justified such an intrusion on First Amendment rights.[51]

Justice White reasoned that, because the prohibition on the distribution of child pornography passed constitutional muster, the criminalization of possession of child pornography must also be permissible.[52] Although the *Stanley* Court rejected a similar argument as it related to obscene materials, the *Osborne* Court relied on the final footnote in *Stanley* to justify such a departure.[53] Based on

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sion as the Court's rejection of substantive due process protection for sexual privacy).

[47] *See* Mazzone, *supra* note 16, at 188. *See, e.g.*, *Ex Parte* Felton, 526 So. 2d 638 (Ala. 1988) (holding that *Stanley* does not control the state's ability to prohibit the possession of child pornography); State v. Beckman, 547 So. 2d 210 (Fla. Dist. Ct. App. 1989) (holding that the defendant's conviction for possessing child pornography did not violate his First Amendment rights); People v. Geever, 522 N.E.2d 1200 (Ill. 1988) (rejecting a constitutional challenge to a statute criminalizing the possession of child pornography); State v. Young, 525 N.E.2d 1368 (Ohio 1988) (holding that the state's prohibition on the possession of child pornography was constitutionally valid); State v. Meadows, 503 N.E.2d 697 (Ohio 1986) (rejecting the argument that *Stanley* prevents the government from prohibiting the possession of child pornography); Savery v. State, 767 S.W.2d 242 (Tex. Ct. App. 1989) (upholding the state's child pornography statute against a First Amendment attack).

[48] 495 U.S. 103 (1990).

[49] *See Osborne*, 495 U.S. at 107.

[50] *See id.* at 108.

[51] *See id.* ("[W]e nonetheless find this case distinct from *Stanley* because the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in *Stanley*.").

[52] *See id.* at 109-10 ("Given the importance of the State's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain.").

[53] *See id.* at 110; Stanley v. Georgia, 394 U.S. 557, 568 n.11 (1969). In addition, relying on the 1986 Attorney General's Report on Pornography, the majority concluded that "pedophiles use child pornography to seduce other children into sexual activity." *Osborne*, 495 U.S. at 111. The Attorney General's Final Report stated:

> Child pornography is often used as part of a method of seducing child

the limitations created by *Stanley* and *Ferber*, the *Osborne* Court held that states could prohibit the mere possession of child pornography, provided their purpose was to protect children from the harms caused by the production of child pornography and not to regulate people's thoughts and expressions.[54]

This trilogy of cases seems to create a clear set of principles regarding First Amendment rights as they relate to sexually explicit expression. Although the government can prohibit the sale and distribution of obscene materials, it cannot punish citizens for merely viewing or possessing obscene materials in the privacy of their own homes.[55] When the sexually explicit material contains depictions of children, however, the government may prohibit the production, sale, distribution, and possession of such material, whether it is legally obscene or not.[56] Even though the government may prohibit such nonobscene material, its authority is limited to visual depictions that are made using actual children under the age of majority.[57] In addition, the government may only prohibit the possession of child pornography in an effort to protect children from the harms resulting from their participation in the production of such material.[58]

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> victims. A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having "fun" participating in the activity.

ATTORNEY GEN. COMM. ON PORNOGRAPHY, U.S. DEP'T OF JUSTICE, FINAL REPORT 649 (1986) (footnotes omitted).

[54] *See Osborne*, 495 U.S. at 109. The *Osborne* Court noted that the Ohio scheme differed from the Georgia scheme in *Stanley* because "[t]he State does not rely on a paternalistic interest in regulating Osborne's mind. Rather, Ohio has enacted § 2907.323(A)(3) in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children." *Id.* Immediately after *Osborne*, Congress initiated legislation that prohibited the mere possession of child pornography. *See* 136 CONG. REC. S4729-30 (daily ed. Apr. 20, 1990) (statement of Sen. Thurmond). This bill was passed into law in 1990; however, because of Congress' limits under the Commerce Clause, the provision only prohibits possession of child pornography that was mailed or shipped by interstate commerce or was created with materials that were mailed or shipped in interstate commerce. *See* 18 U.S.C. § 2252(a)(4) (West Supp. II 1991).

[55] *See Stanley*, 394 U.S. at 568 (noting that "the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home.").

[56] *See Osborne*, 495 U.S. at 111; New York v. Ferber, 458 U.S. 747, 774 (1982).

[57] *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994) (holding that the First Amendment requires that the federal child pornography statute contain a scienter requirement showing that the offender knew the participant in the visual material was underage).

[58] *See Ferber*, 458 U.S. at 764.

## 1996 AMENDMENT: PROHIBITING VISUAL IMAGES THAT APPEAR TO BE OF A MINOR

In 1995 Congress proposed a bill that seems to conflict with these basic principles laid out by the Supreme Court. The proposed bill,[59] sponsored by Senator Hatch, made several changes to Congress's attack on child pornography. Most pertinent, the Hatch Amendment expanded the definition of child pornography to cover "any visual depiction, including . . . any computer or computer-generated image or picture, whether made or produced by electronic, mechanical or other means . . . where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct."[60] Through this proposal, Congress has tried to address the new technological advances in computer imaging software that enable users to create realistic looking images of people, including children.[61] Officials endorsing this new legislation believe that these computer capabilities, if possessed and utilized by pedophiles and other child abusers, would hinder the government's ability to prosecute child pornographers and protect children from sexual abuse and molestation.[62]

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[59] *See* S. REP. NO. 104-358, at 1 (1996). The bill, labeled S. 1237, was introduced to Congress by Senator Hatch on August 27, 1996. *See id.*

[60] 18 U.S.C.A. § 2256 (8)(B) (West Supp. 1998). In addition, this proposed legislation has made it a crime to knowingly mail, ship, or distribute by interstate commerce, including by computer, any child pornography as defined by the previously stated provision. *See* 18 U.S.C.A. § 2252A (West Supp. 1998). This provision has also prohibited the possession of three or more visual images of child pornography, if they were mailed or shipped in interstate commerce or were produced using materials that were mailed or transported in interstate commerce. *See* 18 U.S.C.A. § 2252A(a)(5)(B) (West Supp. 1998).

[61] *See* S. REP. NO. 104-358, at 7 (1996). The report stated:

> This legislation is needed due to technological advances in the recording, creation, alteration, production, reproduction, distribution and transmission of visual images and depictions, particularly through the use of computers. Such technology has made possible the production of visual depictions that appear to be of minors engaging in sexually explicit conduct which are virtually indistinguishable to unsuspecting viewers from unretouched photographs of actual children engaging in identical sexual conduct.

*Id.*

[62] *See id.* at 2. In his report to the Senate, Senator Hatch explained that computer-generated child pornography, which is created without the use of an actual child, posed a few possible threats to the physical and psychological well-being of children. *See id.* at 7. For instance, Congress felt that pedophiles used this material to foster and encourage their activities of child abuse and to "feed their sexual fantasies." *Id.* at 12. Also, Senator Hatch's report explained that because computers could create realistic images, not prohibiting computer-generated child pornography would make it more difficult for prosecutors to prove that other prohibited

Although the goal of protecting children is compelling, a few members of Congress disagreed with the constitutional validity of these proposed amendments to the federal child pornography statutes.[63] Specifically, both Senators Biden and Feingold voiced their opposition to the Hatch Amendment because they felt it conflicted with the Supreme Court's holdings in *Osborne* and *Ferber*.[64] The senators expressed concern that the proposed changes were not aimed at protecting children from the harms associated with their participation in child pornography but rather bordered on censorship.[65] Despite this opposition, Congress enacted the Hatch Amendment to the 1977 Act on September 30, 1996.[66]

## CONGRESS MAY OUTLAW SEXUALLY EXPLICIT IMAGES OF AN "ACTUAL, IDENTIFIABLE MINOR"

Although Congress rejected Senator Biden's concerns about the constitutionality of a prohibition of computer-generated child pornography, an amendment was adopted that outlaws sexually explicit images created by the computer alteration or morphing of visual materials depicting actual children.[67] This provision provides an alter-

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child pornography was made with the use of actual children. *See id.* at 16-17.

Finally, Congress reasoned that because of the material's realistic nature, pedophiles and other child abusers could use computer-generated child pornography "to seduce or blackmail the child into submitting to sexual abuse or exploitation." *Id.* at 16. For these reasons, endorsers of this bill believed that the purposes behind this legislation was compelling enough to satisfy any level of constitutional scrutiny. *See id.* at 20-21. Specifically, Senator Hatch explained that *Ferber* and *Osborne* held that all sexually explicit images depicting children are without First Amendment protection, especially in light of the compelling interest in protecting children from future sexual abuse and molestation. *See id.*

[63] *See id.* at 36-38. A few officials felt that the new changes would be a violation of First Amendment rights. *See id.* (highlighting the views of Senators Biden and Feingold). In addition, Senators Kennedy and Simon expressed their opposition to the bill because it implemented mandatory minimum sentencing. *See id.* at 33-35.

