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Arnold H. Loewy

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TAKING FREE SPEECH SERIOUSLY: THE UNITED STATES SUPREME COURT AND VIRTUAL CHILD PORNOGRAPHY

ARNOLD H. LOEWY *

Although always believing that the United States Supreme Court should invalidate the portion of the Child Pornography Protection Act (CPPA)¹ that proscribes the dissemination of any image “that appears to be . . . a minor engaging in sexually explicit conduct,”² I seriously doubted that it would do so. For one thing, the Court granted certiorari in *Free Speech Coalition v. Reno*,³ a case in which the Ninth Circuit had *invalidated* the statute. Having previously denied certiorari in a case in which the lower courts had *upheld* the statute,⁴ there was good reason to believe that the Court intended to reverse the Ninth Circuit. Fortunately, that did not happen.

Apart from the procedural posture of the case, a cursory glance at the equities appears to favor the statute. The value of exploiting the sexuality of children certainly appears to be de minimus.⁵ Furthermore, the government made at least a surface case that virtual child pornography can be harmful to children.⁶ With that kind of a balance, one might have anticipated a

* Graham Kenan Professor of Law, University of North Carolina at Chapel Hill School of Law. The author wishes to thank his Research Assistant, William Cross, for assistance provided in connection with this article.

1. Child Pornography Prevention Act, Pub. L. No. 104-208, § 121(2)(8)(c), 110 Stat. 3009-26, 3009-28 (1996).

2. See Arnold H. Loewy, *Obscenity, Pornography, and First Amendment Theory*, 2 WM. & MARY BILL RTS. J. 471, 480-82 (1993).

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

4. *Hilton v. United States*, 528 U.S. 844 (1999), *denying cert.* to *United States v. Hilton*, 167 F.3d 61 (1st Cir. 1999).

5. *Cf. New York v. Ferber*, 458 U.S. 747, 762-63 (1982) (“The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis.”).

6. See *Free Speech Coalition v. Reno*, 198 F.3d at 1098 (Ferguson, J., dissenting) (referring to evidence presented in CPPA hearings suggesting that “virtual child pornography causes real harm to real children”).

willingness to accept the invitation of Judge Ferguson of the Ninth Circuit to create a new category of unprotected speech called “virtual child pornography.”⁷ Though undoubtedly tempted, the Court rejected going down that wrong road.

In this paper, I will focus on both the importance and correctness of the Supreme Court’s decision in *Ashcroft v. Free Speech Coalition*.⁸

I. THE IMPORTANCE OF PROTECTING BAD SPEECH

Few liberal democracies challenge freedom of speech in the abstract. Specific applications, however, are different. Many who would never challenge freedom of speech in the abstract balk at extending such protection to flag burners⁹ and Nazis.¹⁰ Yet the slightest reflection should reveal that unless all speech is free, no speech is free. No sensible government, including the most dictatorial, will ever prosecute good speech or even neutral

7. *Id.* at 1100 (dissenting opinion).

8. 122 S. Ct. 1389 (2002).

9. *See* *Texas v. Johnson*, 491 U.S. 397, 421–35 (1989) (Rehnquist, J., dissenting) (arguing that flag burning should be categorically excluded from First Amendment protection); *id.* at 436 (Stevens, J., dissenting) (arguing that the criminalization of flag burning constitutes a trivial burden on freedom of speech). Following *Johnson*, Congress and the President again attempted to ban flag burning with the Flag Protection Act of 1989, which the Supreme Court again overturned by a bare five to four majority in *United States v. Eichman*, 496 U.S. 310 (1990).

10. *See, e.g.,* *Collin v. Smith*, 578 F.2d 1197, 1217 (Sprecher, J., dissenting in part) (arguing that a Nazi march in predominantly Jewish Skokie, Illinois, “may be so extremely offensive and of such little social utility as to be beyond the protection of the First Amendment”). In a recent European case with strong ramifications in the United States, the Tribunal de Grande Instance (High Court) of Paris held that the act of displaying Nazi memorabilia for sale violated section R645-1 of the French criminal code and that the American website Yahoo! must comply with French law and deny access of French internet users via *www.yahoo.com* to any “Nazi artifact auction service.” T.G.I. Paris, May 22, 2000, Interim Court Order No. 00/050308, 00/05309, *cited and translated in part in* *Yahoo!, Inc. v. La Ligue Contre le Racisme*, 169 F. Supp. 2d 1181, 1184–85 (N.D. Cal. 2001). *See also*, David Kretzmer, *Free Speech and Racism*, 8 CARDOZO L. REV. 445 (1987) (offering several justifications for restrictions on racist speech).

speech.¹¹ Indeed, no democracy would even think of prosecuting ordinarily bad speech (e.g. “Vote Republican”).¹² It is only when we get to very bad speech that the government even thinks about prosecution. Thus, it is in those situations in which free speech is needed most. Hence, protection for Nazis, flag burners, and virtual child pornographers logically follows if we want to take free speech seriously.

