Fiction, Culture and Pedophilia: Fantasy and the First Amendment after *United States v. Whorley*

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INTRODUCTION

In 1998, congressional and public sentiment was set ablaze by the publication of a seemingly esoteric academic article by three previously little-known psychologists.[1] The article, in an American Psychological Association ("APA") journal, *Psychological Bulletin*, challenged the "lay belie[f] that child sexual abuse (CSA) causes intense harm" and concluded that the common construct of child sexual abuse was "of questionable scientific validity."[2] The authors suggested further that psychologists researching child sexuality use different terms, "adult-child sex, a value-neutral term" for "a willing encounter with positive reactions," reserving "child sexual abuse, a term that implies harm to the individual," for a nonconsensual experience accompanied by negative feelings.[3] The National Association for Research and Therapy of Homosexuality ("NARTH"), a group that claims to "help" gays and lesbians rid themselves of "unwanted homosexuality," was the first to comment.[4] NARTH claimed that the APA was attempting to

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1. *See* Erica Goode, *Study on Child Sex Abuse Provokes a Political Furor*, N.Y. TIMES, June 13, 1999, at A33.

2. Bruce Rind, Philip Tromovitch & Robert Bauserman, *A Meta-Analytic Examination of Assumed Properties of Child Sexual Abuse Using College Samples*, 124 PSYCHOL. BULL. 22, 22, 46 (1998).

3. *Id.* at 46.

4. *See NARTH's Mission Statement*, NARTH, http://www.narth.com/menus/mission.html (last visited Feb. 2, 2011); *see also The Three Myths of Homosexuality*, NARTH, http://www.narth.com/menus/myths.html (last visited Feb. 2, 2011). The American Psychological Association and the American Medical Association unequivocally oppose the representation of homosexuality as a mental disorder that can be "cured" through "conversion therapy." *See AMA Policy Regarding Sexual Orientation*, AMA, http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glbt-advisory-committee/ama-policy-regarding-sexual-orientation.shtml (last visited Feb. 2, 2011); *APA Council of Representatives Passes Resolution on So-Called Conversion Therapy*, SEXUAL ORIENTATION: SCI., EDUC., & POL'Y (Aug. 14, 1997), http://psychology.ucdavis.edu/rainbow/html/resolution97.html. LGBT advocacy organizations have, unsurprisingly, also challenged the claims of NARTH and published findings on the harms of the "ex-gay movement." *See generally* POLITICAL RESEARCH ASSOCS., EQUAL PARTNERS IN FAITH & THE POLICY INST. OF THE NAT'L GAY & LESBIAN TASK FORCE, CHALLENGING THE EX-GAY MOVEMENT: AN INFORMATIONAL PACKET (1998). *See also The Rind Controversy*, MHAMIC, http://www.mhamic.org/rind/ (last visited Feb. 2, 2011).

"normalize pedophiles."[5] Dr. Laura Schlessinger agreed, and together with NARTH and the conservative organization Family Research Council, prodded Congress to respond.[6] House Majority Whip Tom DeLay (R-Texas) and Dr. Schlessinger appeared at a press conference convened by the Family Research Council, introducing a bill requiring the APA to renounce the findings of the study.[7] A House Resolution condemning the psychologists' conclusions passed 355 to zero in 1999.[8] Looking back on the episode, literary critic Kathryn Bond Stockton comments that "Congress, it would seem, has acted only once to resolve against science: in order to say that children must be harmed."[9]

The story has not changed much in the years between that late 1990s period of congressional sex panic and today.[10] It seems likely that similar furor would result if a similar article were published today. In November of 2010, popular online retailer Amazon.com came under fire for offering in its Kindle bookstore an e-book entitled *The Pedophile's Guide to Love and Pleasure*.[11] Amazon at first refused to remove the book from its site, responding, "Amazon believes it is censorship not to sell certain books simply because we or others believe their message is objectionable. Amazon does not support or promote hatred or criminal acts, however, we do support the right of every individual to make their own purchasing decisions."[12] However, the blogosphere soon erupted with news of the book, and thousands threatened to boycott Amazon via Twitter. One person "tweeted," "Free speech doesn't include a written manual on how to exploit, molest and rape our children."[13] Others created Facebook pages advocating boycotting Amazon until

5. KATHRYN BOND STOCKTON, THE QUEER CHILD, OR GROWING SIDEWAYS IN THE TWENTIETH CENTURY 69 (2009).

6. Dr. Laura Schlessinger and the Family Research Council are also widely known for their anti-gay views. *See, e.g.*, *The Rind Controversy*, *supra* note 4.

7. *See* Judith Reisman, *APA Pedophilia on the March*, WORLDNETDAILY (June 1, 1999), http://www.wnd.com/news/article.asp?ARTICLE_ID=16148 ("After the American Psychological Association removed pedophilia as sexual perversion in its 1994 Diagnostic and Statistical Manual IV, it was only a matter of time until The American Psychological Association would ease us further toward legalizing child sexual abuse.").

8. H.R. Con. Res. 107, 106th Cong. (1999) (enacted).

9. STOCKTON, *supra* note 5, at 71.

10. The "Monica Lewinsky affair" is one prominent example of "congressional sex panic." *See, e.g.*, Dana D. Nelson & Tyler Curtain, *The Symbolics of Presidentialism: Sex and Democratic Identification*, *in* OUR MONICA, OURSELVES: THE CLINTON AFFAIR AND THE NATIONAL INTEREST 34 (Lauren Berlant & Lisa Duggan eds., 2001). Nelson says: "This clarifies the sexual panic that pervades congressional 'outrage,' the imperative to silence anything that does not speak from the normatively repressive space of the faith-demanding hetero-husband. . . . [The] terminology [of 'constitutional crisis'] made us feel as though our 'whole country' was at stake . . . ." *Id.* at 41–42.

11. Nick Bilton, *Amazon Under Attack for Sale of Pedophile Book*, N.Y. TIMES BITS BLOG (Nov. 11, 2010, 5:10 PM), http://bits.blogs.nytimes.com/2010/11/11/amazon-under-attack-for-sale-of-pedophile-book/?scp=1&sq=pedophilia&st=cse.

12. *Id.*; Douglas MacMillan, *Amazon.com Irks Users over Pedophile Guide Sale, Defends Move*, BLOOMBERG BUSINESSWEEK (Nov. 10, 2010, 5:39 PM), http://www.businessweek.com/news/2010-11-10/amazon-com-irks-users-over-pedophile-guide-sale-defends-move.html.

13. *See* Hugh Collins, *'Pedophile's Guide' Sparks Angry Criticism of Amazon*, AOLNEWS (Nov. 10, 2010, 3:45 PM), http://www.aolnews.com/2010/11/10/pedophiles-guide-sparks-angry-criticism-of-

the book was gone.[14] After the "online atom bomb" of the controversy, Amazon removed the book from its site without further comment.[15] Less than forty-eight hours since the controversy had begun, the book's page was replaced with the message "We're sorry. The Web address you entered is not a functioning page on our site."[16]

Child sexual abuse has become a prominent, even central issue in our culture.[17] Some view child sexual abuse as a national or even international emergency, a devastating and widespread social problem.[18] Others see it, at least partly, as a "moral panic" full of exaggeration and hysteria. For instance, Victorianist and cultural critic James Kincaid observes: "child-molesting trials . . . the newspapers, advertising, and sensationalistic best-sellers all tell us there [is] a multi-billion dollar kiddie porn industry, and a vast network of pedophiles."[19] Laura Kipnis, a

amazon/ (quoting Twitter user).

14. Shawn Alff, *Amazon Finally Stops Selling* The Pedophile's Guide to Love and Pleasure, CREATIVE LOAFING, THE DAILY LOAF BLOG (Nov. 11, 2010, 9:08 AM), http://blogs.creativeloafing.com/dailyloaf/2010/11/11/amazon-finally-stops-selling-the-pedophiles-guide-to-love-and-pleasure/ (discussing "a tidal wave of angry voices on Twitter" and "two Facebook pages dedicated to boycotting Amazon"); Bilton, *supra* note 11; Nick McMaster, *Twitter Users Slam Amazon Over 'Pedophile's Guide'*, NEWSER (Nov. 10, 2010, 4:57 PM), http://www.newser.com/story/105071/twitter-users-slam-amazon-over-pedophiles-guide.html (quoting Twitter user and Amazon's refusal to stop selling the book).

15. Bilton, *supra* note 11 ("[T]he small debate exploded into an online atom bomb . . . ."); Claudine Beaumont, *Amazon Removes 'Paedophile Guide' from Kindle Store*, TELEGRAPH TECH. NEWS (Nov. 11, 2010, 12:44 PM), http://www.telegraph.co.uk/technology/amazon/8126013/Amazon-removes-paedophile-guide-from-Kindle-store.html ("Amazon has not given any reason for its change of heart.").

16. Bilton, *supra* note 11 (containing screenshot of Amazon "We're sorry" page).

17. First amendment and art law scholar Amy Adler argues that "[c]hild sexual abuse has become the master narrative of our culture." Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 227 (2001) [hereinafter Adler, *Perverse*] (citing Nancy Scheper-Hughes & Howard F. Stein, *Child Abuse and the Unconscious in American Popular Culture*, *in* THE CHILDREN'S CULTURE READER 178, 179 (Henry Jenkins ed., 1998)). Scheper-Hughes and Stein insightfully discuss how in the 1960s, child abuse and neglect were "medicalized," making a new "social space," including the creation of novel laws and "interventional strategies," come into view. *See* Scheper-Hughes & Stein, *supra*, at 178–79. It should also be noted that "child sexual abuse" encompasses a wide variety of types of behavior or exploitation. The National Center for Missing & Exploited Children lists several types, including "possession, manufacture, and distribution of child pornography," "child prostitution," "sex tourism involving children," "extra-familial child sexual molestation" and "online enticement of children for sexual acts." *See Sexual Exploitation of Children*, NAT'L CENTER MISSING & EXPLOITED CHILDREN, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=218 (last visited Feb. 2, 2011).

18. UNICEF and UNESCO, both international bodies, have convened an International Conference on Combating Child Pornography on the Internet, compiling a plan that includes "national hot lines and 'electronic watchtowers' to report causes of pedophilia and child pornography on the Internet." Steven Hick & Edward Halpin, *Children's Rights and the Internet*, 575 ANNALS AM. ACAD. POL. & SOC. SCI. 56, 61 (2001). The United Nations also instituted a special rapporteur on child pornography. *Id.*; *see also* JAMES R. KINCAID, EROTIC INNOCENCE: THE CULTURE OF CHILD MOLESTING 9–10 (1998) [hereinafter KINCAID, EROTIC] (discussing the sensationalistic nature of reports of "an 'epidemic' of child molesting, a 'National Emergency'").