As amended, 18 U.S.C.A. § 2251(d) requires a mandatory sentence of 10 years imprisonment for persons convicted of sexually exploiting a minor. *See* 18 U.S.C.A. § 2251(d) (West Supp. 1998). Under 18 U.S.C.A. § 2252(b)(1), previously convicted offenders who receive or distribute child pornography must be sentenced to at least five years in prison. *See* 18 U.S.C.A. § 2252(b)(1) (West Supp. 1998). Defendants who have been previously convicted of a child pornography offense and are convicted of possessing three or more articles of child pornography must be sentenced to at least two years in prison. *See* 18 U.S.C.A. § 2252(b)(2) (West Supp. 1998).

[64] *See* S. REP. No. 104-358, at 29, 37 (1996).

[65] *See id.*

[66] *See* 18 U.S.C.A. §§ 2251-2258 (West Supp. 1998).

[67] *See* 18 U.S.C.A. § 2256. Under the statute child pornography means "any visual depiction, including any . . . computer or computer-generated image or pic-

native definition of child pornography in the event that the clause that prohibits computer-generated images created without the use of an actual minor is struck down as unconstitutional.[68]

Unlike Senator Hatch's definition, the alternative clause only prohibits child pornography created by the computer alteration or morphing of visual images produced by using a person that could be identified as an actual child.[69] Together, these two additions to the definition of child pornography have made it a federal crime knowingly to create, possess, sell, or distribute nonobscene, sexually explicit images that appear to depict a child, regardless of whether the image actually involves a living child.[70]

Under the Court's holdings in both *Ferber* and *Osborne*, Congress may prohibit the creation, distribution, and possession of visual images that are created using a photograph of an actual, identifiable child. Although the photographs used are often innocent pictures involving no depiction of the child engaging in lewd or lascivious conduct, this material cannot be created without sexually exploiting the image of an actual, identifiable minor.[71]

In *Ferber*, the Court justified the prohibition of child pornography because "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation."[72] This language implies that Congress is permitted to prevent actual children from being the subject of sexually explicit images. Ironically, most photographs used to make computer-altered child pornography are not depictions of actual children engaging in

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ture, . . . where such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct." *Id.* Under the statute an identifiable minor is one "who was a minor at the time the visual depiction was created, adapted, or modified or whose image as a minor was used in creating, adapting, or modifying the visual depiction; and who is recognizable as an actual person by the person's face, likeness or other distinguishing characteristic." *Id.*

[68] *See* S. REP. NO. 104-358, at 31 (1996). Congress added a severability clause to the amendment in case Senator Hatch's definition of child pornography was held to be impermissible. *See* 18 U.S.C.A. § 2252A(a)(5)(B) (West Supp. 1998).

[69] In many cases, innocent pictures of actual, live children would be scanned onto a computer screen and altered or morphed by software to create a visual image of a nude child or one engaging in sexually explicit conduct. *See supra* note 9 and accompanying text. This is quite different than visual images that are completely generated by a computer without the use of a child or a photograph of a child, because an actual, identifiable child is the basis for the sexually explicit image. *See* Johnson, *supra* note 9, at 314-15.

[70] *See* 18 U.S.C.A. §§ 2252, 2256 (West Supp. 1998).

[71] See *supra* note 9 and accompanying text for a discussion of the morphing process.

[72] New York v. Ferber, 458 U.S. 747, 759 (1982).

any sexually explicit conduct. In fact, many of the children whose live images are used to produce sexually explicit images are unaware that their photographic images are being altered or morphed.[73]

The *Ferber* Court also reasoned that children are harmed because their participation in a sexual act has been permanently recorded.[74] Although this computer-altered visual image may be created without an actual child participating in a sexual act or pose, this should not end the inquiry.[75] Such material still requires the exploitation of an actual child's identity and image for sexually explicit purposes and should be deemed an invasion of that child's privacy rights.[76] In *Ferber*, Justice White implied that the production and distribution of a child's image for sexually explicit purposes constitutes an invasion of that child's privacy interests.[77] Therefore, even though no actual child has been abused to create the sexually explicit image, an actual child's identity and image has been exploited for sexual and commercial purposes. Congress, and the states as well, should be permitted to protect children by preventing their identity and features from being sexually exploited.[78]

## CONGRESS MAY NOT BAN NONOBSCENE, SEXUALLY EXPLICIT IMAGES THAT DO NOT DEPICT AN ACTUAL, IDENTIFIABLE CHILD

It is not so clear, however, whether the government can constitutionally prohibit people from creating, possessing, and even disseminating computer-generated images of child pornography that are created without the use of an actual, identifiable minor. Obviously, if the material is obscene under the *Miller* standard, Congress

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[73] *See supra* note 9 and accompanying text.

[74] *See Ferber*, 458 U.S. at 759 & n.10.

[75] *See* Adelman, *supra* note 7, at 484 n.13 (arguing that prohibiting sexually explicit computer alterations of photographs of actual children would not violate the First Amendment).

[76] *See id.*

[77] *See Ferber*, 458 U.S. at 758 n.9 ("When such performances are recorded and distributed, the child's privacy interests are also invaded."); *see also* United States v. Wiegand, 812 F.2d 1239, 1245 (9th Cir. 1987) (explaining that the child's "human dignity" is offended when he is used as a subject for child pornography). This dignity is equally offended when a real child's identity or image is used to create sexually explicit images by computer. *See Prison-Computer List Centers on Information About Children*, ORANGE COUNTY REGISTER, Nov. 20, 1996, at A21 (discussing a convicted sex offender who used photographs of children from community newspapers to compile a catalog of 3000 children on his computer apparently intended to be distributed to other pedophiles).

[78] *See Ferber*, 458 U.S. at 759 n.10 (suggesting that child "pornography may haunt [the exploited child] in future years"); Adelman, *supra* note 7, at 484 n.13.

may prohibit its dissemination and receipt regardless of whether the material depicts children.[79] Even if material is declared obscene under *Stanley*, however, the government should not be able to punish people for merely possessing child pornography created solely by computer software and the user's imagination. Moreover, if this type of material is deemed not to be obscene, then it should possess full constitutional protection.[80] In order to survive constitutional scru-

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[79] *See* Miller v. California, 413 U.S. 15, 23-24 (1973).

[80] Under the Supreme Court's First Amendment jurisprudence, any government regulation restricting the freedom of speech must be scrutinized under one of two standards of analysis. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 582 (1978). In determining which analysis to apply to a given statute, the Court must first determine if the restriction on speech is content-based or content-neutral. *See* Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 113, 114 (1981). If the government's purpose is to suppress speech because of the communicative impact of the expression, then the statute is content-based and presumptively invalid unless the speech itself falls within a category of unprotected speech, such as obscenity, or the statute satisfies strict scrutiny. *See* TRIBE, *supra*, at 582. Under the Court's strict scrutiny standard of review, the statute must be narrowly drawn to serve a compelling state interest. *See* Roe v. Wade, 410 U.S. 113, 155 (1973) (stressing that governmental restrictions on fundamental rights must be subjected to this stringent standard of judicial review).

If the challenged regulation is content-neutral, not aimed at restricting the speech because of its message, then the statute will be scrutinized under a track two standard of analysis. *See* TRIBE, *supra*, at 582. Under this more relaxed standard of review, usually reserved for content-neutral time, place, and manner restrictions, the government's provision is valid if it serves an important governmental interest, is not aimed at the content of the speech, and leaves open other channels of communication. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77, 88-89 (1949) (upholding an ordinance forbidding the use of sound trucks for any expressive purpose). *See* James R. Branit, *Reconciling Free Speech and Equality: What Justifies Censorship?*, 9 HARV. J.L. & PUB. POL'Y 429, 436-37 (1986) (contending that this track two standard of analysis should not be applied to restrictions on sexual material). Because the material proscribed under the new child pornography statute covers some material that does not fall within any category of traditionally unprotected speech and because the statute is clearly a content-based restriction, the statute is presumptively unconstitutional unless it survives strict scrutiny. *See* Reno v. ACLU, 117 S. Ct. 2329, 2346 (1997) (applying a heightened degree of scrutiny to legislation prohibiting the transmission of sexual material over the internet); Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989) (applying strict scrutiny to a statute banning indecent phone messages).