But should we want to take it seriously if the cost of doing so is to give added protection for speech that we would all be better off without? One’s first intuition is to say “no,” and indeed, that is the result regularly reached in European courts¹³ and too frequently reached in American courts.¹⁴ The reason that this should bother us is that it gives government the power to decide which speech can compete in the marketplace and which speech is dead on arrival.

11. See Arnold H. Loewy, *Criminal Speech: Should Free Trade in Ideas be Absolute?*, 2 CRIM. L.F. 117, 117–18 (1990).

12. Or if you don’t like that one, try “Vote Democrat.”

13. In *Gay News, Ltd. v. United Kingdom*, 5 Eur. H.R. Rep. 123 (1982), the European Commission of Human Rights upheld a conviction for blasphemy, reasoning that a law prohibiting speech that offends religious sensibilities is justifiable as a limitation on free expression “for the protection of . . . the rights of others” under the meaning of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Cf. *Jones v. Toben* (F.C.A. 2002) (ordering an Australian website to remove content suggesting that the Nazi holocaust was a hoax on the grounds that such content violated Australia’s Racial Discrimination Act of 1975), http://www.austlii.edu.au/au/cases/cth/federal_ct/2002/1150.html (Sept. 17, 2002) (on file with the First Amendment Law Review).

14. See, e.g., *Miller v. California*, 413 U.S. 15 (1973) (upholding a California anti-obscenity statute); see also *Johnson*, 491 U.S. 397, 421–35 (1989) (Rehnquist, J., dissenting) (arguing that flag burning should be categorically excluded from First Amendment protection). As I have said elsewhere, “[i]t is understandable that our President, Congress, legislators, and general populace who do not regularly study the First Amendment would initially condemn the *Johnson* decision. It is more difficult to rationalize the opinions of the Supreme Court dissenters who really ought to know better.” Arnold H. Loewy, *The Flag-Burning Case: Freedom of Speech When We Need It Most*, 68 N.C. L. REV. 165, 172–73 (1989); cf. Loewy, *supra* note 2 (arguing that American obscenity law is overly restrictive in light of sound First Amendment theory).

While some of us might be happy to relegate flag burning, Nazi marches, and virtual pornography to the scrapheap of dead-on-arrival speech, few would say that about speech urging racial integration. Yet speech urging racial integration fifty years ago would have been thought highly offensive to much of the citizenry of a large number of American communities and would have been subject to prohibition under a standard that protects the dignitary interest of some against the speech of others. Thus, even though government may be correct about some types of speech, it is better to deny government the power to suppress that speech than to grant it the power to suppress speech that may turn out to be valuable (such as civil rights speech).¹⁵

The fact that virtual pornography appears to be entertainment rather than ideological indoctrination is immaterial. In one of its most prescient moments, the Supreme Court of the United States observed:

We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine.¹⁶

It is true that the United States Supreme Court exempts obscenity from its otherwise relatively libertarian view of free speech, but as I have demonstrated elsewhere, this is more the result of fiat than logic.¹⁷ And, somewhat paradoxically, the concept of obscenity as unprotected speech is not the law in many European countries.¹⁸

15. For a more detailed development of this point, see Arnold H. Loewy, *Freedom of Speech as a Product of Democracy*, 27 U. RICH. L. REV. 427 (1993).

16. *Winters v. New York*, 333 U.S. 507, 510 (1948).

17. See Loewy, *supra* note 2.

18. See John Quigley, *Child Pornography and the Right to Privacy*, 43 FLA. L. REV. 347 (1991). Quigley notes that many European nations permit most speech American law would define as "obscenity" and that "[w]hile some European penal codes do prohibit possession of child pornography for

In any event, the presence of the obscenity doctrine militates against, rather than for, a separate unprotected category of virtual child pornography. Given the American law of obscenity, which allows obscene materials to be prosecuted,¹⁹ the need for a special law condemning virtual child pornography is substantially reduced. Most really offensive virtual child pornography would likely be subject to prosecution as obscenity anyway,²⁰ while a virtual sexually explicit presentation of Romeo and Juliet would not.