19. KINCAID, EROTIC, *supra* note 18, at 20.

media studies scholar and cultural critic, argues:

> Pedophilia is the new evil empire of the domestic imagination: now that communism has been defanged, it seems to occupy a similar metaphysical status as the evil of all evils, with similar anxiety about security from infiltration, the similar under-the-bed fear that "they" walk among us undetected—fears that are not entirely groundless, but not entirely rational either.[20]

Commenting on the effect of this rhetoric on freedom of expression, first amendment and art law scholar Amy Adler notes, "[I]f you mention the First Amendment in this context, someone might accuse you of being a pedophile."[21]

The *Psychological Bulletin* and Amazon affairs illustrate how pedophilia troubles the freedom of expression. Congress was so aghast at the Rind-Tromovitch-Bauserman article that it felt the need to pass a resolution condemning it. Amazon, on the other hand, defended itself against what it perceived to be "censorship"—until the controversy became overwhelming.

Considering these phenomena, it may be unsurprising that the area of the law where obscenity, pornography and children meet is where the freedom of expression is most, and most uncontroversially, curtailed.[22] One such case is *United States v. Whorley*, decided by the Fourth Circuit in 2008.[23] Briefly, a pedophile who enjoyed looking at illegal pictures was caught, convicted and sent to prison; all of his appeals were denied, including the most recent: a 2010 denial of certiorari by the Supreme Court.[24] More specifically, the defendant, Dwight Whorley, downloaded or otherwise received several dozen pictures and a handful of email messages depicting or involving children in various sexual situations.[25] Some of these representations were of real children.[26] Other representations were of entirely fictional children, the figments of someone's imagination: allegedly "obscene" cartoon illustrations and descriptions of fantasies about children.[27] Whorley was prosecuted and convicted under federal child pornography and obscenity laws and sentenced to twenty years in prison.[28] Whorley claimed, inter

20. LAURA KIPNIS, BOUND AND GAGGED: PORNOGRAPHY AND THE POLITICS OF FANTASY IN AMERICA 5 (1995).

21. Adler, *Perverse*, *supra* note 17, at 210.

22. *See* Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 922 (2001) [hereinafter Adler, *Inverting*] (describing child pornography law as the area of law "where the greatest encroachments on free expression are now accepted").

23. United States v. Whorley (*Whorley III*), 550 F.3d 326 (4th Cir. 2008), *aff'g* United States v. Whorley (*Whorley I*), 386 F. Supp. 2d 693 (E.D. Va. 2005) *and* United States v. Whorley (*Whorley II*), 400 F. Supp. 2d 800 (E.D. Va. 2005), *reh'g and reh'g en banc denied*, United States v. Whorley (*Whorley IV*), 569 F.3d 211 (4th Cir. 2009), *cert. denied*, Whorley v. United States (*Whorley V*), 130 S. Ct. 1052 (2010).

24. *Whorley V*, 130 S. Ct. at 1052 (denying certiorari without opinion).

25. *Whorley III*, 550 F.3d at 331.

26. *Id.*

27. *Id.*

28. *Id.* at 332.

alia, that these laws violated the First Amendment.[29] A Fourth Circuit panel, divided two to one, upheld his convictions and sentence.[30] The entire circuit, except the judge who had dissented on the panel, denied rehearing of the case en banc.[31] Judge Gregory, the dissenter, concurred in upholding the convictions relating to the representations of actual children, but dissented as to the upholding of the convictions relating to the cartoon pictures and emails.[32] He also dissented to the denial of rehearing, urging Whorley to seek certiorari (which Whorley did, to no avail).[33]

Recently, some have taken a critical view of the legal treatment of crimes involving pedophilia and child pornography. Religion scholar and historian Philip Jenkins, for instance, notes that:

> Viewing child porn material is a criminal offense, in a legal environment in which it is all but impossible for even the most inept of prosecutors to lose a case. Nor, given the horror attached to the offense, is there likely to be much public outcry about judicial railroading: in this area of law, only the most egregious cases of police entrapment have inspired any media complaints whatever.[34]

Both Jenkins and Adler notice that there is no "liberal" or "libertarian" position on child pornography, "no minoritarian school that upholds the rights of individuals to pursue their private pleasures."[35] Some of the reasons for this absence might be sound: for instance, there is a suspicion that "the subjects of child pornography cannot give any form of informed or legal consent to their involvement . . . and [that] even when children are just depicted nude, they are subject to actual molestation."[36]

However, a suspicion based on technical legal definitions does not shed much light on the emotion and intensity of the attention given to child sexual abuse. A comment on a case like *Whorley* thus must involve a wider social narrative than the one told in the legal cases involving pedophilia.[37] One aspect of this wider

29. *Id.*; *Whorley I*, 386 F. Supp. 2d 693, 695 (E.D. Va. 2005).

30. *Whorley III*, 550 F.3d at 343.

31. *Whorley IV*, 569 F.3d 211 (4th Cir. 2009).

32. *Whorley III*, 550 F.3d at 353 (Gregory, J., concurring in part and dissenting in part).

33. *Whorley IV*, 569 F.3d at 214 (Gregory, J., dissenting from the denial of rehearing en banc).

34. PHILIP JENKINS, BEYOND TOLERANCE: CHILD PORNOGRAPHY ON THE INTERNET 19 (2001).

35. *Id.* at 4; Adler, *Perverse*, *supra* note 17, at 210 ("There is not an acceptable 'liberal' position when it comes to the sexual victimization of children.").

36. JENKINS, *supra* note 34, at 4.

37. What constitutes "pedophilia" and who are "pedophiles" is not entirely clear or uncontroversial. *See* Dawn Fisher, Tony Ward & Anthony R. Beech, *Pedophilia*, *in* PRACTITIONER'S GUIDE TO EVIDENCE-BASED PSYCHOTHERAPY 531, 531 (Jane E. Fisher & William T. O'Donohue eds., 2006). Fisher, Ward and Beech write:

> The term pedophile has come to be used variously in the scientific and journalistic literature, ranging from being used loosely to describe all individuals who sexually molest children through to a more restrictive subset of child molesters who are only sexually attracted to children. Not surprisingly this has led to confusion as to what the term actually means and what type of person is being included in this category.

Id. The etiology, or causal basis, of pedophilia has been posited to be biological. *See, e.g.*, *Are Some*

understanding has been explored by critics like James Kincaid. His book *Child-Loving: The Erotic Child and Victorian Culture* lends disturbing insight into how we think about pedophiles and children. There, he writes:

> The scenes we enact in our heads answer to and promote needs so insistent they are not going to depend on books alone for their exercise. The fictions we engender have a wider scope, and we find ourselves able to construct them not simply or even mainly by way of novels. We plot the life about us in much the same way, find means for dramatizing our desires and their necessary protections through movies, television, the schools, the athletic fields, the playground, the daycare center, and the courtroom. . . .
>
> By creating gothic melodramas, monster stories of child-molesting and playing them out periodically (often), we provide not just titillation but assurances of righteousness. Demonizing the child-molester much as we demonize Alec d'Urberville, we can connect to a pedophile drama while pretending to shut down the theater.[38]

Kincaid's argument is as important as it is unsettling. He argues that rather than standing apart from pedophilia and objectively judging child molestation and pornography, we are ourselves implicated; in fact, the intensity of our attention indicates how close we want to remain to pedophilia, how it satisfies a strange cultural need. Pedophilia occupies a space of fascination and emotion for us. But, Kincaid argues, rather than dealing with that fascination and emotion, we create a "gothic melodrama" in which the situation is painted in terms of good versus evil, "us" versus "them." We are not only playwrights and directors in the "theater" of pedophilia, but also we are the righteous, observing spectators.

Professor Adler similarly reads the wildly popular television special series "Dateline NBC: To Catch a Predator with Chris Hansen" as a show structured by its audience's (our) pleasure in engaging in the fantasy (she calls it a "highly scripted S&M scene") of the prospective child molester, caught red-handed by the "preppy father figure."[39] Adler asks: what is so entertaining or pleasurable about

Men Predisposed to Pedophilia?, SCIENCEDAILY (Oct. 23, 2007), http://www.sciencedaily.com/releases/2007/10/071022120203.htm; *Pedophiles Have Deficits in Brain Activation, Study Suggests*, SCIENCEDAILY (Sept. 24, 2007), http://www.sciencedaily.com/releases/2007/09/070920091209.htm. Pedophilia has also been theorized to be best conceptualized "at the intersection of sociology and biology, sociobiology." *See* M. Ashley Ames & David A. Houstin, *Legal, Social, and Biological Definitions of Pedophilia*, 19 ARCHIVES OF SEXUAL BEHAV. 333, 339–40 (1990). My reference to "actual pedophiles" is meant to comport with definitions of pedophilia most commonly accepted in the psychological literature on the subject. A good summary is found in Michael Seto's survey of the literature, touching on what is commonly accepted regarding the definition and some of the complexities of the term "pedophilia." Michael C. Seto, *Pedophilia: Psychopathology and Theory*, *in* SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT 164 (D. Richard Laws & William T. O'Donohue eds., 2d ed. 2008). *See also generally*, SARAH D. GOODE, UNDERSTANDING AND ADDRESSING ADULT SEXUAL ATTRACTION TO CHILDREN: A STUDY OF PAEDOPHILES IN CONTEMPORARY SOCIETY (2010); MICHAEL C. SETO, PEDOPHILIA AND SEXUAL OFFENDING AGAINST CHILDREN: THEORY, ASSESSMENT, AND INTERVENTION (2008).

38. JAMES R. KINCAID, CHILD-LOVING: THE EROTIC CHILD AND VICTORIAN CULTURE 341 (1992).

39. Amy Adler, *To Catch a Predator*, 20 COLUM. J. GENDER & L. (forthcoming 2011) [hereinafter Adler, *To Catch a Predator*] (based on Amy Adler, Remarks at Columbia Law School: A

the show? She argues that there is pleasure or satisfaction in two modes of viewing: one, the familiar condemnation of the "child predator" who has shown up at the house we all know is bugged to the gills with microphones and hidden cameras, ready for sex with a minor; the other, a much more unsettling alignment *with* the predator.[40] We, the audience, watch Hansen, the host, read back to the predator the fantasies he has chatted online about.[41] He begs Hansen to stop.[42] We tune in to hear these transcripts and thus involve ourselves in the fantasies they contain.[43] Adler insightfully argues that our extreme and punitive legal responses to the "child predator" are based on a disavowal of our own identification with the predator.[44] To avoid the appearance of "sympathy" with "predation" (all the while reveling in the drama, the pleasure and the theater of it) we engage in what Freud might call an "ego split."[45]

Symposium Honoring the Contributions of Professor Judith Butler to the Scholarship and Practice of Gender and Sexuality Law (March 5, 2010)).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. Freud discusses "disavowal" on a number of occasions. For instance, in discussing the early appearance of penis envy, he writes:

> [W]hen a little boy first catches sight of a girl's genital region, he begins by showing irresolution and lack of interest; he sees nothing or *disavows* what he has seen, he softens it down or looks about for expedients for bringing it into line with his expectations. It is not until later, when some threat of castration has obtained a hold upon him, that the observation becomes important to him: if he then recollects or repeats it, it arouses a terrible storm of emotion in him and forces him to believe in the reality of the threat which he has hitherto laughed at.