The 1996 amendment has been recently challenged by a trade association, several artists, and book publishers on First Amendment grounds. *See* The Free Speech Coalition v. Reno, No. C 97-0281VSC, 1997 WL 487758, at *1 (N.D. Cal. Aug. 12, 1997). Specifically, the plaintiffs in *Free Speech Coalition* argued that the statute outlawed legitimate artistic materials that do not constitute child pornography and have always been deemed protected by the First Amendment. *See id.* at *2. In rejecting the plaintiffs' contentions, the district court upheld the new amendment as a valid content-neutral restriction because it was aimed at preventing the secondary effects of child pornography including its effect on society, its effect on viewers, and its potential to be used to lure child victims. *See id.* at *4. Relying on

tiny, the new amendment to the child pornography laws must be the least restrictive means of achieving a compelling governmental interest.[81]

In *Miller*, the Supreme Court declared that all sexually explicit but not obscene material retained First Amendment protection.[82]

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the Court's secondary effects theory as enunciated in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) and *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the district court concluded that because the statute is aimed at curbing these secondary effects it is content-neutral and subject to less than strict First Amendment scrutiny. *See Free Speech Coalition*, 1997 WL 487758, at *4.

Although the Court relied on the secondary effects theory in *Renton* and *Young*, the legislation upheld in those cases were zoning regulations that only prohibited adult theaters in certain parts of the city. *See Renton*, 475 U.S. at 46; *Young*, 427 U.S. at 52. The Court specifically explained that because the regulations did not ban adult theaters altogether, they were valid time, place, and manner restrictions that are reviewed under intermediate scrutiny. *See Renton*, 475 U.S. at 46, 50; *Young*, 427 U.S. at 62. The Court went on to rely on its secondary effects theory because the time, place, and manner regulations were only directed at certain theaters based on the content of the films they exhibited. *See Renton*, 475 U.S. at 46-47; *Young*, 427 U.S. at 70, 71. The Court further elaborated that an otherwise content-neutral time, place, and manner restriction does not become a content-based restriction because the legislature's purpose was based on the subject matter of the regulated material. *See Renton*, 475 U.S. at 48-49. Finally, the Court implied that its secondary effects theory would not justify a regulation that effectively banned adult theaters from the city. *See Renton*, 475 U.S. at 54; *Young*, 427 U.S. at 70-71; *see also Reno*, 117 S. Ct. at 2342 (stressing that *Renton* does not justify a blanket prohibition of sexually explicit expression).

Based on a reading of these cases, the district court incorrectly applied the secondary effects theory in *Free Speech Coalition*. The changes to the child pornography statute are not an otherwise content-neutral time, place, and manner restriction because they effectuate a blanket prohibition on sexually explicit, computer generated images that appear to be of a child. *See* 18 U.S.C.A. § 2256(a)(8) (West Supp. 1998). Because this new amendment is not a time, place, and manner regulation and because it is clearly content based, the Court's secondary effects theory will not justify the use of less than strict scrutiny review. *See, e.g., Reno*, 117 S. Ct. at 2342 (stressing that protecting children from the effects of sexual material on the internet is not a secondary effect under *Renton*'s reasoning).

[81] *See* Sable Communications v. FCC, 492 U.S. 115, 126 (1989) (holding that restrictions on sexual expression are subject to strict judicial review).

[82] *See Miller*, 413 U.S. at 27. Since *Miller*, a few commentators have argued that sexually explicit material constitutes low value speech and therefore, only deserves limited First Amendment protections. *See* Geoffrey R. Stone, Comment, *Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 HARV. J.L. & PUB. POL'Y 461, 477-78 (1986) (arguing that pornography constitutes a new category of low-value speech because of its harmful, unconscious effects on viewers and its noncognitive similarity to obscene expression); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 606-07 (contending that nonobscene pornographic materials should be provided limited First Amendment protection because it operates in a noncognitive manner). On the other hand, many analysts have criticized this low-value approach to sexual expression and have argued that the Court's definition of obscenity draws the line between unprotected and fully protected speech. *See* Branit, *supra* note 80, at 440-43 (claiming that pornography is not a form of unpro-

The *Stanley* decision, which preceded the *Miller* case, held that even obscene material retained limited First Amendment protection when merely possessed within the privacy of one's home.[83] When faced with the issue of nonobscene child pornography, however, the Supreme Court has carved out an exception to these widely accepted

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tected expression because it is not obscene and does not satisfy the stringent *Brandenburg* test for dangerous and harmful speech); Mary C. Dunlap, *Sexual Speech and the State: Putting Pornography in its Place*, 17 GOLDEN GATE U. L. REV. 359, 362, 374-75 (1987) (explaining that the Court's reasoning for allowing restrictions on obscenity cannot be extended to deny all sexually explicit material full constitutional protections); Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 327-28 (1995) (questioning the constitutional validity of a low-value approach to providing protected expression with less than full First Amendment protection). The Supreme Court has never specifically addressed the issue of providing sexually explicit material with a lesser degree of First Amendment protection. Although the Court has sanctioned the use of differing degrees of protection for different forms of speech, such as commercial speech and nonverbal speech, the Court has never explicitly stated that sexual expression deserves less than full First Amendment protection. *See Sable*, 492 U.S. at 126 (stating that nonobscene sexual expression is "protected by the First Amendment").

In *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 547-48 (1975), town officials prohibited the plaintiff from performing the musical *Hair* at a local municipal theater because it contained nudity and sexually explicit scenes. *See Conrad*, 420 U.S. at 547-48. Despite the musical's sexually provocative themes, the Court applied a strict scrutiny test and found the prior restraint to be a violation of the First Amendment. *See id.* at 557-58. Similarly, in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 206-07 (1975), a town passed an ordinance prohibiting drive-in movie theaters from displaying films that contained nude scenes. *See id.* at 206-07. In striking down the ordinance as violative of the First Amendment, the Court held that the government could not restrict sexually explicit speech just because it may be offensive to some members of the public. *See id.* at 210-11. Finally, in *Sable Communications v. FCC*, 492 U.S. 115, 117 (1989), the Court struck down a federal regulation that prohibited the transmission of indecent commercial telephone messages to adults. *See id.* After declaring that sexual expression is protected by the First Amendment, the Court invalidated the restriction because it was not the least restrictive means of achieving the government's compelling interest in protecting children. *See id.* at 131. *But see* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 570-71 (1991) (holding that nude dancing could be prohibited in lounges and adult stores, not because of the value of the expressive activity but because of its secondary effects); Renton v. Playtime Theaters, Inc., 475 U.S. 41, 46-47 (1986) (holding that a restriction on the location of adult movie theaters was a content-neutral regulation, and therefore subject to a more deferential standard of review because the regulation focused on eradicating the secondary effects caused by such theaters); Young v. American Movie Theaters, Inc., 427 U.S. 50, 62 (1976) (using a more deferential level of scrutiny to uphold an ordinance restricting the location of adult theaters and bookstores). In these few cases where the Court has upheld restrictions on sexually explicit expression, the Court did state that sexual expression is a highly valued form of expression. *See* Shaman, *supra*, at 309 (explaining that a majority of the Court has never held sexual expression to be of low First Amendment value).

[83] *See* Stanley v. Georgia, 394 U.S. 557, 559 (1969).

principles of First Amendment law.[84] Although the Court has held child pornography to be without First Amendment protection, even if merely possessed, the Court's reasoning has been based on eradicating the despicable means that were once necessary to produce these visual images—the underlying sexual abuse of children.[85]

The Supreme Court has departed from constitutional principles in order to permit the government to prohibit even the mere possession of child pornography. Even so, Congress may only regulate and prohibit nonobscene child pornography to dry up its production.[86] It is the injuries that children incur when they are used to produce these visual images and the harms stemming from the future distribution of such visual depictions that have driven the Court to stray from deeply rooted principles of First Amendment law.[87]

These harms are not present when a sexually explicit image depicting an imaginary child is created solely by computer technology without the use of an actual child participant.[88] When the computer-

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[84] *See* Osborne v. Ohio, 495 U.S. 103, 108 (1990).

[85] *See id.* at 109-10. As Judge Beezer of the United States Court of Appeals for the Ninth Circuit eloquently put it:

> A child pornography law is akin to a child labor law: both are concerned with the conduct through which a product is made, not with what the product is or the product's effect on consumers. Accordingly, "*Ferber* seems to signal a heightened sensitivity on the Court's part to the harms that pornographic activity can inflict upon *participants*."

United States v. United States Dist. Court for the Central Dist. of Cal., 858 F.2d 534, 545 (9th Cir. 1988) (Beezer, J., dissenting) (citation omitted) (quoting LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-16, at 914-15 (2d ed. 1988)); *see also* Jeffrey J. Kent & Scott D. Truesdell, *Spare the Child: The Constitutionality of Criminalizing Possession of Child Pornography*, 68 OR. L. REV. 363, 387 (1989) (explaining that child pornography may be restricted or prohibited because it is "part of a continuing course of illegal conduct and not . . . 'speech' in the usual sense").

[86] *See Osborne*, 495 U.S. at 109-10.