II. DISTINGUISHING REAL CHILD PORNOGRAPHY

Real child pornography is rightly subject to prosecution. But the reason that it is so treated has nothing to do with the abhorrent nature or intrinsic worthlessness of the material. It can be prosecuted for the same reason that employment of child labor can be prosecuted. Just as child labor harms the children that manufacture the goods to be sold, so does child pornography. It would not be a defense to a child labor prosecution that employment of children was necessary to enhance the quantity or quality of the product produced. Similarly, it should be no defense

distribution, they do not prohibit the possession of such materials for personal use in the home or elsewhere.” *Id.* at 402 (citing the Penal Codes of England, Italy, France, Hungary, and the former U.S.S.R.). Similarly, in Germany the focus is on protecting children, not banning pornography: German federal law “allows the distribution of adult communications if generally available technology allows parents to prevent their children from accessing such contents.” Lothar Determann, *The New German Internet Law*, 22 HASTINGS INT’L & COMP. L. REV. 113, 146 (1998). Denmark goes even further, having repealed its obscenity statute in 1969. Eric Schlosser, *The Business of Pornography*, U.S. NEWS & WORLD REPORT, Feb. 10, 1997, at 42, 50.

19. See *Miller*, 413 U.S. at 24 (holding that material that predominantly appeals to the prurient interest, describes sex in a patently offensive way, and lacks serious literary, artistic, political, and scientific value, is outside the ambit of First Amendment protection).

20. It certainly seems to appeal predominantly to a prurient (shameful or morbid) interest in sex, describe sex in a patently offensive way, and lack serious literary, artistic, or scientific value. To be sure, the *Ferber* jury found the defendant guilty of disseminating child pornography and not guilty of disseminating obscenity with respect to the same movies. *New York v. Ferber*, 458 U.S. 747, 752 (1982). Most probably, this was due to an unwillingness to convict twice for what was essentially one offense.

that the finished product had some kind of literary or artistic merit. It is the use of a child in an explicit sexual performance that is rightly forbidden.²¹

Similarly, as the United States Supreme Court has suggested, morphed child pornography²² is enough like real child pornography that it should be treated as though it were real.²³ A morphed image does not harm a real child in the making of the picture, but it does harm the child by providing an unauthorized permanent and false record of the child's engaging in sexual activity.²⁴

Apart from pornography that displays the image of a real child, actual or morphed, the objections to these materials are similar to the objections to any kind of distasteful speech, and should be subject to the same kind of scrutiny. In the remainder of this paper, I shall explain why none of the justifications generally advanced against virtual child pornography warrant its prohibition.

III. VIRTUAL PORNOGRAPHY'S CAPACITY TO HARM REAL CHILDREN

Proponents of criminalizing virtual pornography argue that there are two ways in which such materials can harm real children. First, they argue that virtual child pornography can whet a pedophile's appetite, making it more likely that he will abuse real

21. I put to one side the issue of whether the jurisdiction punishing the dissemination of child pornography is the one in which the pornography was made. I deal with the resolution of that issue elsewhere. See Loewy, *supra* note 2, at 480–82.

22. "Morphed" child pornography consists of images of a real child altered, often by computer, so that the child appears to be engaging in sexual activity. See *Aschroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1397 (2002).

23. The suggestion stopped short of a holding. In *Free Speech Coalition*, Justice Kennedy wrote that "[a]lthough morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber*." *Id.*

24. Certainly such pictures can cause harm by their very existence. Consider the recent Miss North Carolina dispute in the 2002 Miss America contest. Miss North Carolina's photograph was taken unauthorizedly while she was changing clothes. The mere suggestion that such a picture existed was enough to cause her to resign from the Miss America pageant.

children.²⁵ Second, they argue that a pedophile can use a picture of what appears to be a real child enjoying her sexuality as a visual aid to persuade an innocent victim to engage in similar activity.²⁶ I will treat these arguments separately.

As to the first argument, I question both its factual accuracy and its legal significance. As to its accuracy, I assume that many, if not most, pedophiles possess child pornography. But it is quite another thing to assume that the pornography caused the pedophilia. More likely, it was the perpetrator's attraction to children that caused him to possess the pornography, rather than vice-versa.²⁷ Indeed, one does not have to approach a "Clockwork Orange"²⁸ scenario to find behavioralists employing child pornography for the purpose of curing pedophiles.²⁹

25. *E.g.*, Child Pornography Prevention Act, Pub. L. No. 104-208, § 121(4), 110 Stat. 3009-26, 3009-26 (1996) (finding that "child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites").