SIGMUND FREUD, SOME PSYCHICAL CONSEQUENCES OF THE ANATOMICAL DISTINCTION BETWEEN THE SEXES (1925), *reprinted in* THE FREUD READER 670, 673–74 (Peter Gay ed., 1989) (emphasis added). A few years later, Freud introduced disavowal—instead of his previously posited repression—as the mechanism by which fetishes grew. *See* 21 SIGMUND FREUD, *Fetishism*, *in* THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 152 (James Strachey et al. eds., James Strachey trans., 1961) (1927). Later, in another revision and summarization, Freud:

> described disavowal as a defense available when the need to preserve the reality-testing function comes into conflict with the perception of a significant environmental reality that is potentially traumatic. Unable to simply turn away, a compromise is formed that attempts to serve both the pleasure and the reality principle. This is accomplished by bringing about an ego split, one arm of which acknowledges the reality, while the other repudiates the meaning of the perception and substitutes a fantasy that protects the individual from the anxiety he would otherwise have to face. Disavowal defends against anxiety-provoking external perceptions and is the counterpart of repression, repression being directed toward similar demands from the inner world of the instincts.

Michael Franz Basch, *The Perception of Reality and the Disavowal of Meaning*, 11 ANN. PSYCHOANALYSIS 125, 135 (1983) (discussing 23 SIGMUND FREUD, *An Outline of Psycho-Analysis*, *in* THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 141) (James Strachey et al. eds, James Strachey trans., 1964) (1940)). More detail would require more depth than there is room for here, but the relevant demonstration is that disavowal, in the psychoanalytic contexts of sex and sexuality formation, the individual and civilization, is a highly important process that is not only surrounded by phobic projections and narratives (such as the denial of castration anxiety), but also operatively attached to the neuroses of individuals and societies. *See generally* HENRY KRIPS, FETISH: AN EROTICS OF CULTURE (1999). When Adler calls the audience's reaction to the "predators" of "To

Sexuality studies scholar Steven Angelides, asking "Why does the very mention of pedophilia evoke such fear, anxiety, and panic among so many people?" also importantly asks, "[W]hat unconscious forces might be at work?"[46] He argues that "the discursive field of pedophilia is contained largely within a neurotic structure."[47] He also helpfully summarizes Freudian thought on what comprises "neurosis":

> [A]nxiety is the "nodal point" of neurosis, and repression the ego's primary defense against it. When disturbing or forbidden ideas threaten to emerge into consciousness, anxiety acts as the danger signal to the ego. The ego attempts to defend itself against these intrusive thoughts, and employs the defense mechanism of repression. When an individual is unable to mount a successful defense against the forbidden thoughts, symptoms develop. As conflict solutions, neurotic symptoms are both signs of and substitutes for unconscious desires . . . . Elements of the discourse of pedophilia are . . . indicative of neurotic symptomatology.[48]

Take the *Psychological Bulletin* affair of 1998–99 as an example: the "disturbing or forbidden ideas" are what got Rind, Tromovitch and Bauserman in such trouble—specifically, "adult-child sex." This idea, published, set off an anxious "danger signal" to the cultural ego. Repression was attempted, but since the ideas were already published, the best Congress could do was implement a neurotic containment strategy: the House Resolution "rejecting the conclusions" of the study.

I would suggest that similar processes of disavowal and neurosis are central to cases like *Whorley*. Although much of the discussion in *Whorley* is about the freedom of expression, this discussion is subsumed under an anxious discussion of the pedophile or "predator." *Whorley* is arguably more about handling the "predator" than it is about the First Amendment or any civil liberties—and yet, as Judge Gregory vigorously argues, the case has effects on those liberties.[49] What is perhaps most striking about *Whorley* is not how the majority deals with the first amendment issues at stake, but rather how those issues are evaded.

Catch a Predator" a "disavowal," she invokes much more than simply a "rejection" or "hatred." She also invokes a psychologically complex phenomenon that involves the processes of the unconscious itself.

46. Steven Angelides, *Historicizing Affect, Psychoanalyzing History: Pedophilia and the Discourse of Child Sexuality*, 46 J. HOMOSEXUALITY 79, 87 (2003).

47. *Id.*

48. *Id.* at 88. Angelides goes on to argue that it is childhood sexual conflict, which is central to classical psychoanalysis, that forms the basis of this neurosis. *See generally id.*

49. *Whorley IV*, 569 F.3d 211, 214 (4th Cir. 2009) (Gregory, J., dissenting from the denial of rehearing en banc) ("The Supreme Court's obscenity jurisprudence has never come close to stripping adults of First Amendment protections for their purely private fantasies, and the implications of our sanctioning this kind of governmental intrusion into individual freedom of thought are incredibly worrisome. This is an important and difficult case . . . ."); Whorley III, 550 F.3d 326, 353 (4th Cir. 2008) (Gregory, J., concurring in part and dissenting in part) ("Today, under the guise of suppressing obscenity . . . we have provided the government with the power to roll back our previously inviolable right to use our imaginations to create fantasies.").

An answer to how this evasion occurs must examine the "cultural unconscious" of the narratives the courts present. Legal scholar Larry Catá Backer comments on the role of courts in society: "Judging is a process of narrative transmogrification: Courts hear the stories of litigants and transform them into something digestible. Courts accomplish this transformation by retelling stories to express conformity with what our society believes and what society 'knows.'"[50] Backer notes that "[t]he process of narrative transformation is *subconscious*."[51] This subconscious nature of judicial narrative-making may have much to do with sexuality's functioning "at the level of the unconscious," as psychoanalytic literary critic Jacqueline Rose has argued.[52] Just as "the story of the murders of Ronald Goldman and Nicole Brown Simpson teaches us far more about the relationships among races, the social code of violence between the sexes and perhaps even the power of juries than they might teach us about the jurisprudence of murder," *Whorley* teaches us more about the narratives of childhood and pedophilia in our culture than it does about its ostensible subject, the First Amendment.[53]

Part I of this Note explains the legal framework that gave rise to *Whorley* by examining the expansion of obscenity law into child pornography law, and by closely examining the majority opinion in *Whorley*.[54] In Part II, this Note discusses the issue of punishment in *Whorley*, considering the dissent's claim that the holding in *Whorley* criminalizes thoughts, violating the First Amendment. This Note also examines the punishment or casting out of the "predator" by reading *Whorley* alongside *Doe v. City of Lafayette, Indiana*, a Seventh Circuit case that also arguably criminalizes thoughts in the service of protecting children.[55] Finally, Part III considers *Whorley* more generally in the context of the chilling effects it may have on artistic expression that legitimately challenges how we think about children and sex.

I. BACKGROUND: THE FIRST AMENDMENT CLAIM, THE INTERNET AND CHILD PORNOGRAPHY

In the 1990s, "obscenity law seemed to be in its death throes, a doctrine largely abandoned by prosecutors."[56] How did we get from there to Judge Gregory's 2008 dissenting opinion in *Whorley* stating that "[t]oday, under the guise of suppressing obscenity . . . we have provided the government with the power to roll back our

50. Larry Catá Backer, *Tweaking Facts, Speaking Judgment: Judicial Transmogrification of Case Narrative as Jurisprudence in the United States and Britain*, 6 S. CAL. INTERDISC. L.J. 611, 611 (1998).

51. *Id.* at 611 (emphasis added).

52. JACQUELINE ROSE, PETER PAN, OR THE IMPOSSIBILITY OF CHILDREN'S FICTION 4 (1992).

53. Backer, *supra* note 50, at 614.

54. *Whorley III*, 550 F.3d at 330–43 (majority opinion).

55. *Whorley IV*, 569 F.3d 211 (4th Cir. 2009); *Whorley III*, 550 F.3d at 326; Doe v. City of Lafayette, 377 F.3d 757 (7th Cir. 2004) (en banc).

56. Amy Adler, *All Porn All the Time*, 31 N.Y.U. REV. L. & SOC. CHANGE 695, 697 (2007) [hereinafter Adler, *All Porn*].

previously inviolable right to use our imaginations to create fantasies"?[57] This Part examines *Whorley* in the context of child pornography and obscenity law, arguing that the upholding of many of Whorley's convictions is complicit with a congressional strategy that substitutes obscenity law for child pornography law to criminalize speech without showing harm. The argument begins with an outline of *Whorley*'s Supreme Court predecessors in child pornography and obscenity law, and proceeds with a discussion of some jurisprudential issues raised by these cases. This Part then discusses the PROTECT Act of 2003, a direct congressional response to the Supreme Court's 2002 ruling in *Ashcroft v. Free Speech Coalition*.[58] Finally, this Part outlines the portion of Judge Niemeyer's majority opinion in *Whorley* that dismisses every first amendment issue that *Whorley* raises.[59]

A. OBSCENITY AND CHILD PORNOGRAPHY IN SUPREME COURT FIRST AMENDMENT JURISPRUDENCE: DOCTRINE AND PRINCIPLES

1. Child Pornography and Obscenity Law Doctrine

a. Miller *and the* Ferber *Exception*

Endeavoring to "formulate standards more concrete than those in the past," referring to a "somewhat tortured history," the Supreme Court in 1973 in *Miller v. California* began with the "categorical[]" agreement that "obscene material is unprotected by the First Amendment."[60] That "tortured history" included *Roth v. United States*, the first case in which the Court enunciated that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."[61] In *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts*, a divided Court produced a test for what constitutes the "obscenity" that can constitutionally be proscribed.[62] The test included the requirement that "the material [be] utterly without redeeming social value," a requirement that the *Miller* court called "virtually impossible to discharge."[63] The *Miller* court cobbled

57. *Whorley III*, 550 F.3d at 353 (Gregory, J., concurring in part and dissenting in part).

58. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18, 21 and 42 U.S.C. (2006)); Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).

59. *Whorley III*, 550 F.3d at 330–43 (majority opinion).

60. Miller v. California, 413 U.S. 15, 20, 23 (1973).

61. Roth v. United States, 354 U.S. 476, 484 (1957). The Court noted the "universal judgment that obscenity should be restrained," citing international, state and federal laws. *Id.* at 485. The Court held unequivocally that "obscenity is not within the area of constitutionally protected speech or press." *Id.*

62. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Mass., 383 U.S. 413, 418 (1966).