[87] For instance, in *United States v. Smith*, 795 F.2d 841, 844-45 (9th Cir. 1986), the defendant was charged with violating 18 U.S.C. § 2252 for mailing undeveloped and unprocessed photographic film that was taken of semi-nude minors. *See id.* The defendant argued that the term visual depiction did not include undeveloped film because no visual image had yet been created. *See id.* at 846. The court rejected this argument, explaining that it was not the state of the development of the film that was important, but rather the child's participation underlying the creation of the undeveloped material. *See id.* at 846-47.

*Smith* illustrates that Congress' primary and sole objective in prohibiting child pornography is to protect the children who are victimized when the material is created and not to regulate the image itself. With computer-generated child pornography, there is no underlying harmful or illegal conduct for Congress to regulate or prohibit.

[88] See *supra* note 10 and accompanying text for a discussion of the computer-generation process.

generated images are created and distributed, no actual child has been subjected to any form of sexual abuse and no actual child's privacy interests have been exploited or invaded.[89] Therefore, Congress cannot defend such an intrusion on First Amendment rights on the basis of protecting children because no actual child has been used or abused to produce these computer images.

In addition, the *Ferber* Court stated that sexually explicit images of children that are not the result of a child's live performance retain First Amendment protection.[90] The Court reaffirmed this reasoning in *United States v. X-Citement Video, Inc.*,[91] when it held that a defendant could not be constitutionally convicted under a child pornography statute unless he knew that the material contained depictions of children under the age of majority.[92] In reaching its conclusion, the Court explained that "the age of the performers is the crucial element separating legal innocence from wrongful conduct."[93] Under the Court's holding, if the subject of the visual image is over the age of majority or the possessor reasonably believed so, the individual possessing the material could not be prosecuted under the child pornography statutes.[94] Although the Court did not consider the issue of computer-generated subjects, the Court's language strongly

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[89] *See supra* notes 69-74 and accompanying text. It would be a different story if the image creator used an actual child to model while the image was created by computer. This is because an actual child has been used to create the image. Even a sexually explicit artistic drawing or sculpture, if created while using a child model, would involve some level of participation by an actual child and would constitute some form of sexual abuse. In addition, that child model's identity has been reproduced either on the canvas or computer screen and if distributed or exploited, would be an infringement of that child's privacy rights.

[90] *See* New York v. Ferber, 458 U.S. 747, 764-65 (1982).

[91] 513 U.S. 64 (1994).

[92] *See X-Citement Video*, 513 U.S. at 78. In *X-Citement Video*, the defendant, an adult video retailer and distributor, was convicted for distributing a pornographic film depicting the live performance of a minor. *See id.* at 66. In his defense, the defendant argued that the federal child pornography statutory scheme was unconstitutional because it did not specifically require the government to prove that the defendant knew that the material contained depictions of children. *See id.* at 66-67. Although the Court did not invalidate the statute, Chief Justice Rehnquist held that the provision was not constitutional unless it contained a scienter requirement with respect to the age of the participants in the sexually explicit material. *See id.* at 78.

[93] *Id.* at 73. Congress' recent prohibition on computer-generated materials is difficult to reconcile with the Court's holding in *X-Citement Video* because the new amendment prohibits material with no actual human performer whose age can be reasonably determined or inferred by the trier of fact. *See* Burke, *supra* note 9, at 452-54 (articulating the inherent problems in construing the new amendment in accordance with the Court's decision in *X-Citement Video*).

[94] *See X-Citement Video*, 513 U.S. at 72-73.

implies that an individual may only be prosecuted for possessing material that depicts an actual person under the age of majority.[95]

Over the past decade, a few state courts have considered whether computer-generated child pornography can be constitutionally regulated. In *Cinema I Video, Inc. v. Thornburg*,[96] the North Carolina Court of Appeals considered whether the child pornography law could be construed to prohibit visual depictions that were produced without the use of a live minor.[97] Based on the language in *Ferber*, the North Carolina court found the child pornography law unconstitutional unless it required the exploitation of an actual, live minor as an element of the offense.[98]

Similarly, in *Aman v. State*,[99] the Georgia Supreme Court was called upon to construe the breadth and scope of Georgia's child pornography statute that proscribed visual material that "depicts a minor."[100] The *Aman* court held that the term "depict a minor" must be limited to visual representations of a live minor in order for the Georgia statute to survive constitutional scrutiny.[101] The Georgia court explained that the state's objective in protecting children from the harms of child pornography was only served by banning child pornography that was "based on the use of a live child model."[102]

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[95] *See id.*

[96] 351 S.E.2d 305 (N.C. Ct. App. 1986).

[97] *See Cinema I Video*, 351 S.E.2d at 318-19. The plaintiffs, comprised of a group of videotape sellers and viewers, sought a judgment declaring North Carolina's child pornography statute unconstitutional as drafted. *See id.* at 309, 319. The challenged statute prohibited "material that contains a visual representation of a minor engaged in sexual activity." N.C. GEN. STAT. § 14-190.17(a)(2) (1993). A preceding section, however, defined "material" as "[p]ictures, drawings, video recordings, films or other visual depictions or representations . . . ." N.C. GEN. STAT. § 14-190.13(2) (1993). The plaintiffs argued that these provisions could be authoritatively construed to encompass materials produced without the use of an actual child. *See Cinema I Video*, 351 S.E.2d at 319.

[98] *See Cinema I Video*, 351 S.E.2d at 319.

[99] 409 S.E.2d 645 (Ga. 1991).

[100] *See Aman*, 409 S.E.2d at 646. In *Aman*, Georgia convicted the defendant for possessing articles of child pornography. *See id.* The statute made it "unlawful for any person knowingly to possess or control any material which depicts a minor engaged in any sexually explicit conduct." GA. CODE ANN. § 16-12-100(b)(8) (1996).

[101] *See Aman*, 409 S.E.2d at 646.

[102] *Id.* at 647 (Hunt, J., concurring). Relying on *Osborne*, the Georgia Supreme Court found no legitimate basis for legislation that criminalized sexually explicit material that did not involve the use of an actual child. *See id.* at 646, 647 (Hunt, J., concurring). The court's language implied that protecting children from sexual exploitation was the only permissible governmental purpose justifying a ban of child pornography. *See id.*

Finally, in *State v. Stoneman*,[103] the Oregon Supreme Court considered the appropriate interpretation of Oregon's child pornography statute.[104] Oregon law prohibits the sale of any "visual recording of sexually explicit conduct involving a child."[105] Relying on Oregon's constitution, the *Stoneman* court held that the material made criminal by the statute must be limited to visual reproductions of live events.[106] The Oregon court stated that materials merely giving "the illusion that actual children are involved" could not be prohibited by the statute.[107]

Although the previously discussed statutes did not specifically exempt from criminal punishment materials produced without the use of an actual child, courts in these states have limited their application to exempt such material in order to survive constitutional review.[108] Several commentators have argued that decisions exempting such material are a result of statutory interpretation rather than any constitutional principle.[109] Rather, such an interpretation is required

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[103] 920 P.2d 535 (Or. 1996).

[104] *See Stoneman*, 920 P.2d at 537. In *Stoneman*, the defendant was arrested for purchasing certain materials that contained depictions of child pornography. *See id.*

[105] OR. REV. STAT. § 163.686(1)(a)(A)(ii) (1997).

[106] *See Stoneman*, 920 P.2d at 537-38 & n.3. The court relied on a provision of Oregon's constitution, similar to the First Amendment, which states that "[n]o law shall be passed restraining the free expression of opinion, restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." *Id.* at 537 n.2; OR. CONST. art. I, § 8.

[107] *Stoneman*, 920 P.2d at 538.

[108] Several other state child pornography statutes do not explicitly state whether they are limited to cover only visual reproductions of live events involving actual children. *See* ARIZ. REV. STAT. ANN. § 13-3551(5)(b) (West Supp. 1997) (defining visual medium as any "computer-generated image of a minor"); CAL. PENAL CODE § 311.3(a) (West Supp. 1998) (prohibiting computer-generated images that depict a person under the age of 18); ILL. COMP. STAT. ANN. 5/11-20.1(a)(6) (West 1993) (defining child pornography as a visual reproduction of a child under age 18); MICH. COMP. LAWS ANN. § 750.145c(i) (West 1991) (defining child pornography as any electronic visual image of a child engaging in a sexual act); N.J. STAT. ANN. § 2C:24-4(4) (West 1995) (prohibiting the reproduction or reconstruction of an "image of a child in a prohibited sexual act"); OR. REV. STAT. § 163.688(1)(a) (1997) (prohibiting the possession of "any visual depiction of sexually explicit conduct that appears to involve a child"); PA. CONS. STAT. ANN. § 6312(d) (West Supp. 1997) (prohibiting computer depictions of a child under age 18). These statutes do not explicitly state whether they prohibit computer-generated child pornography produced without the involvement of an actual minor. However, relying on the reasoning in the previously mentioned cases, for these statutes to avoid being invalidated as unconstitutional, they must be interpreted to cover only visual reproductions of actual, live children.