26. *E.g.*, Child Pornography Prevention Act § 121(1)(c) (finding that "child pornography is often used as part of a method of seducing other children into sexual activity with an adult").

27. *See* EBERHARD KRONHAUSEN & PHYLLIS KRONHAUSEN, PORNOGRAPHY AND THE LAW 335 (Ballantine Books 1964) (1959) (arguing that "it is clinically very dangerous to block by critical or prohibitory attitudes and actions the few remaining fantasy outlets of sexually disturbed individuals"); *see also* 2 MARCIA PALLY, SENSE AND CENSORSHIP: THE VANITY OF THE BONFIRES 42-43 (1991) (reprinting studies conducted in Denmark, Sweden, and the former West Germany that conclude that the availability of sexually explicit material leads to less crime, not more). Even opponents of pornography have long had to concede that there is "no evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquency or criminal behavior among youth or adults." U.S. COMMISSION ON OBSCENITY AND PORNOGRAPHY, REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 32 (1970). For a similar concession, *see* Lydia W. Lee, *Child Pornography Prevention Act of 1996: Confronting the Challenges of Virtual Reality*, 8 S. CAL. INTERDISC. L. J. 639 (1999).

28. *A CLOCKWORK ORANGE* (Warner Brothers 1971). In this film, a criminal is repeatedly shown images of horrific violence and given a drug that makes him associate those images with strong feelings of nausea. The character is released into the world unable to commit any violent acts or even to think violent thoughts.

29. *See* W.C. Lobitz & J. LoPiccolo, *New Methods in Behavioral Treatment of Sexual Dysfunction*, 3 J. BEHAV. THERAPY & EXPERIMENTAL

I do not mean to argue that there has never been a pedophile who but for the pornography would not have committed his crime. But that can hardly be the relevant standard. To sustain this justification, it would be necessary to establish that virtual child pornography (as opposed to real child pornography) has significantly increased pedophilia. To prove that five people who viewed virtual pornography committed an act of pedophilia that they otherwise would not have committed (assuming one could establish causation, which I doubt) would only tell half of the story. We would also have to know how many potential pedophiles had their appetites satiated by virtual child pornography, and therefore left real children alone.

To illustrate, three of the most heinous crimes in history were inspired respectively by the *Holy Bible*,³⁰ an Anglican High Church service,³¹ and the movie *The Ten Commandments*.³² Obviously, nobody measures the worth of these sources by the worst things that they inspired. To be sure, child pornography, virtual or otherwise, has undoubtedly done far more harm and far less good than the aforementioned sources. Nevertheless, it is not intuitively obvious, nor has it been proven, that eliminating all virtual pornography from the face of the earth would significantly reduce the incidence of pedophilia.

More importantly, even if it could be proven that virtual child pornography caused significant net harm, it would not follow that the law should permit its suppression. One of the costs of free speech is the recognition that sometimes speech will do more harm than good. Even so, for the reasons already given,³³ it is better to

PSYCHIATRY 245, 265–71 (1972); Patricia Gillan, *Therapeutic Uses of Obscenity*, in CENSORSHIP AND OBSCENITY 127 (Rajeev Dhavan & Christie Davies eds., 1978).

30. Albert Fish was inspired to castrate and “sacrifice” young boys by reading about sacrifices in the Bible. Earl Finbar Murphy, *The Value of Pornography*, 10 WAYNE L. REV. 655, 668 (1964).

31. John George Haigh was inspired by the procedures of the Anglican High Church Service to drink his victims' blood through straws and dissolve their bodies in acid baths. *Id.*

32. Heinrich Pommerenke was prompted by Cecil B. DeMille's film *The Ten Commandments* to rape, abuse, and slay women. *Id.*

33. See *supra* Section 1.

allow the speech to cause whatever harm it may rather than to allow the government the power to decide whether the material can be published at all. For example, *The Turner Diaries* was said to have been the inspiration for Timothy McVeigh's massacre at Oklahoma City. It would not be hard for a court to conclude that on a cost-benefit basis that book should be condemned. Indeed, it is hard for me to believe that *The Turner Diaries* did not do significantly more harm than good. Yet, I would vehemently oppose the government's power to remove it from the marketplace of ideas.