63. *Miller*, 413 U.S. at 22; *A Book Named "John Cleland's Memoirs of a Woman of Pleasure,"* 383 U.S. at 418.

together a three-part test from previous decisions, a test that remains the standard for obscenity to this day: 1) "whether the average person, applying *contemporary community standards* would find that the work, taken as a whole, appeals to the *prurient interest*"; 2) "whether the work depicts or describes, in a *patently offensive way*, *sexual conduct* specifically defined by the applicable state law"; and 3) "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific *value*."[64]

All pornography was governed by the *Miller* test until the 1982 case, *New York v. Ferber*, in which the Supreme Court remarkably recognized child pornography as a new form of speech categorically unprotected by the First Amendment.[65] The defendant in *Ferber*, the owner of a bookstore "specializing in sexually oriented products" sold two films "devoted almost exclusively to depicting young boys masturbating."[66] The Court noted that laws criminalizing the distribution of child pornography could end up encroaching on protected expression "by allowing the hand of the censor to become unduly heavy," but the Court decided that the states were entitled to greater deference in regulating child pornography.[67] The Court identified five reasons: 1) "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance"; 2) the dissemination of photographs and films of sexual activity by children "is intrinsically related to the sexual abuse of children," in that "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation" and "the distribution network for child pornography must be closed . . . [to] effectively control[]" it; 3) the commercial selling and advertising of child pornography "provide an economic motive for and are thus an integral part of the production of such materials"; 4) "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*"; and 5) holding child pornography outside of first amendment protection "is not . . . incompatible" with the earlier precedents.[68] The Court also expressed the opinion that whether or not pornographic films and photographs of children satisfied the *Miller* test was irrelevant, as whether or not a piece of child pornography appealed to the "prurient interest" (first prong), whether or not it was "patently offensive" (second prong) and whether or not it had "serious literary, artistic, political, or scientific value" (third prong) did not affect the basic fact that "child[ren] ha[d] been physically or psychologically harmed in the production of the work."[69] Obscenity and child pornography law are thus closely related but distinct.[70]

64. *Miller*, 413 U.S. at 24 (internal citations and quotation marks omitted) (emphasis added).
65. New York v. Ferber, 458 U.S. 747, 774 (1982).
66. *Id.* at 751–52.
67. *Id.* at 756.
68. *Id.* at 756–64.
69. *Id.* at 760–61.
70. *See* Gabrielle Russell, Comment, *Pedophiles in Wonderland: Censoring the Sinful in Cyberspace*, 98 J. CRIM. L. & CRIMINOLOGY 1467, 1477 (2008) ("Although child pornography law grew

b. Expanding the Exception: Oakes *and* Osborne

The *Ferber* Court arguably begged the question of what "child pornography" really *is*, what kinds of representations constitute child pornography and which of these can be proscribed without running afoul of the First Amendment. The Court has doctrinally moved in the direction of expanding both what constitutes child pornography and when it can be proscribed.[71] In *Massachusetts v. Oakes*, a 1989 case, the state statute in question criminalized the act of a person

> [with] reason to know that [a] person is a child under eighteen years of age [who] hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to pose or be exhibited in a state of nudity or to participate or engage in any live performance or in any act that depicts, describes or represents sexual conduct for purpose of visual representation or reproduction . . . .[72]

The Court declined to consider the overbreadth challenge the defendant raised.[73] What is more, two concurring Justices, on the authority of *Ferber*, indicated that it would be constitutionally permissible for a state to proscribe *all* representation of childhood nudity so long as the statutes carved out exceptions for certain valid "purposes."[74]

The next year, in *Osborne v. Ohio*, the Court held that mere possession and viewing (as opposed to advertising, distribution and sale, as in *Ferber*) of child pornography could be proscribed.[75] Although *Stanley v. Georgia* had clearly stated two decades before that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime,"[76] the Court in *Osborne*

out of obscenity precedents, the two areas of law are distinct.").

71. *See* Adler, *Perverse*, *supra* note 17, at 238–39 ("Each subtle reiteration of the definition of 'lascivious exhibition of the genitals' since *Ferber* has expanded it.").

72. Massachusetts v. Oakes, 491 U.S. 576, 579 (1989) (quoting MASS. GEN. LAWS ch. 272, § 29A (1986)).

73. *Id.* at 583–84.

74. *Id.* at 588–90 (Scalia and Blackmun, JJ., concurring). Such "purposes" included "artistic purposes" and "family photographs." *Id.* at 589.

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

76. Stanley v. Georgia, 394 U.S. 557, 568 (1969). Even though *Stanley* held that the First and Fourteenth Amendments did not allow the criminalization of obscene materials inside the home, as the Court later noted, "*Stanley* depended, not on any First Amendment right to purchase or possess obscene materials, but on the *right to privacy in the home*," further emphasizing the reasoning of the "[t]hree concurring Justices [who] indicated that [*Stanley*] could have been disposed of on Fourth Amendment grounds without reference to the nature of the materials." United States v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 126 (1973) (emphasis added). The same day *12 200-Foot Reels* was decided, the Court held that the constitutionally protected "zone of privacy" for obscene materials did not extend beyond the home. United States v. Orito, 413 U.S. 139, 141–43 (1973). *Orito* and *12 200-Foot Reels* were both five to four decisions, however, and Justices Douglas and Brennan wrote dissents in each, which could theoretically be cited for support in child pornography and obscenity cases. Justice Douglas began in *12 200-Foot Reels*, "I know of no constitutional way by which a book, tract, paper, postcard, or film may be made contraband because of its contents. The Constitution never purported to give the Federal Government censorship or oversight over literary or artistic productions . . . ." *12 200-Foot Reels*, 413 U.S. at 130–31 (Douglas, J., dissenting). Justice Douglas had always held that

reasoned that child pornography could be distinguished from obscene materials depicting adults, because of the state's "compelling interests in protecting the physical and psychological well-being of minors and in destroying the market for the exploitative use of children by penalizing those who possess and view the offending materials," citing *Ferber*.[77] *Osborne*'s holding is particularly notable considering that this "destroying the market" rationale is not accepted in any context other than child pornography.

One example comparable to, but treated entirely differently from, child pornography is the depiction of animal cruelty ending in death to the animals depicted. In the 2010 decision *United States v. Stevens*, the Supreme Court declined to extend the *Ferber* "destroying the market" rationale for upholding child pornography statutes to a federal anti-animal-cruelty-video law.[78] The law at issue in *Stevens* criminalized depictions such as dog fighting tapes and "crush videos" in which small animals are trampled and crushed to death on tape for the sexual gratification of the viewer.[79] The Court in *Stevens* ruled that the federal criminalization of these videos was overbroad and in violation of the First Amendment.[80] Justice Alito, the sole dissenter, argued that the "destroying the market" rationale of *Ferber was* in fact applicable to depictions of animal cruelty.[81] However, he made a point of noting that "the abuse of children is certainly much more important than preventing the torture of the animals used in crush videos."[82] Protecting children from being depicted sexually clearly holds a special place in first amendment jurisprudence, justifying intrusions far beyond those that are accepted in other contexts.

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excluding obscenity from the First Amendment's protection violated the Constitution. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 114 (1973) (Douglas, J., dissenting). Justice Brennan had come to the same point. By the time of the 1973 *Miller*, *Paris Adult Theatre I*, *12 200-Foot Reels* and *Orito* decisions, Justice Brennan believed that the modern architecture of obscenity law, begun by the decision he himself had written in *Roth*, should be abandoned. *See id.* at 73 (Brennan, J., dissenting). Justice Brennan argued:

> If, as the Court today assumes, a state legislature may act on the assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior, then it is hard to see how state-ordered regimentation of our minds can ever be forestalled. For if a State, in an effort to maintain or create a particular moral tone, may prescribe what its citizens cannot read or cannot see, then it would seem to follow that in pursuit of that same objective a State could decree that its citizens must read certain books or must view certain films. However laudable its goal . . . the State cannot proceed by means that violate the Constitution.

Id. at 110 (Brennan, J., dissenting) (internal citations omitted) (internal quotation marks omitted) (internal ellipses omitted). *See also generally* W. WAT HOPKINS, MR. JUSTICE BRENNAN AND FREEDOM OF EXPRESSION (1991). Obviously, the views of Justices Douglas, Brennan, Stewart and Marshall were edged out. If they had not been, as arguably they should not have been, it seems reasonable to speculate that modern obscenity law and child pornography law could be drastically different.

77. *Osborne*, 495 U.S. at 103.
78. United States v. Stevens, 130 S. Ct. 1577, 1586 (2010).
79. *Id.* at 1583.
80. *Id.* at 1592.
81. *Id.* at 1599–1600 (Alito, J., dissenting).
82. *Id.* at 1600.

c. The Internet and Virtual Child Pornography: Free Speech Coalition

While these cases developed in the Supreme Court, Congress was responding to the threat of child pornography with federal legislation.[83] In 1988, Congress responded to what it saw as the danger of the Internet in the proliferation of child pornography, and passed the Child Protection and Obscenity Enforcement Act.[84] The Act added the phrase "by any means including by computer" into 18 U.S.C. § 2251, a federal statute concerning "sexual exploitation of children."[85]

As technology and the Internet became more advanced, pedophiles and pornographers catering to them began to produce pornographic material using more advanced technologies than those available in the 1970s and '80s, when obscenity and child pornography laws were first adjudicated.[86] Photographs of adults could be "morphed" or otherwise digitally modified to make them appear like children.[87] Congress passed the Child Pornography Prevention Act ("CPPA") in 1996, banning any depiction that "is, *or appears to be*, of a minor engaging in sexually explicit conduct," or "*conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct."[88] The court of appeals circuits split on the constitutionality of the CPPA: the Ninth Circuit found the Act invalid on its face, but the First, Fourth, Fifth and Eleventh Circuits upheld its constitutionality.[89] In the 2002 case *Ashcroft v. Free Speech Coalition*, the

83. Shortly after *Ferber*, Congress passed the Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (codified as amended at 18 U.S.C. §§ 2251–55 (2006)).

84. The Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, Title VII, Subtitle N, 102 Stat. 4181, 4485–4503 (codified as amended at 18 U.S.C. § 2251 (2006)).

85. *Id.* at 4485.

86. *See* Russell, *supra* note 70, at 1481.

87. *See id.* at 1481 n.89 (describing "morphing" as "modifying an image or combining two images into one. For example, the features and genitalia of an adult can be adjusted digitally to appear more childlike, or a child's face can be copied from one photo and pasted onto the nude body of an adult in another.").

88. Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3028 (emphasis added), *invalidated by* Ashcroft v. Free Speech Coal., 535 U.S. 234, 258 (2002) (current version at 18 U.S.C. § 2256(8)(B) (2006)); 18 U.S.C. § 2256(8)(D) (2006) (emphasis added).

89. *See* Free Speech Coal. v. Reno, 198 F.3d 1083, 1097 (9th Cir. 1999) (holding the language "appears to be a minor" and "conveys the impression" unconstitutionally vague and overbroad); United States v. Hilton, 167 F.3d 61, 76–77 (1st Cir. 1999) ("Hilton's vagueness challenge fails [because] there are few equally efficacious alternatives. . . . We see no reason to strike down the CPPA as unconstitutionally vague. The language of the statute affords an ordinary consumer of sexually explicit material adequate notice of the kinds of images to avoid."), *overruled by Ashcroft*, 535 U.S. at 258; United States v. Mento, 231 F.3d 912, 921–22 (4th Cir. 2000) (stating that "[w]e agree with the First Circuit that the statutory language 'appears to be' cannot be improved upon while still achieving the compelling government purpose of banning child pornography" and holding the CPPA not unconstitutionally overbroad or vague), *overruled by Ashcroft*, 535 U.S. at 258; United States v. Fox, 248 F.3d 394, 405, 407 (5th Cir. 2001) (finding that Balthus paintings or stills from film version of *Lolita* would not be sufficiently threatened by the CPPA in light of the constitutional avoidance doctrine and holding that the statute's scienter requirement and affirmative defenses are constitutionally adequate protection against improper prosecution), *overruled by Ashcroft*, 535 U.S. at 258; United States v. Acheson, 195 F.3d 645, 652–53 (11th Cir. 1999) (holding the CPPA not overbroad or unconstitutionally vague), *overruled by Ashcroft*, 535 U.S. at 258.

Supreme Court struck down two provisions of the CPPA as overbroad in violation of the First Amendment.[90] This was the first (and so far, only) time the Court invalidated child pornography legislation on overbreadth grounds.[91] In fact, in the line of child pornography cases starting with *Ferber*, *Ashcroft* was the first decision in which a majority on the Court sent a clear message that some legislation prohibiting certain kinds of child pornography would run afoul of the First Amendment's guarantee that "Congress shall make no law . . . abridging the freedom of speech."[92]

2. Broader First Amendment Theory and Child Pornography Law's Effects

With regard to the intersection of children and sexuality, we may be in what legal scholar Vincent Blasi calls a "pathological period," a historical period in which "certain dynamics . . . radically increase the likelihood that people who hold unorthodox views will be punished for what they say or believe."[93] In his view, the First Amendment ought to provide its most robust protection "in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically."[94]

90. *Ashcroft*, 535 U.S. at 256, 258. The Court writes:

> [Section] 2256(8)(B) covers materials beyond the categories recognized in *Ferber* and *Miller*, and the reasons the Government offers in support of limiting the freedom of speech have no justification in our precedents or in the law of the First Amendment. The provision abridges the freedom to engage in a substantial amount of lawful speech. For this reason, it is overbroad and unconstitutional. . . . § 2256(8)(D) . . . prohibits a substantial amount of speech that falls outside *Ginzburg*'s rationale. . . . the CPPA does more than prohibit pandering. It prohibits possession of material described, or pandered, as child pornography by someone earlier in the distribution chain. . . . The First Amendment requires a more precise restriction. For this reason, § 2256(8)(D) is substantially overbroad and in violation of the First Amendment.

Id. (citing Ginzburg v. United States, 383 U.S. 463 (1966)).

91. *See* Adler, *Inverting*, *supra* note 22, at 962 (noting, in 2001, that "[s]o far, the Supreme Court has rejected all 'overbreadth' challenges to child pornography laws").

92. *Ashcroft*, 535 U.S. at 244 (quoting U.S. CONST. amend. I).

93. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 450 (1985).

94. *Id.* at 449–50. In case one would wonder, the point here is not to present pedophilia or child sexual abuse as merely reflecting "unorthodox ideas" or "stifled" sexual preferences. But the doctrine already presented has shown that, at least for a majority of the Supreme Court, there is a difference between the child pornography regulated in *Ferber*, in which the Court found that actual children were harmed in the production of the pornography, and the virtual child pornography in *Ashcroft*, which "is not 'intrinsically related' to the sexual abuse of children." *Ashcroft*, 535 U.S. at 250 (quoting New York v. Ferber, 458 U.S. 747, 759 (1982)). Also, the psychological literature notes that "'[p]edophilia' is not synonymous with 'sexual offending against children.'" Seto, *supra* note 37, at 164; *see also supra* note 37 (discussing what "pedophilia" is according to varying perspectives). The notorious organization the North American Man/Boy Love Association ("NAMBLA") does indeed see "men and boys in mutually consensual relationships" as an "extreme[ly] oppress[ed]" sexuality. *See Who We Are*, NAMBLA, http://www.nambla.org/welcome.htm (last visited Feb. 2, 2011). The point here is not to support NAMBLA's view or to say that gay pederastic relations should be tolerated or legalized. (NAMBLA seems to assume that issues of whether children can properly give meaningful consent are unimportant or uncontroversial, saying "NAMBLA is strongly opposed to age-of-consent laws and all other

Examples of such periods are the times that produced the Alien and Sedition Acts, the Red Scare and McCarthyism, "lapses in toleration of dissent" that "have acquired an aura of ignominy that says much about the importance of free speech in the pantheon of national ideals."[95]

Professor Adler argues that there has been a recent historical and cultural construction of panic over child sexual abuse and child pornography, and that as a result "[w]e are so horrified . . . that, to combat it, we have *inverted* the First Amendment."[96] The distinction between speech and conduct is a core element of first amendment jurisprudence: a depiction of an act is different from the act itself.[97] The former may not be proscribed; the latter may be.[98] This distinction took time in first amendment jurisprudence to build.[99] Thinking of speech and what it represents as equivalent is "an ancient instinct" which the Court once "succumbed to" in subversive political advocacy cases, but later rejected.[100] "By insisting on the division between speech and what it represents or causes, modern first amendment law marked a triumph of rationality over religious, magical, or superstitious views of speech," Adler writes.[101] But in child pornography law, from *Ferber* to now, that "ancient" equivalence has reasserted itself. In the context of child pornography, the Court holds that the *depiction* of a crime *can* be proscribed without violating the First Amendment; in doing so, it inverts the distinction between speech and action that is at the core of the First Amendment.

Child pornography is the *only* place in first amendment law where it is constitutional to "criminalize the *depiction* of a crime."[102] Criminalizing the depiction of a crime was, in *Ferber*, justified by the idea that criminalizing the depiction was the only way to stamp out the underlying harm (the harm done to the children used in the production of pornography and the continued harm done by its circulation).[103] But *Ferber* was not entirely uncontroversial, even when it was decided.[104] It was signed by a unanimous Court, but three concurring opinions

restrictions which deny men and boys the full enjoyment of their bodies and control over their own lives." *Id.*) The point, rather, is to understand how views such as NAMBLA's operate as a limit to social acceptability, and a limit to the kinds of expression that the First Amendment will protect. The point is to consider what those limits might mean and what the implications are. The response of "Oh, so you think pedophilia, coercion, assault and rape are just 'unorthodox ideas' that are unfairly 'put down' by society and law? Do you *know* what pedophiles *do* to children?" operates as a silencing technique that seeks to foreclose any critical thinking about these issues.

95. Blasi, *supra* note 93, at 456.

96. Adler, *Inverting*, *supra* note 22, at 926 (emphasis added).

97. *Id.* at 972–73.

98. *Id.*

99. *See id.* at 1002.

100. *Id.*

101. *Id.*

102. *Id.* at 984.

103. New York v. Ferber, 458 U.S. 747, 759 (1982) ("[T]he distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.").

104. Sandra Zunker Brown argued in 1982 that *Ferber* was "insufficiently protective of first amendment freedoms, unnecessary to protect children, and unsound," calling its departure from the

raised questions beyond those contemplated by the Court.[105] Also, a commentator noted, "An absolute categorical exclusion such as that created in *Ferber* has never before been permitted, and for excellent reasons."[106]

Whether or not the initial move to allow criminalization of the depiction of a crime is justified in the case of child pornography, child pornography law has moved far beyond that point.[107] In *Osborne*, a new rationale for allowing the

Miller standard of obscenity "ominous" and expressing the hope that prosecutors would retreat from the "extraordinarily broad exclusion" of *Ferber*. Sandra Zunker Brown, Note, *First Amendment—Nonobscene Child Pornography and Its Categorical Exclusion from Constitutional Protection*, 73 J. CRIM. L. & CRIMINOLOGY 1337, 1362–64 (1982).

105. *See Ferber*, 458 U.S. at 774–75 (O'Connor, J., concurring). Justice O'Connor writes:

> [T]he Court does not hold that New York must except material with serious literary, scientific, or educational value, from its statute. The Court merely holds that, even if the First Amendment shelters such material, New York's current statute is not sufficiently overbroad to support respondent's facial attack. The compelling interests identified in today's opinion . . . suggest that the Constitution might in fact permit New York to ban knowing distribution of works depicting minors engaged in explicit sexual conduct, regardless of the social value of the depictions. . . . On the other hand, it is quite possible that New York's statute is overbroad because it bans depictions that do not actually threaten the harms identified by the Court.

Id. (internal quotation marks omitted). Justice Brennan writes:

> [A]pplication of [the New York statute] or any similar statute to depictions of children that in themselves *do* have serious literary, artistic, scientific, or medical value, would violate the First Amendment. . . . I . . . adhere to my view that, in the absence of exposure, or particular harm, to juveniles or unconsenting adults, the State lacks power to suppress sexually oriented materials.

Id. at 775–77 (Brennan, J., concurring) (citing Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting)) (emphasis added). Justice Stevens writes:

> [T]he specific conduct that gave rise to this criminal prosecution is not protected by the Federal Constitution [but] the state statute that respondent violated prohibits some conduct that *is* protected by the First Amendment. The critical question, then, is whether this respondent, to whom the statute may be applied without violating the Constitution, may challenge the statute on the ground that it conceivably may be applied unconstitutionally to others in situations not before the Court. I agree with the Court's answer to this question but not with its method of analyzing the issue.

Id. at 777–81 (Stevens, J., concurring in the judgment) (emphasis added).

106. Brown, *supra* note 104, at 1364. Brown elaborates on the reasons that a categorical exclusion such as *Ferber*'s is inappropriate:

> If this nation is seriously committed to preserving first amendment freedoms, it must allow no departure from the long-standing principle that 'in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression.' In order to detect such infringements, the Court must use sensitive tools. . . . [A]n absolute categorization is not a sensitive tool; it is a blunt instrument. It renders the Court blind to any serious value which a work might contain.