[109] *See Child Pornography Prevention Act of 1995: Hearing on S. 1237 Before the Senate Committee on the Judiciary*, 104th Cong. 41, 45 & n.2 (1996) (statement of Professor Frederick Schauer, Harvard Law School) (stressing the point that sexually explicit

by the Supreme Court's decisions in both *Ferber* and *Osborne*, which explain that any broader reading of these statutes would prohibit protected material and render the statutes unconstitutional under the First Amendment.[110]

Some states, on the other hand, have drafted their statutes explicitly to exclude material that is not a reproduction of a live event.[111] These statutes would clearly survive constitutional scrutiny, because the states have limited their attack solely to prevent the harms associated with children being used to create child pornography.[112] Statutes that are not expressly limited to cover child pornography depicting live performances may still be constitutionally valid provided they are not interpreted to prohibit nonobscene images produced without the use of an actual child.[113] If not, such statutes run the risk of being declared inconsistent with the First Amendment as set out in *Ferber*, *Miller*, and *Stanley*.

Although no federal court specifically has limited the scope of the federal child pornography laws to include only depictions of live events, a few courts of appeals have been faced with the issues presented by computer-generated child pornography. In *United States v.*

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material created without the use of an actual minor cannot be prohibited as a matter of federal constitutional law and not merely due to statutory interpretation).

[110] *See id.*

[111] *See* ALA. CODE § 13A-12-190(12) (1994) (defining child pornography as any "visual reproduction of a live act, performance or event"); ALASKA STAT. § 11.61.127(a) (Michie 1996) (prohibiting the possession of material that "involved the use of a child under eighteen"); CONN. GEN. STAT. ANN. § 53a-193(13) (West 1994) (defining child pornography as "any material involving the live performance" of a child); FLA. STAT. ANN. § 827.071(4) (West 1994) (prohibiting the possession of material that "includes any sexual conduct by a child"); IOWA CODE ANN. § 728.12(2) (West 1993) (prohibiting visual depictions of a "live performance of a minor engaging in a prohibited sexual act"); KAN. STAT. ANN. § 21-3516(2) (1995) (prohibiting visual material in which a "real child" is shown); KY. REV. STAT. ANN. § 531.335(1) (Banks-Baldwin Supp. 1996) (prohibiting visual depictions of "an actual sexual performance by a minor person"); MO. ANN. STAT. § 573.010(1) (West 1995) (excluding from the definition of child pornography "material which is not the visual reproduction of a live event"); NEB. REV. STAT. § 28-1463.02(6) (1995) (defining visual depiction as a representation of a "live performance"); N.M. STAT. ANN. § 30-6A-3(C) (Michie 1994) (outlawing the creation of a visual image that depicts a child participant); OHIO REV. CODE ANN. § 2907.322(5) (Anderson 1996) (banning the possession of "any material that shows a minor participating or engaging in sexual activity"); OKLA. STAT. ANN. tit. 21, § 1021.2 (West Supp. 1998) (prohibiting "material involving the participation of any minor"); VA. CODE ANN. § 18.2-374.1(B)(3) (Michie 1996) (prohibiting sexually explicit computer-generated material "which utilizes or has as a subject" a minor).

[112] *See* Osborne v. Ohio, 495 U.S. 103, 109 (1990).

[113] *See* New York v. Ferber, 458 U.S. 747, 764 (1982) ("[T]he conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed.").

*Nolan*,[114] the defendant was convicted for the knowing receipt of child pornography in violation of 18 U.S.C. § 2252(a)(2).[115] On appeal, the defendant argued that the prosecution failed to prove that the photographs were taken of an actual child.[116] Specifically, Nolan argued that the prosecution, in order to convict him, had to prove that the photographs were taken of actual children and not wax figures, mannequins, or composite representations that were faked or doctored or even created by computer generation.[117] Although the United States Court of Appeals for the First Circuit refused to place such a burden on the prosecution, the court gave some credence to the defendant's claims.[118] In so doing, the court stated that in order for the defendant to be convicted under § 2252 the jury had to be convinced that the images in question were made using actual children.[119]

This case explains that the government may only prohibit child pornography that is created with the use of an actual child.[120] *Nolan* furthers the proposition that Congress can only constitutionally prohibit nonobscene child pornography in order to protect children.

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[114] 818 F.2d 1015 (1st Cir. 1987).

[115] *See Nolan*, 818 F.2d at 1016. Nolan was convicted for receiving child pornography that was sent from a source located in a foreign country. *See id.* Although 18 U.S.C. § 2252 did not explicitly prohibit child pornography produced in foreign countries, the United States Court of Appeals for the First Circuit held that Congress did not intend to only "protect United States children from the negative effects this activity has on them." *Id.* at 1016 n.1.

[116] *See id.* at 1016.

[117] *See id.*

[118] *See id.* at 1018-19. The court refused to hold the prosecution to the duty of "rul[ing] out every conceivable way the pictures could have been made other than by ordinary photography." *Id.* at 1020. The court further explained that the jury, by merely viewing and analyzing the images without the use of expert testimony, could infer that the "subjects depicted actually existed" and "were of actual, living children who were, therefore, 'used' in the production of these pictures." *Id.* at 1018.

[119] *See id.* at 1018, 1020. Even though the prosecution was not required to bring in an expert to prove that the visual depictions were of actual children, the *Nolan* court stated:

> Whether it would be practicable to manufacture pornography [by computer generation] is, therefore, purely speculative, and we do not think the government was required to negative in advance what is merely unsupported speculation. Appellant, of course, was free to have presented evidence of his own suggesting that the pictures used other than real subjects. He could have called an expert to testify as to how photographs like these could have been made without using real children.

*Id.* at 1020.

[120] *See Nolan*, 818 F.2d at 1020.

Although the *Nolan* court held that the government did not have the burden of proving that the material depicted an actual child, it implied that computer generation, without the use of a child, was an available defense.[121]

This defense was also recognized in *United States v. Kimbrough*.[122] The defendant offered evidence that the images in question could have been created by photograph-altering computer software.[123] In response, the United States Court of Appeals for the Fifth Circuit stated, "Had the jury believed Kimbrough's defense—that the depictions had been altered and were not of actual children—they could have easily found so applying the instructions as given."[124] The only inference to draw from this statement is that child pornography created solely by computer generation cannot be the basis for criminal punishment under any child pornography statute.

By placing the burden of proof upon the defendant to prove that the child pornography in question was made without the use of an actual child, one of Congress's reasons for prohibiting computer-generated child pornography is rendered meaningless. In his report to Congress, Senator Hatch argued that the failure to prohibit computer-generated child pornography would pose undue burdens on the government's ability to prosecute offenders because it would be required to prove that images of child pornography were produced with the use of actual children.[125] Based on the rapid advancement of computer technology, within a few years the computer-generated

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[121] *See id.*

[122] 69 F.3d 723 (5th Cir. 1995). In *Kimbrough*, the defendant was convicted for receiving several depictions of child pornography by means of his computer, a violation of 18 U.S.C. § 2252A. *See id.* at 726-27. After being sentenced to 72 months in prison, the defendant argued that the jury instructions given by the trial court constituted reversible error. *See id.* at 727, 733. Specifically, "Kimbrough argue[d] that the Court should have instructed the jury that 'it must find Defendant knew the producing of the depiction involved the actual use of a minor engaging in sexually explicit conduct.'" *Id.* at 733.

[123] *See* S. REP. No. 104-358, at 17 (1996). Kimbrough had hoped that the court would require the prosecution to prove that the images were made using actual children. *See id.*

[124] *Kimbrough*, 69 F.3d at 733.

[125] *See* S. REP No. 104-358, at 16-17 (1996). The report stated: "If the government must continue to prove beyond a reasonable doubt that mailed photographs . . . and computer images . . . are indeed actual depictions of an actual minor engaging in the sex portrayed then there could be a built-in reasonable doubt argument in every child exploitation/pornography prosecution." *Id.* (footnote omitted).

images will be almost indistinguishable from photographs of live, actual persons.[126]

Under the reasoning in *Nolan* and *Kimbrough*, however, it is the defendant's burden to prove that the child pornography was produced without using an actual child.[127] The prosecution bears no burden of proving that an actual child was exploited. If the technology is capable of producing images that appear life like to an average juror, the defendant, not the government, will be forced to bring in an expert to try and prove how the material was actually made.[128] Therefore, it is the defendant, and not the prosecution, who will face the difficulty in proving that the image was computer-generated rather than photography of an actual child.[129] As a result, the congressional purpose of protecting children has become intertwined with the public's desire to censor nonobscene child pornography. This censorship does not alone give rise to a compelling government interest justifying an intrusion on First Amendment rights.[130]

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[126] *See* Weigner & Schlax, *supra* note 10, at 274.