To further illustrate the wrongness of allowing judges (or legislators) to condemn a book based on its net harm, imagine a claim in the United States that the *Qur'an* should be banned because it was said to inspire the 9/11 terrorists. Would anybody feel comfortable leaving a good versus harm standard to American judges, most of whom are Christian, in regard to Islam's holiest book? I certainly would not, and thus conclude that even if virtual child pornography were conclusively shown to do more harm than good, the Supreme Court was correct in not allowing it to be eliminated.³⁴

As to the argument that virtual pornography can be used to seduce children, Justice Kennedy, for the Supreme Court, got it exactly right when he noted that if virtual pornography is to be suppressed because of its capacity to seduce children, we might as well suppress "cartoons, video games, and candy."³⁵ (He could have added bicycles, puppy dogs, and vans.) The point is, of course, that many things, including but not limited to literature, can be misused. But, as the Court once succinctly put it, we must not "reduce the adult population . . . to reading only what is fit for children."³⁶

34. To further illustrate this point, consider the Hollywood satire *Pleasantville* (New Line Cinema 1998), which recounts the story of a town from the 1950s where only sweetness and light is allowed. Anybody who dares to deviate from the approved "everything is perfect" mantra is dealt with harshly.

35. *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1402 (2002).

36. *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

IV. DISTINGUISHING VIRTUAL FROM REAL CHILD PORNOGRAPHY

By far the most powerful argument for punishing virtual child pornography is the difficulty of distinguishing it from the real thing. The argument is that virtual and real pictures look so indistinguishable that a person marketing real child pornography might argue either that the material is virtual (and you cannot prove beyond a reasonable doubt that it is not) or at least that the defendant believed that it was virtual. To the extent that this argument rests on a factually sound premise, it presents a very serious problem. If real child pornography is punishable, but virtual is not, and you cannot tell the difference, what's a government to do?

The good news is that, at least for now, that does not seem to be an insurmountable problem. Although criminal defendants charged with possession of child pornography have sometimes argued that the material was virtual, they have not generally succeeded.³⁷ Furthermore, there is technology available that allows the government to take a picture apart, pixel by pixel, to determine its origin.³⁸ Thus, at present, detection appears to be keeping up with technology.

To the extent that technology outstrips detection and one really cannot tell the difference, some type of burden of proof shifting device might be appropriate. Surely, the government should be able to argue that a picture that appears real can be treated as real in the absence of evidence that it is not. Such a rule would differ from the one at issue in *Free Speech Coalition*, where

37. Indeed, as of April 16, 2002, when *Free Speech Coalition* was decided, they had never succeeded. See *Free Speech Coalition*, 122 S. Ct. at 1406 (Thomas, J., concurring).

38. The technique is called "digital pixel examination." See Jim Goldman, *Detecting Real Child Porn: New Software Tools Spot Doctored Pictures* (April 22, 2002) (reporting that this closely guarded technology "may be helping police spot pornographic pictures that depict actual children"), at http://abcnews.go.com/sections/scitech/TechTV/techtv_childporn020422.html (last visited Jan. 25, 2003) (on file with First Amendment Law Review).

the statute allowed punishment even when it was clear that the picture was virtual.³⁹

As for the scienter issue, presumably it would take more than the defendant's word that he intended to transmit virtual pictures to create a reasonable doubt. If the Government proves that the pictures are real, a simple statement from the defendant that he thought they were virtual would be very unlikely to create a reasonable doubt.

V. DECRIMINALIZING VIRTUAL PORNOGRAPHY MAY PROTECT REAL CHILDREN

It is certainly not immediately obvious that real children would be *better* off by allowing the sale of virtual pornography, yet that may in fact be the case. In an ideal world, nobody would want child pornography, real or virtual. Unfortunately, the world we live in is not ideal. Despite the efforts of all civilized governments to suppress child pornography, it is still with us. Why? Simply because the demand is there. If one accepts the unfortunate truth that the demand for child pornography exists despite these governmental efforts, there is little reason to believe that we will totally stamp it out.

On the other hand, if virtual child pornography is (or can be made) nearly identical to real child pornography and only the latter is unlawful, why wouldn't the pornographer sell only the former? Certainly most pornographers would love to avoid the risk of prison if their anticipated profits would not be compromised. And from the consumer's perspective, a virtual picture would also shield him from prosecution.⁴⁰ Thus, there is good reason to believe that legalizing virtual child pornography may reduce the

39. Child Pornography Prevention Act, Pub. L. No. 104-208, § 121, 110 Stat. 3009-26, 3009-28 (1996) (defining child pornography as "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct").

40. The only reason that this might not happen is the dollar cost of producing virtual child pornography. This, of course, is a reason for the law to keep the cost of exploiting real children high. It is also a reason to decriminalize virtual pornography as the Supreme Court has done.

number of children that are currently exploited by this perverted industry. And so, the United States Supreme Court may well have rendered a decision that will ultimately protect children as well as protecting freedom of speech.