Id. (citations omitted).

107. There is reason to believe that *Ferber*'s rationale is at least less problematic for the First Amendment than the subsequent cases. *See* Osborne v. Ohio, 495 U.S. 103, 129, 126 (1990) (Brennan, J., dissenting) (distinguishing the legitimate statute in *Ferber*, which was not overbroad, because "only 'a tiny fraction of materials within the statute's reach' was constitutionally protected" from the regulation in *Osborne*, which is "plainly overbroad" (quoting *Ferber*, 458 U.S. at 773)); Adler, *Inverting*, *supra* note 22, at 987–88 (recognizing that "there are other bases on which to defend *Ferber* [such as] that the conflation of image and act may be justified because of the special circumstances surrounding child pornography" while questioning these bases by asking whether it is "correct to say that child pornography 'is' child abuse and to treat it accordingly?").

criminalization of possession of child pornography emerged: "evidence suggests that pedophiles use child pornography to *seduce other children* into sexual activity."[108] This is the only time in history that the Court upheld a restriction on speech "because of the possibility that someone might use it for nefarious purposes."[109] Justice Brandeis had, after all, stated unequivocally, "[f]ear of serious injury *cannot alone justify suppression* of free speech . . . . Men feared witches and burnt women. . . . There must be reasonable ground to believe that the danger apprehended is *imminent*."[110] In *Stanley* (distinguished in *Osborne*), the Court said "the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits."[111] When the issue is child pornography, however, the Court is willing to allow the criminalization of speech for a reason accepted *nowhere else* in first amendment law: that pedophiles might "use" child pornography to "seduce other children."[112]

Why did a majority of the Court in *Osborne* strive to distinguish the holding in *Stanley*? Perhaps it has more to do with the "*sin*" or "*immorality*" of child pornography rather than "destroying the market" or the fact that pedophiles might "use" the child pornography to "seduce" children.[113] Legal scholar Louis Henkin argued in 1963 that morality and the concept of sin are *central* to obscenity law, that obscenity laws "are based on traditional notions, rooted in this country's religious antecedents, of governmental responsibility for communal and individual 'decency' and 'morality.'"[114] Henkin argued that "obscenity laws are not principally motivated by any conviction that obscene materials inspire sexual offenses."[115] In other words, obscenity is used primarily to punish and deter "sin," not to prevent harm. But the entire line of child pornography cases is predicated upon the prevention of harm to children.[116] The child pornography cases may be explained better by the Court's wish to punish and deter *moral corruption*, not by its stated objective of protecting children.

B. THE PROTECT ACT AND THE EMERGENCE OF OBSCENITY LAW AS A WAY

108. *Osborne*, 495 U.S. at 111 (emphasis added).

109. Adler, *Inverting*, *supra* note 22, at 993 ("Until *Osborne*, it was unheard of in modern First Amendment law that speech could be banned because of the possibility that someone might use it for nefarious purposes.").

110. Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) (emphasis added), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969); *see also* Adler, *Inverting*, *supra* note 22, at 994 (calling Justice Brandeis's declaration "a basic free speech principle").

111. Stanley v. Georgia, 394 U.S. 557, 567 (1969); *see also* Adler, *Inverting*, *supra* note 22, at 994 (quoting *Stanley*, 394 U.S. at 567).

112. *Osborne*, 495 U.S. at 111.

113. *Id.*

114. Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 391 (1963).

115. *Id.* at 391.

116. *See supra* notes 67–69 and accompanying text.

TO CRIMINALIZE CHILD PORNOGRAPHY

The Court in *Ashcroft* takes pains to make a strong statement in favor of protecting free speech from congressional overreach. The Court wrote:

> Congress may pass valid laws to protect children from abuse, and it has. The prospect of crime, however, by itself does not justify laws suppressing protected speech. . . . . It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities.[117]

Having failed to draft constitutionally sound legislation to deal with the problem of "virtual" child pornography, Congress went back to the drawing board, settling on the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today ("PROTECT") Act, and passing it in 2003.[118] The Act added a new obscenity offense to Title 18 of the U.S. Code, § 1466A(a)(1), which subjects to criminal prosecution "any person who knowingly produces, distributes, receives, or possesses with intent to distribute, a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting that . . . depicts a minor engaging in sexually explicit conduct; and . . . is obscene."[119] Obscene materials have long been unprotected by the First Amendment.[120] However, obscenity prosecutions were almost nonexistent by the 1990s; it was a doctrine "in its death throes."[121] It was time to revive obscenity, Congress seemed to declare, this time as a tool to get around the Court's holding in *Ashcroft*.

The Senate Report on the PROTECT Act claimed that its purpose was to undo the

> great[] impair[ment of] the government's ability to bring successful child pornography prosecutions. . . . Since the ruling in [*Ashcroft*], defendants in child pornography cases have consistently claimed that the images in question could be virtual. By raising this 'virtual porn defense,' the government has been required to find proof that the child is real in nearly every child pornography prosecution.[122]

117. Ashcroft v. Free Speech Coal., 535 U.S. 234, 245 (2002), (citing 18 U.S.C. §§ 2241, 2251 (2000)); *see also* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 874 (1997) ("In evaluating the free speech rights of adults, we have made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment.'" (quoting Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989))); FCC v. Pacifica Found., 438 U.S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it."); Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y., 360 U.S. 684, 689 (1959) ("Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech . . . ." (quoting Whitney v. California, 274 U.S. 357, 378 (1927))).

118. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18, 21, and 42 U.S.C. (2006)).

119. 18 U.S.C. § 1466A(a)(1).

120. *See* Miller v. California, 413 U.S. 15, 20 (1973); Roth v. United States, 354 U.S. 476, 485 (1957).

121. Adler, *All Porn*, *supra* note 56, at 697.

122. S. REP. NO. 108-2, at 4 (2003). Justice Souter notes in his dissenting opinion in the 2008 case

Curiously, the Senate Report does not provide similar justification for the new obscenity offense; it simply explains what the offense entails:

> It prohibits any obscene depictions of minors engaged in any form of sexually explicit conduct. It further prohibits a narrow category of 'hardcore' pornography involving real or apparent minors, where such depictions lack literary, artistic, political or scientific value. This new offense is subject to the penalties applicable to child pornography, not the lower penalties that apply to obscenity, and therefore contains a directive to the U.S. Sentencing Commission requiring it to ensure that the U.S. Sentencing Guidelines are consistent with this fact.[123]

Unlike the *Ferber* definition of child pornography as "intrinsically harmful" to the minors involved in its production, the *Miller* standard of "obscenity" needs no "victims" and is so general as to encompass "patently offensive" exhibitions of "sexual conduct" appealing to the "prurient interest."[124]

In this way, Congress used obscenity law to get around the obstacle of *Ashcroft*. This strategy has affinities with those of organizations such as the National Center for Missing and Exploited Children, whose representative told PROTECT Act sponsor Senator Patrick Leahy (D-VT):

> the vast majority (99–100%) of all child pornography would be found to be obscene by most judges and juries, even under the standard of beyond a reasonable doubt in criminal cases. Even within the reasonable person under community standards model, it is highly unlikely that any community would not find child pornography obscene.[125]

Obscenity law was therefore an attractive avenue allowing Congress to circumvent *Ashcroft*.[126] As one commentator notes, this revision of existing obscenity law "has basically reinstated the ban on virtual child pornography struck down [in *Ashcroft*] but has refashioned it as an obscenity law to avoid having to

United States v. Williams that this basis is questionable. He wrote, "Although Congress found that child pornography defendants 'almost universally rais[e]' the defense that the alleged child pornography could be simulated or virtual, neither Congress nor this Court has been given the citation to a single case in which a defendant's acquittal is reasonably attributable to that defense." United States v. Williams, 553 U.S. 285, 323–34 (2008) (Souter, J., dissenting) (brackets in original).

123. S. REP. NO. 108-2, at 13.

124. *See Miller*, 413 U.S. at 24.

125. Letter from Daniel Armagh, Nat'l Ctr. for Missing & Exploited Children, to Senator Patrick J. Leahy (Oct. 17, 2002), *in* 149 CONG. REC. S2582–83 (daily ed. Feb. 24, 2003) [hereinafter Letter from Daniel Armagh]; *see* James Nicholas Kornegay, Note, *Protecting Our Children and the Constitution: An Analysis of the "Virtual" Child Pornography Provisions of the PROTECT Act of 2003*, 47 WM. & MARY L. REV. 2129, 2162 (2006) ("Recognizing that virtual child pornography cannot be constitutionally proscribed as pornography, some have argued that the more effective method of dealing with such material is to seek its elimination under the umbrella of obscenity regulations.") (citing Aimee G. Hamoy, Comment, *The Constitutionality of Virtual Child Pornography: Why Reality and Fantasy Are Still Different Under the First Amendment*, 12 SETON HALL CONST. L.J. 471, 512 (2002); Ryan P. Kennedy, Note, Ashcroft v. Free Speech Coalition*: Can We Roast the Pig Without Burning Down the House in Regulating "Virtual" Child Pornography?*, 37 AKRON L. REV. 379, 411 (2004)).

126. *See* Russell, *supra* note 70, at 1484–85.

prove actual harm to minors."[127]

The constitutional deficiency of the PROTECT Act has been noted by at least two Justices on the Supreme Court. In the 2008 case *United States v. Williams*, a majority of the Court upheld 18 U.S.C. § 2252A(a)(3)(B), the "pandering" provision of the Act.[128] Justice Souter, joined by Justice Ginsburg, dissented from the Court's apparent finding of "justification . . . for making independent crimes of proposals to engage in transactions that may include protected materials."[129] Justice Souter does not think it constitutionally infirm to prohibit pandering or presenting prosecutable child pornography, but finds that "maintaining the First Amendment protection of expression we have previously held to cover fake child pornography requires a limit to the law's criminalization of pandering proposals."[130] Here, Justice Souter objects to the fact that the elements of the pandering provision are the same whether the material depicts real children or not.[131] This is a restriction on speech (by criminal prosecution) that leaves *Ferber* and *Ashcroft* "as empty as if the Court overruled them formally, and when a case as well considered and as recently decided as [*Ashcroft*] is put aside (after a mere six years) there ought to be a very good reason."[132] Justice Souter thus clearly recognizes the PROTECT Act's pandering provision as an "attempt to get around our holding[]" in *Ashcroft*.[133] Justice Souter would hold "that a transaction of what turns out to be fake pornography is better understood, not as an incomplete attempt to commit a crime [as the majority holds], but as a completed series of intended acts that *simply do not add up to a crime*, owing to the privileged character of the material the parties were in fact about to deal in."[134]

127. *Id.* at 1486.