[127] *See* United States v. Kimbrough, 69 F.3d 723, 733 (5th Cir. 1995); United States v. Nolan, 818 F.2d 1015, 1020 (1st Cir. 1987).

[128] *See Nolan*, 818 F.2d at 1017-18. In *Nolan*, the court explained that ordinary people were sufficiently capable of distinguishing photographs of actual people from "other forms of visual reproductions." *Id.* As a result, the court held that the prosecution did not have to produce expert testimony in order to prove that the visual images in question depicted an actual child. *See id.* at 1018-19. The fact-finder is permitted to determine, just by viewing the material, whether they were produced by photograph or by computer-generation. *See id.* at 1017-18.

[129] *See id.* at 1020.

[130] Even as technology advances, allowing images to be created that are virtually indistinguishable from actual photographs, courts would most likely require the defendant to bear the burden of showing that the material in issue was created without the use of an actual child or his photographed image. *Cf. id.* at 1017-18. Because the restriction is content-based, the government, in order to survive strict scrutiny, must show that the means chosen in the statute are the least restrictive means available. *See supra* notes 80-81 and accompanying text.

Creating a rebuttable presumption that images depict actual persons provides a less restrictive alternative to a blanket prohibition of computer generated images. For instance, Congress could require defendants to provide sufficient evidence that images were computer-generated and absent such a showing the jury could infer that the child pornography was created using an actual, identifiable minor. A few states have already taken this approach by promulgating statutes that permit the trier of fact to infer that a person in the visual image is a minor if the material represents or depicts the participant as a minor. *See, e.g.*, OHIO REV. CODE ANN. § 2907.322(B)(3) (Anderson 1996); S.C. CODE ANN. § 16-15-405(B) (Law. Co-op. Supp. 1997); TENN. CODE ANN. § 39-17-1003(b) (1997). This permissive inference, justified by the Supreme Court in *County Court of Ulster County v. Allen*, 442 U.S. 140, 157 (1979), would adequately address the government's concerns without infringing on First Amendment rights. *See Allen*, 442 U.S. at 157 (holding that permissive inferences do not abdicate the defendant's right to have every element of the of-

CONGRESS'S JUSTIFICATIONS FOR THE NEW AMENDMENT

In order to determine the constitutional validity of the Hatch Amendment, the Court would have to consider whether any of Congress's purposes and motives underlying the legislation constitute a compelling government interest.[151] Preventing the harms caused by a child's participation in the production of child pornography is only one of the declared purposes behind the federal child pornography statutes.[152] As previously discussed, Congress's new definition of child pornography is not directed at protecting children from being used to create child pornography.[153]

Congress, however, has sought to prohibit computer-generated child pornography because the government believes (1) it might provide sexual stimulation for pedophiles and (2) is indirectly dangerous to children and harmful to the moral fabric of our society.[154] Although this rationale may be socially acceptable, this reasoning directly conflicts with the underlying values of the First Amendment. Under the First Amendment, Congress has no authority to ban visual images simply because they are repugnant to a majority of society or because they may have an adverse effect on the minds of viewers.[155]

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fense proven by the prosecution unless there is no rational way the jury could "make the connection permitted by the inference").

[151] *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (arguing that the Court's First Amendment principles are intended to uncover improper legislative motives and purposes behind legislation).

[152] *See* S. REP. NO. 104-358, at 2 (1996) (stating that the existence of computer-generated child pornography "creates the potential for many types of harm in the community and presents a clear and present danger to all children").

[153] *See supra* notes 80-83 and accompanying text.

[154] *See* S. REP. NO. 104-358, at 17 (1996). In his report to Congress, Senator Hatch explained:

> As discussed above, a major part of the threat to children posed by child pornography is its effect on the viewers of such material, including child molesters and pedophiles who use such material to stimulate or whet their own sexual appetites. To such sexual predators, the effect 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 such a viewer of child pornographic images the difference is "irrelevant because they are *perceived* as minors by the psyche."

*Id.*

[155] *See* Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *see also*

As the United States Court of Appeals for the Ninth Circuit has pointed out, "Speech shielded by the [First] [A]mendment's protective wing must remain inviolate regardless of its inherent worth. The distaste we may feel as individuals toward the content or message of protected expression cannot, of course, detain us from discharging our duty as guardians of the Constitution."[136] Indeed, just because child pornography may be socially abhorrent, the First Amendment still guarantees free expression, unless some countervailing governmental interest outweighs this fundamental right.[137]

In addition, even if computer-generated child pornography may have socially adverse effects on its viewers' minds,[138] under the First Amendment this is an area that Congress is not entitled to regulate.[139] This reasoning is the centerpiece of the Court's holding in *Stanley*.[140] In *Stanley*, Georgia argued that it could pass regulations that protected its citizens' minds from the adverse effects of viewing obscene materials.[141] Rejecting this contention, Justice Marshall explained that the First Amendment guaranteed to citizens the fundamental "right to receive information and ideas, regardless of their

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Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. KY. L. REV. 553, 562 (1997) ("However, it amounts to a nonsequitur to reason that because particular speech causes serious harm, the speech is to be judged by a less protective standard."); Kathleen M. Sullivan, *Cheap Spirits, Cigarettes and Free Speech: The Implications of* 44 Liquormart, 1996 SUP. CT. REV. 123, 127 ("Regulations aimed at viewpoints, subject matters, or the communicative impact of speech on its audience get strict scrutiny, even if the ideas aimed at are not very good or valuable ideas . . . .").

[136] United States v. United States Dist. Court for the Central Dist. of Cal., 858 F.2d 534, 541 (9th Cir. 1988).

[137] *See* Cohen v. California, 403 U.S. 15, 21 (1971) ("The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.").

[138] *See* Clinton, *supra* note 7, at 132 (claiming that pedophiles use child pornography to sexually stimulate themselves while masturbating); Tim Tate, *The Child Pornography Industry: International Trade in Child Sexual Abuse*, *in* PORNOGRAPHY: WOMEN, VIOLENCE AND CIVIL LIBERTIES 211 (Catherine Itzin ed., 1992) (explaining that pedophiles use child pornography to validate their feelings, to normalize their sexual cravings, and to lower their inhibitions so that they can go out and abuse children). *But see* John C. Scheller, Note, *PC Peep Show: Computers, Privacy, and Child Pornography*, 27 J. MARSHALL L. REV. 989, 996 n.47 (1994) (expressing the alternative view that using child pornography helps pedophiles and is a "healthy expression of repressed feeling and fantasy and helps people to become more comfortable with their sexuality").

[139] *See* Kent & Truesdell, *supra* note 85, at 386 n.121 (arguing that the government cannot prohibit pornography in order to train people to hold socially acceptable views).

[140] *See* Stanley v. Georgia, 394 U.S. 557, 563-65 (1969).

[141] *See id.* at 565.

social worth" and "to satisfy [their] intellectual and emotional needs in the privacy of [their] own home[s]."[142]

The Supreme Court adhered to this reasoning again in *Osborne* when it permitted the states to proscribe the possession of child pornography as long as the purpose of the restriction was not to regulate people's minds.[143] Prohibiting computer-generated child pornography in order to control people's sexual feelings and thoughts would contravene the purposes and philosophy behind the First Amendment.[144] Even if viewers use child pornography for sexual stimulation, this activity alone does not establish a compelling government interest in prohibiting the material. In *United States v. Wiegand*,[145] the Ninth Circuit stated: "The crime punished by the statutes against the sexual exploitation of children, however, does not consist in the cravings of the person posing the child or in the cravings of his audience. Private fantasies are not within the statute's ambit."[146] Therefore, Congress cannot defend its unconstitutional broadening of the coverage of the federal child pornography statute based on its attempts to control the "sexual appetites" of pedophiles and other viewers.[147]

Furthermore, Congress cannot ban the possession of computer-generated child pornography simply because the material may cause the viewer to act out his fantasies and molest or abuse a child.[148] The causal link between the proposition that those who view child pornography will ultimately abuse a child is too attenuated.[149] In *Stanley*, the Court rejected the state's argument that the viewing of obscene images had a tendency to cause its viewers to commit unlawful sexual acts.[150]

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[142] *Id.* at 564, 565; *see also* GORDON HAWKINS & FRANKLIN E. ZIMRING, PORNOGRAPHY IN A FREE SOCIETY 178 (1988) (emphasizing that pedophiles may not be the only members of society who use child pornography to become sexually aroused).

[143] *See* Osborne v. Ohio, 495 U.S. 103, 109 (1990).

[144] *See Stanley*, 394 U.S. at 565 ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.").

[145] 812 F.2d 1239 (9th Cir. 1987).

[146] *Weigand*, 812 F.2d at 1245.

[147] *See* S. REP. No. 104-358, at 17 (1996).

[148] *Cf.* Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("Fear of serious injury cannot alone justify suppression of free speech").

[149] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). Under the Court's "clear and present danger" test, speech cannot be prohibited or punished because of its dangerous propensity unless the potential harm is intended, imminent, and likely to occur. *See id.*

[150] *See* Stanley v. Georgia, 394 U.S. 557, 566-67 (1969) ("[T]he State may no more prohibit mere possession of obscene matter on the ground that it may lead to

The United States Court of Appeals for the Seventh Circuit rejected a similar argument in *American Booksellers Ass'n v. Hudnut*.[151] In *Hudnut*, the Seventh Circuit struck down an ordinance that prohibited the trafficking of nonobscene materials that depicted the graphic, sexually explicit subordination of women.[152] The city defended the statute, claiming that it was necessary to eliminate the male tendency "to view women as sexual objects;" the city alleged that this created unacceptable attitudes, discrimination, and violence towards women.[153] Even after accepting this premise, the Seventh Circuit declared the law to be aimed at "thought control" and, therefore, inconsistent with the First Amendment.[154] Even if the exposure to computer-generated child pornography leads viewers to act out against children, the government should punish the harmful conduct and not the ideas or expressive materials that lead up to the behavior.[155]

Somewhat more persuasively, Congress has explained that the purpose behind its ban on computer-generated child pornography is to prevent pedophiles from using child pornography to seduce children into performing sexual acts or posing for child pornography.[156]

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antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.").

[151] 771 F.2d 323 (7th Cir. 1985).

[152] *See Hudnut*, 771 F.2d at 324, 332. The statute defined trafficking as the "production, sale, exhibition or distribution of pornography" and defined pornography as sexually explicit material, encompassing much more material than the *Miller* standard of obscenity. *Id.* Furthermore, victims of physical assaults precipitated by the attacker having previously viewed pornography had a cause of action against the seller, exhibitor, or distributor of the material. *See id.* at 325.

[153] *See id.* at 325.

[154] *See id.* at 328, 329, 332.

[155] *See Stanley*, 394 U.S. at 566-67 ("[I]n the context of private consumption of ideas and information we should adhere to the view that '[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law . . . .'") (quoting Whitney v. California, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring)).

[156] *See* S. REP. NO. 104-358, at 13-14 (1996). Relying on testimony given by a few child pornography experts, Senator Hatch reasoned:

> A child who may be reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photos, can sometimes be persuaded to do so by viewing depictions of other children participating in such activity. Child molesters and pedophiles use child pornography to convince potential victims that the depicted sexual activity is a normal practice; that other children regularly participate in sexual activities with adults or peers.

*Id.*; *see also* Clinton, *supra* note 7, at 132-33 (describing the process by which pedophiles use child pornography to entice children into performing sexual acts); Liz Kelly, *Pornography and Child Sexual Abuse, in* PORNOGRAPHY: WOMEN, VIOLENCE AND CIVIL LIBERTIES 119 (Catherine Itzin ed., 1992) (explaining that pedophiles use

Senator Hatch further explained that, because computer technology will soon be able to generate visual images that are indistinguishable from photographs of live events, computer-generated child pornography will be just as effective at luring children as real photographic images.[157]

In dicta, the *Osborne* Court intimated that prohibiting the possession of child pornography benefited society because evidence suggested that pedophiles use child pornography to entice children into performing harmful sexual acts.[158] The *Osborne* court accepted this proposition based on the Attorney General's Final Report on Pornography, which merely stated that "[c]hild pornography is often used as part of a method of seducing child victims."[159] This report did not contain any empirical evidence to support such a finding, but rather, was based on general assertions regarding the behavioral patterns of pedophiles.[160]

Of course, it may be true that many pedophiles possess some form of child pornographic material and may even use such material to seduce their victims.[161] It does not follow, however, that all possessors of sexually explicit depictions of children are pedophiles who use the material to seduce children into performing sexual acts.[162] Although Congress may have good intentions—protecting children from being subjected to molestation and other forms of sexual abuse—this objective should not be furthered at the expense of infringing on others' First Amendment rights. Computer-generated child pornography is speech and expression in its purest form; therefore, the government's interest in prohibiting that expression must be compelling and the means chosen must be the least restrictive.[163] Even though protecting children from sexual abuse is a com-

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child pornography to sexually arouse their child victims and to persuade them that they will enjoy participating in the requested sexual activities).

[157] *See* S. REP. NO. 104-358, at 16 (1996).

[158] *See* Osborne v. Ohio, 495 U.S. 103, 111 (1990).

[159] *See* ATTORNEY GEN. COMM. ON PORNOGRAPHY, U.S. DEP'T OF JUSTICE, FINAL REPORT 649 (1986).

[160] *See id.*

[161] *See* Adam W. Smith, Casenote, *Taking* Ferber *a Step Further:* Stanley *Loses in the Battle Against Child Pornography*, 14 OHIO N.U. L. REV. 157, 166 n.74 (1987) (citing GOLDSTEIN, *supra* note 2, at 135-38).

[162] *But see* Josephine R. Potuto, Stanley + Ferber = *The Constitutional Crime of At-Home Child Pornography Possession*, 76 KY. L.J. 15, 55 (1988) (arguing that very few possessors of child pornography have it merely to possess and view).

[163] Pure speech, as opposed to symbolic speech, is fully protected by the First Amendment. *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557-58 (1975) (holding that even the exhibition of a play that "mixes speech with live action or conduct" does not justify the use of a less stringent standard of review).

pelling governmental interest, prohibiting the creation and possession of computer-generated child pornography is not the least restrictive means of achieving that objective.

To satisfy such a burden, Congress, at a minimum, must provide some substantial, empirical evidence to demonstrate that the prohibited material's only purpose is to seduce children into participating in sexual activity.[164] In addition, the possession of purely communicative, nonobscene material is granted full First Amendment protection even though it could be used unlawfully or to achieve illegal ends.[165] Although mere possession of materials may be proscribed in limited instances, the government must demonstrate in those cases that the material has no other purpose.[166] These computer-generated images are produced without harming, abusing, or sexually exploiting children in any way. The material's potential for illegal use alone should not remove it from the protective shield of the First Amendment.[167]

Moreover, the government has other less restrictive ways of protecting children without prohibiting the possession and creation of computer-generated sexual material. Coercing a child to perform sexual acts or to pose in sexually explicit ways is prohibited in every state and by federal law.[168] In addition, most states have criminalized the distribution of sexually explicit materials to minors.[169] Also, if the

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Government suppression of symbolic speech, which the Court has defined as nonverbal conduct that contains some expressive elements, is subject to an intermediate level of First Amendment scrutiny. *See* Texas v. Johnson, 491 U.S. 397, 406-07 (1989) (flag burning); United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (draft card burning). Expression such as writing, drawing, or creating visual images via computer are types of pure speech that may only be restricted if the regulation survives strict scrutiny. *See Johnson*, 491 U.S. at 406.

[164] There is no evidence to show that pedophiles only or mainly use child pornography to seduce children. Many pedophiles use other materials to entice their victims such as adult pornography, money, candy, and other types of gifts. *See* Potuto, *supra* note 162, at 28; *see also* S. REP. No. 95-438, at 9 (1977), *reprinted in* 1978 U.S.C.C.A.N. 46 ("An offer of money, food, or shelter, or even a few friendly words or a show of concern can lead [children], unquestioning, into the hands of exploiters for purposes of pornography or prostitution.").

[165] *See* Quigley, *supra* note 28, at 363-64 (stating that the government does not have the power to prohibit the possession of every material that might be used for an illegal purpose, especially where the material consists of purely speech).

[166] *See id.*

[167] *See* United States v. Villard, 700 F. Supp. 803, 812 (D.N.J. 1988) ("When a picture does not constitute child pornography, . . . it does not become child pornography because it is placed in the hands of a pedophile, or in a forum where pedophiles might enjoy it.").

[168] *See* 18 U.S.C. § 2251 (West Supp. III 1986).