128. United States v. Williams, 553 U.S. 285, 307 (2008) (holding 18 U.S.C. § 2252A(a)(3)(B) constitutional). The "pandering" statute imposes a five-year mandatory minimum prison sentence and a possible twenty-year term for someone who

> knowingly advertises, promotes, presents, [or] distributes . . . any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains an obscene [or non-obscene] visual depiction of a minor [or an actual minor] engaging in sexually explicit conduct.

18 U.S.C. § 2252A(b)(1), (a)(3)(B) (2006). The Court construes the provision to mean that one is "promoting child pornography" in violation of the statute if one: 1) "knowingly exhibits 'speech that accompanies or seeks to induce a transfer of child pornography . . . from one person to another'"; 2) "holds the subjective belief that the material is child pornography"; 3) "the speech 'objectively manifest[s] a belief that the material is child pornography'"; 4) "the speaker 'intend[s] that the listener believe the material to be child pornography'"; 5) "the speaker 'select[s] a manner of advertising, promoting, presenting, distributing, or soliciting the material that he thinks will engender that belief"; and 6) the material depicts sexual activity by actual minors. This summarization is Megan Stuart's. Megan Stuart, *Saying, Wearing, Watching, and Doing: Equal First Amendment Protection for Coming out, Having Sex, and Possessing Child Pornography*, 11 FLA. COASTAL L. REV. 341, 363–64 (2010).

129. *Williams*, 553 U.S. at 314 (Souter, J., dissenting).

130. *Id.* at 311.

131. *Id.*

132. *Id.* at 320.

133. *Id.* at 321.

134. *Id.* (emphasis added).

Finally, Justice Souter also questions a major basis for the PROTECT Act itself: "Although Congress found that child pornography defendants 'almost universally rais[e]' the defense that the alleged child pornography could be simulated or virtual, neither Congress nor this Court has been given the citation to a single case in which a defendant's acquittal is reasonably attributable to that defense."[135] So, at least one of the reasons for such "Prosecutorial Remedies and Other Tools" is at least questionable, as is its precedential role in *Williams*.[136]

C. REITERATING OBSCENITY LAW'S REACH: MORE FACTS AND CONSTITUTIONAL ISSUES IN THE MAJORITY OPINION IN *WHORLEY*, INITIAL CHALLENGES FROM THE DISSENT AND *HANDLEY*

Defendant Dwight Whorley did not sell, produce or pander child pornography or obscenity; instead, he principally received the materials at issue over the Internet.[137] Moreover, he wrote and sent only one of the twenty emails for which he is serving time; the rest were written to him by another adult.[138] In the Virginia Employment Commission's public resource room, which included a number of computers and printers, a woman saw Whorley "viewing what appeared to be child pornography" on one of the computers and notified employees, who found Japanese anime-style cartoon pictures of children engaged in sexual conduct with adults.[139] Whorley was escorted away and, finding his email account still open on the computer, Commission employees printed emails and several more pictures.[140] The FBI also obtained information from his email account provider.[141] He was convicted of seventy-four counts, under 18 U.S.C. § 1466A(a)(1) for the anime-style cartoons ("knowingly receiving . . . obscene visual depictions of minors engaging in sexually explicit conduct"), § 1462 for the emails and cartoons ("sending or receiving in interstate commerce 20 obscene e-mails") and § 2252(a)(2) for the sexually explicit pictures of actual children ("knowingly receiving . . . 15 visual depictions of minors engaging in sexually explicit conduct").[142]

Judge Niemeyer, writing for the two to one panel majority in Whorley's Fourth

135. *Id.* at 323–24.

136. *See* Stuart, *supra* note 128, at 364–65. Stuart writes:

> The Court's interpretation of the Act is overly broad. . . . The PROTECT Act criminalizes any statement about one's sexual fantasies or reactions to viewing material (either child pornography or not) if the individual communicates the fantasy in such a way that leads the listener to believe the speaker has child pornography.

Id.

137. *Whorley III*, 550 F.3d 326, 338 (4th Cir. 2008).

138. *Id.* at 339–40.

139. *Id.* at 330.

140. *Id.* at 330–31.

141. *Id.* at 331.

142. 18 U.S.C. §§ 1466A(a)(1), 2252(a)(2), 1462 (2006); *Whorley III*, 550 F.3d at 331. One of the counts did not result in a conviction, due to lack of evidence that the person depicted was a minor. *Whorley III*, 550 F.3d at 331.

Circuit panel appeal, is apparently unconcerned by the emphasis placed in *Ashcroft* on the "intrinsic abuse" rationale of *Ferber*, focusing, as Congress did in enacting the PROTECT Act, on "obscenity" involving children.[143] Judge Niemeyer's opinion upholds all of Whorley's convictions, including those involving no real children. Judge Niemeyer characterizes Whorley's crimes as simply "violat[ing] criminal statutes regulating obscenity."[144] By placing the emphasis on obscenity rather than child pornography, Judge Niemeyer echoes Congress's strategy of avoidance: criminalizing virtual child pornography through obscenity law (where no harm need be shown), as opposed to earlier legal doctrine applicable to actual child pornography under *Ferber* (where harm is presumed since actual children are used in its production).

Whorley's first challenge to his convictions is that § 1462 is facially unconstitutional because it violates the First Amendment under *Stanley v. Georgia*.[145] As discussed above, in *Stanley*, the Court held that it is a violation of the First Amendment to criminalize mere possession and viewing of obscene materials in one's home.[146] Judge Niemeyer answers this challenge by asserting that there is no corresponding right to *receive* such materials, and that the "focus of the statute's prohibition is on the movement of obscene matter in interstate commerce, not its possession in the home."[147] Since Whorley "received" the emails and cartoon pictures through interstate commerce, the convictions must stand. Whorley also argues that § 1462 is impermissibly vague, in the sense that the word "receives" is so broad as to criminalize even unwitting receipt of obscene materials.[148] This argument appears to be mistaken, as Judge Niemeyer observes in response that § 1462 criminalizes only "knowing" receipt of such materials.[149] In Whorley's case, Judge Niemeyer sees no difficulty in finding the requisite level of scienter, as "Whorley actively used a computer to solicit obscene materials through numerous and repetitive searches and ultimately succeeded in obtaining the materials he sought."[150] These "numerous . . . searches" are those Whorley performed on the Commission computer via the YAHOO! search engine, using the search string "child sex play."[151] Judge Niemeyer does not address the possibility that Whorley's receipt of the obscene emails through his private email account might not have been "knowing." It is unclear what level of scienter is required under § 1466, and it is a point Judge Niemeyer does not address or consider.

Whorley also argues that the emails, as pure text, cannot legally be obscene. In

143. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 236 (2002); New York v. Ferber, 458 U.S. 747, 759 (1982).

144. Whorley IV, 569 F.3d 211, 211 (4th Cir. 2009) (Niemeyer, J., supporting the denial of rehearing en banc).

145. *Whorley III*, 550 F.3d at 332 (addressing this argument).

146. Stanley v. Georgia, 394 U.S. 557, 557 (1969).

147. *Whorley III*, 550 F.3d at 332–33.

148. *Id.* at 333.

149. *Id.* at 334.

150. *Id.*

151. *Id.* at 331.

response, Judge Niemeyer cites *Miller* and *Kaplan v. California*, in which the Supreme Court stated that obscenity can be in written or oral forms as well as pictorial or visual.[152] These citations resolve the issue for Judge Niemeyer, but Whorley's claim may not be that simple to discard. In *Miller*, the Court made clear that "[u]nder [our obscenity] holdings . . . no one will be subject to prosecution for the sale or exposure of obscene materials unless those materials depict or describe patently offensive 'hard core' sexual conduct specifically defined . . . ."[153] It also seems that the *Miller* Court viewed the *context* of the obscenity it expelled from first amendment protection differently from the context we are presented with in *Whorley*. The Court in *Miller* said:

> We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his *public* and *commercial* activities may bring prosecution. If the inability to define regulated materials with ultimate, god-like precision altogether removes the power of the States or the Congress to regulate, then 'hard core' pornography may be exposed without limit to the juvenile, the passerby, and the consenting adult alike . . . the *public* portrayal of *hard-core* sexual conduct for its own sake, *and for the ensuing commercial gain*, is a different matter.[154]

The *Miller* decision raises issues absent from Judge Niemeyer's short consideration of Whorley's claim. Are private emails traded between adults "public," "commercial" or related to "commercial gain"? In what way if so? Is there truly a serious risk of exposure of "hard core pornography" to "the juvenile" or "the passerby"? Also absent from Judge Niemeyer's rationale is any consideration of whether or not the emails and pictures were "hard core," something the *Miller* Court clearly found relevant if not dispositive.[155] The majority opinion in *Whorley* also ignores Judge Gregory's point, later made in his dissent to the denial of rehearing en banc, that there is no case "that, in limiting *Stanley*, deals with circumstances like this where the sending or receiving of the obscene materials involves neither a commercial transaction nor any kind of victim."[156] Nevertheless, Judge Niemeyer holds that Whorley's § 1462 arguments "are readily rejected."[157]

Finally, Whorley claims that § 1466A(a)(1) is unconstitutional as applied to the

152. *Id.* at 335 (quoting Kaplan v. California, 413 U.S. 115, 119 (1973)).

153. Miller v. California, 413 U.S. 15, 27 (1973).

154. *Id.* at 27–28, 35 (emphasis added) (citations omitted).

155. The term "hard core" is notoriously difficult to define, leading Justice Stewart famously to conclude, "perhaps I could never succeed in intelligibly [defining "hard core"]. But I know it when I see it . . . ." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Justice Harlan, in the earlier *Roth* case, also took issue with the "hard-core" designation: "I do not think that the federal statute can be constitutionally construed to reach other than what the Government has termed as 'hard-core' pornography." Roth v. United States, 354 U.S. 476, 507 (1957) (Harlan, J., concurring in the result in No. 61, and dissenting in No. 582).

156. *Whorley IV*, 569 F.3d 211, 212 (4th Cir. 2009) (Gregory, J., dissenting from the denial of rehearing en banc).