[169] *See* Ginsberg v. New York, 390 U.S. 629, 639 (1968) (holding that the First Amendment does not prohibit the government from outlawing the distribution of

computer-generated images are sufficiently graphic, state and federal obscenity laws will prohibit the images altogether. These alternative means are equally effective at protecting children from sexual abuse without infringing the First Amendment right to possess sexually explicit images of children that are created without harming an actual child.[170] In order to protect children and the Constitution, Congress should be more concerned with punishing those who actually sexually abuse children rather than those who merely possess computer-generated child pornography.[171]

The Hatch Amendment goes beyond its stated purpose because it hinders art as well as pedophiles. Many serious artistic, scientific, and educational materials involve and contain sexually explicit depictions of children.[172] The child pornography statute proscribes nonobscene and obscene images; thus, serious works may fall within the prohibitions of child pornography if they are deemed to be "sexually explicit," a very amorphous term.[173]

In *Ferber*, the Court stated that, if the portrayal of a child in a sexually explicit manner was necessary for a serious artistic, scientific, or educational work, a person over the statutory age or some other simulation could be utilized to achieve that effect.[174] The use of an

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sexually explicit materials to minors). Some states have specifically criminalized the dissemination, by computer, of information about or to a minor that is intended to solicit sexual conduct with a minor or solicit visual depictions of such sexual conduct. *See, e.g.*, FLA. STAT. ANN. § 847.0135(2)(d) (West 1994). In addition, Congress has passed the Communications Decency Act, which prohibits a person from knowingly using the Internet to provide a child with sexually explicit material. *See* 47 U.S.C.A. § 223(d) (West Supp. 1998). Although the Court struck this Act down as unconstitutional in *Reno v. ACLU*, 117 S. Ct. 2329, 2350 (1997), the decision rested on the vagueness of the term "indecent material" and the burdensome effect it would have on adults' rights to access these protected materials. *See Reno*, 117 S. Ct. at 2346, 2350. The decision clearly does not prevent Congress from prohibiting the distribution of sexually explicit materials to minors through the Internet.

[170] *See* Potuto, *supra* note 162, at 27 ("A focus on potentially causative harmful impact is simply insufficient justification to override the *Stanley* first amendment concerns.").

[171] *See* Quigley, *supra* note 28, at 365.

[172] *See Child Pornography Prevention Act of 1995: Hearings on S. 1237 Before the Senate Comm. on the Judiciary*, 104th Cong. 46, 47-48 (1996) (statement of Judith F. Krug, Director of the American Library Association's Office for Intellectual Freedom (ALA-OIF)) (stating that many critically acclaimed movies such as *Romeo and Juliet* and *The Last Picture Show* and many famous visual works from artists such as Picasso and Leonardo would be illegal under the new changes to the child pornography statute).

[173] *See, e.g.*, United States v. Knox, 32 F.3d 733, 745 (3d Cir. 1994) (holding that the term "sexually explicit" means lewd or lascivious and does not require the child in the material to be fully or even partially nude).

[174] *See* New York v. Ferber, 458 U.S. 747, 762-63 (1982).

adult model, even one who appears to be a minor, has been recognized as a legal alternative to the use of a child for the production of sexually explicit material.[175] In *X-Citement Video*, the Court concluded that the subject's age was an essential element of the offense.[176] Therefore, if the subject of the visual depiction is determined to be over the age of majority, the nonobscene material retains full First Amendment protection.[177]

The new changes to the federal child pornography statute have now made this alternative unavailable. Child pornography is now defined as a visual depiction that is, or appears to be, of a minor.[178] A strict reading of this statute would even prohibit the use of an adult to portray realistically a minor in sexually explicit material.[179] Congress attempted to create an exception for such material in 18 U.S.C. § 2252A by specifically exempting from coverage visual images that are created by using an actual adult to portray a minor.[180] This provision, however, prohibits the creator of such images from presenting the material in any manner that conveys the impression that it contains a depiction of a minor engaging in sexually explicit conduct.[181]

This exception effectively swallows up the availability of the exemption. An artist can use an adult to portray a child engaging in

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[175] *See id.*

[176] *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 72-73 (1994).

[177] *See id.* at 72.

[178] *See* 18 U.S.C.A. § 2256(8)(B) (West Supp. 1998).

[179] For instance, the movie *Lolita*, based on a famous book, opened in Europe in 1997, but was not released in any American theaters presumably because the story is about a man who is sexually obsessed with an underage girl. *See* Joan E. Bertin, *Pornography Law Goes Too Far*, L.A. TIMES, Oct. 17, 1997, at B9. Although this film has been artistically acclaimed, many believe that the film has not been exhibited in America due to fears of prosecution under the new federal child pornography statute, even though an adult plays the minor child in the film. *See id.* (voicing the belief that the mere viewing of child pornography does not cause the sexual abuse and exploitation of children).

[180] *See* 18 U.S.C.A. § 2252A (West 1998). The statute states:

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

*Id.*

[181] *See id.*

sexually explicit conduct, but the material cannot be presented in a realistic way so that the viewer would think that a child is being depicted.[182] The effect of these changes will inevitably cause artists and other image creators to censor themselves and avoid using previously acceptable methods of depicting minors in sexually explicit materials.[183]

## CONCLUSION

By prohibiting computer-generated images that appear to be of a child, Congress is attempting to do more than just protect the children victimized by participation in the child pornography industry. Through such a prohibition, Congress has sought to protect society from the evils believed to be inherent in the possession and future use of these computer-generated sexually explicit materials. Congress's sole and primary purpose in passing statutes banning child pornography is, and should be, to prevent children from suffering the harms linked to their participation in child pornography—not to protect society as a whole.[184] Although this desire to

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[182] Pursuant to the Court's holding in *X-Citement Video*, it is unlikely that this portion of the Hatch Amendment would withstand constitutional scrutiny. *Cf. X-Citement Video*, 513 U.S. at 72. In *X-Citement Video*, the Court explicitly stated that "sexually explicit conduct involving persons over the age of 17 are protected by the First Amendment." *Id.* The clear implication to draw from the Court's holding is that sexually explicit materials produced using adult participants is constitutionally protected regardless of whether they were intended to give the impression that a child was being depicted.

[183] *See Child Pornography Prevention Act of 1995: Hearings on S. 1237 Before the Senate Comm. on the Judiciary*, 104th Cong. 46, 50 (1996) (statement of Judith F. Krug, Director of ALA-OIF) (arguing that the new changes would effectively cause libraries to suppress certain works that depict children, even if adults are used to portray them). For example, in June 1997, an Oklahoma state judge deemed the Oscar-winning film *Tin-Drum*, which eludes to a sexual encounter between two minors, illegal under the new child pornography laws and ordered police to remove copies of the film from local video stores. *See* Joe Holleman, *Webster Series Picks up Controversial 'Tin-Drum': Oscar-Winner in '79 Faced Recent Pornography Protest*, ST. LOUIS POST-DISPATCH, Oct. 16, 1997, at 3G. Pursuant to a lawsuit filed by the ACLU, a federal judge issued an injunction mandating the police to return the seized copies of the film. *See Judge Rules Oklahoma Video Seizure Unconstitutional*, ACLU NEWS WIRE (Dec. 29, 1997) <http://www.aclu.org/news/w122997a.html>. Although the judge did not rule on the constitutionality of the new child pornography statute, the court held that the police's ex parte seizure violated the First Amendment. *See id.*

[184] Federal courts have consistently held that the purpose of the child pornography statutes is to protect children from victimization and not to protect society as a whole. For instance, in both *United States v. Ketcham*, 80 F.3d 789, 793 (3d Cir. 1996) and *United States v. Kirkland*, No. 96-9152, 1997 WL 76211, at *3 (6th Cir. Feb. 20, 1997), the United States Court of Appeals for the Third and Sixth Circuits considered the United States Sentencing Guidelines and how they should be applied to

protect society is no doubt genuine, the resulting censorship is impermissible.

What this Note attempts to demonstrate with respect to computer-generated child pornography is the likelihood that, under the new changes to the federal child pornography statutes, mere creators and possessors of inherently harmless, expressive material will be subject to criminal punishment. Moreover, the lasting effect of such a prohibition will deter artists and other image creators from producing serious works that portray minors in sexually explicit ways. This type of governmental suppression, and correlative self censorship, is precisely what the First Amendment should prevent. Therefore, unless there is some strong, empirical proof that the existence of computer-generated child pornography is directly injurious to the overall well being of our youth, there is no satisfactory justification for such a clear infringement of our constitutional guarantees.

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convictions under the federal child pornography statutes. *See Kirkland*, 1997 WL 76211, at *3; *Ketcham*, 80 F.3d at 793. The defendants in these cases unsuccessfully argued that society was the primary intended victim to be protected by 18 U.S.C. § 2252. *See Kirkland*, 1997 WL 76211, at *3; *Ketcham*, 80 F.3d at 792, 793. In rejecting the argument, both courts determined that for sentencing purposes, the primary objective behind 18 U.S.C. § 2252 was not to protect society but "to protect children from the exploitation by producers of child pornography." *Ketcham*, 80 F.3d at 793; *see also Kirkland*, 1997 WL 76211, at *3. In addition, these courts implied that if the articles of child pornography were images of the same child victim, grouping offenses for sentencing would then have been appropriate. *See Kirkland*, 1997 WL 76211, at *2; *Ketcham*, 80 F.3d at 792.