157. *Whorley III*, 550 F.3d at 335.

cartoon pictures because they are not depictions of actual people.[158] If § 1466A(a)(1) is construed not to require the depiction of actual children in order to trigger an obscenity prosecution, then it is unconstitutional on its face under *Ferber* and *Ashcroft*, Whorley contends.[159] Judge Niemeyer responds that § 1466A(a)(1) clearly criminalizes receipt of "a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting" if it "depicts a minor engaging in sexually explicit conduct" and is obscene.[160] He also points out that § 1466A(c) clearly says "[i]t is not a required element of any offense under this section that the minor depicted actually exist."[161] Judge Gregory argues that Judge Niemeyer misreads § 1466A(c). He points out first that § 2232 defines minor as "any *person* under the age of eighteen years."[162] And Webster's dictionary says a "person" is a "living human being," "with legal rights and duties."[163] Clearly, a cartoon person is not living, and is not a human being with legal rights and duties.[164]

Moreover, as Judge Gregory argues, the relaxing of the requirement that the government show "the minor depicted actually exist" is not meant to allow for prosecution for sexually explicit pictures of imaginary children, but rather "to reliev[e] the Government from the burden of exhaustively searching the country to identify conclusively the children involved in the production of the child pornography."[165] The Senate Report on the PROTECT Act explained:

> [P]rosecutors typically are unable to identify the children depicted in child pornography. . . . [T]hese children are abused and victimized in anonymity, even when the child pornography is produced within the United States. Prosecutions therefore rest on the depictions themselves; juries are urged to infer the age and existence of the minor from the sexually explicit depiction itself.[166]

Congress clearly anticipated actual children involved in child pornography; the concern that led to the clause "it is not a required element . . . that the minor depicted actually exist" was for children "abused and victimized in anonymity."[167] So, assuming the child depicted in the picture actually exists, the government need not actually find that exact child, identify him or her and conclusively identify his or her age to prosecute under § 1466A. Judge Gregory's argument points to this legislative history to offer a much more plausible argument than Judge Niemeyer offers as to the appropriate reading of § 1466A.

Finally, against Judge Niemeyer's view that § 1466A(a)(1) includes cartoon

158. *Id.*
159. *Id.* at 335–36.
160. *Id.* at 336 (quoting 18 U.S.C. § 1466A(a)(1) (2006)).
161. *Id.* (quoting 18 U.S.C. § 1466A(c)).
162. *Id.* at 351 (Gregory, J., concurring in part and dissenting in part) (quoting 18 U.S.C. § 2232) (emphasis added).
163. *Id.* (quoting WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 877 (1994)).
164. *Id*.
165. *Id.*
166. S. REP. NO. 108-2, at 4 (2003).
167. *Id.*

people, Judge Gregory makes a "rule against superfluities" argument.[168] In his view, reading § 1466A(a)(1) to include cartoon depictions makes subsection (a)(2) superfluous.[169] He argues that since (a)(1) requires only "sexually explicit conduct" while (a)(2) criminalizes a smaller set of conduct ("graphic bestiality, sadistic or masochistic abuse, or sexual intercourse"), "the standard under subsection (a)(1) is less demanding, presumably because the conduct involves the abuse of real minors."[170]

The issue of fictional cartoon children and the PROTECT Act has recently been raised elsewhere. The 2008 district court case *United States v. Handley*, in the Southern District of Iowa (in the Eighth, not the Fourth, Circuit) is very similar to *Whorley*.[171] The defendant, Christopher Handley, received drawings from Japanese anime comics of "fictional characters" "produced either by hand or by computer," including "drawings and cartoons, that depicted graphic bestiality, including sexual intercourse, between human beings and animals such as pigs, monkeys, and others."[172] Handley was indicted under § 1466A(a) and § 1466A(b), the new obscenity offenses created by the PROTECT Act.[173] His indictments were upheld by the court.[174] But the court holds two subsections of the PROTECT Act, § 1466A(a)(2) and § 1466A(b)(2), unconstitutional.[175]

Handley's holding highlights another possible problem with the PROTECT Act. Looking more closely at § 1466A, we find that § 1466A(a)(1) subjects to criminal penalty anyone who "knowingly produces, distributes, receives, or possesses with intent to distribute, a visual depiction of any kind . . . that . . . depicts a minor engaging in sexually explicit conduct; *and is obscene*."[176] Section 1466A(b)(1) subjects to criminal penalty anyone who "knowingly possesses a visual depiction of any kind . . . that . . . depicts a minor engaging in sexually explicit conduct; *and is obscene*."[177] Both of these sub-subsections require that the depictions be "obscene," and for that reason the district court in *Handley* upholds the constitutionality of both.[178] However, § 1466A(a)(2) and §1466A(b)(2) require only that the depictions possessed, received, produced, distributed or possessed with the intent to distribute be or appear to be "of a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse . . . and lacks serious literary, artistic, political, or scientific value."[179] Subsections 1466A(a)(2) and

168. The rule against superfluities "instructs courts to interpret a statute to effectuate all its provisions, so that no part is rendered superfluous." Hibbs v. Winn, 542 U.S. 88, 89 (2004).

169. *Whorley III*, 550 F.3d at 351 (Gregory, J., concurring in part and dissenting in part).

170. *Id.* at 351–52.

171. United States v. Handley, 564 F. Supp. 2d 996 (S.D. Iowa 2008).

172. *Id.* at 999.

173. *Id.* at 998–99.

174. *Id.* at 1009.

175. *Id.*

176. 18 U.S.C. § 1466A(a)(1) (2006) (emphasis added).

177. *Id.* § 1466A(b)(1) (emphasis added).

178. *Handley*, 564 F. Supp. 2d at 1009.

179. 18 U.S.C. § 1466A(a)(2), (b)(2).

(b)(2) require only the third prong of the *Miller* test for obscenity—that the depiction lack "serious literary, artistic, political, or scientific value"—while leaving out the remaining two requirements that the depiction appeal to the "prurient interest" and that it be "patently offensive."[180]

The court in *Handley* reasons that because the pictures were not of real children, the indictments were not governed by *Ferber*, but rather by *Miller*, as under *Miller* all "obscene" depictions can constitutionally be criminalized, including cartoons.[181] If the indictments are governed by *Miller*, why do § 1466A(a)(2) and (b)(2) include only one prong from the *Miller* test? The court finds the absence of the first and second prongs of the *Miller* test from § 1466A(a)(2) and (b)(2) dispositive and holds § 1466A(a)(2) and (b)(2) unconstitutional.[182]

Why *did* Congress leave the first and second prongs of the *Miller* test out of § 1466A(a)(2) and (b)(2)? Did Congress simply assume that such depictions are "patently offensive" and appeal to the "prurient interest"? The *Handley* court notes the

> almost complete redundancy of the conduct criminalized by subsections 1466A(a)(1) and (b)(1) with that of subsections 1466A(a)(2) and (b)(2). The [only] observable differences between these subsections are (1) subsections 1466A(a)(1) and (b)(1) incorporate the *Miller* test as essential elements, whereas subsections 1466A(a)(2) and (b)(2) do not; (2) subsections 1466A(a)(2) and (b)(2) include the "appears to be" language in relation to "a minor," and (3) subsections 1466A(a)(1) and (b)(1) encompass a broader list of sexually explicit conduct.[183]

This strange statutory construction is notable in two respects: first, it is clearly an attempt to circumvent the holding of *Ashcroft* by adding the "appears to be a minor" language, allowing prosecution of "convincing" virtual child pornography or pornography of adults who are "made to look" like children—prosecution which is frankly questionable under *Ashcroft*.[184] Second, § 1466A(a)(2) and (b)(2) seem to function as "expanders" on § 1466A(a)(1) and (b)(1), almost as if Congress were afraid that some of the material it wanted to criminalize would *not* be found "obscene." This fear seems unfounded, given that the "the vast majority (99–100%) of all child pornography would be found to be obscene by most judges and juries."[185]

180. *Handley*, 564 F. Supp. 2d at 1005.
181. *Id.* at 1001–02.
182. *Id.* at 1009.
183. *Id.* at 1007.
184. Prosecution of "virtual" child pornography is questionable because the Supreme Court held in *Ashcroft* that such pornography "records no crime and creates no victims by its production [and] is not 'intrinsically related' to the sexual abuse of children." Ashcroft v. Free Speech Coal., 535 U.S. 234, 236 (2002).
185. Letter from Daniel Armagh, *supra* note 125.

II. THOUGHT CRIMES, MONSTERS AND FICTIONALIZATION: PUTTING *WHORLEY* IN THE CONTEXT OF FANTASY

In an entertaining and disturbing essay called *Producing Erotic Children*, James Kincaid says:

> Let us take the stories of Ellie Nesler, Menendez, Woody Allen, Michael Jackson, the day-care trial du jour, and ask about the source, the nature, and the size of *the pleasures we take from such stories*. *What are these stories*, where do they come from, and why do we tell them with such relish? . . . . Why do we tell the stories we tell? Why do we *need to hear them*? Those are plain sorts of questions; but we don't often attend to them. We prefer others:
>
> 1. How can we spot the pedophiles and get rid of them?
>
> 2. Meanwhile, how can we protect our children?
>
> 3. How can we induce our children to tell us the truth, and all of it, about their sexual lives?
>
> 4. How can we get the courts to believe children who say they have been sexually molested?
>
> . . . .
>
> they all have one thing in common: they demand the same answer, "We can't."
>
> I think that is why . . . the . . . stories are so popular: they have about them an urgency and a self-flattering righteous oomph. Asking them, I can get the feeling that I care very much, and that I am really on the right side in these vital issues of our time. Even better, these open-ended, unanswerable questions generate variations on themselves, and allow us to keep them going, circulating them among ourselves without ever experiencing fatigue, never getting enough of what they are offering.[186]

Kincaid's argument owes much to Foucault's *History of Sexuality*.[187] Foucault's central claim in that work is that our conception of sex—as something repressed by a censorious Victorian culture and then liberated by a twentieth-century freedom—is fundamentally mistaken.[188] Our mistake is the result of an incomplete and incorrect conception of power.[189] Adler paraphrases Foucault's insight in the context of first amendment law:

> Power works only marginally through repression and prohibition; it exerts itself most strongly through tools of apparent liberation. . . . [O]ne way power spreads its grasp is through an "incitement to discourse." . . . Foucault writes, "[W]hat we now perceive

186. James R. Kincaid, *Producing Erotic Children*, *in* THE CHILDREN'S CULTURE READER 241, 246 (Henry Jenkins ed., 1998) (emphasis added) [hereinafter Kincaid, *Producing*].

187. MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOLUME ONE: AN INTRODUCTION (Robert Hurley trans., 1990) (1978).

188. *See generally id.* at 1–49.

189. *See generally id.* at 92–102.

> as the chronicle of a censorship and the difficult struggle to remove it will be seen rather as the centuries-long rise of a complex deployment for compelling sex to speak, for fastening our attention and concern upon sex." . . . This "transforming of sex into discourse" served an insidious purpose. First, it opened up channels for disciplinary power: The more we discuss sex, the more we develop norms and then scrutinize our deviations from the norm. But more importantly . . . the transformation of sex into discourse changed the "nature" of sex. . . . Foucault does not deny that censorship exists. Yet, any emphasis on it is a ruse. Censorship is only "part of the strategies that underlie and permeate discourses." . . . Censorship is just a way of shifting the vocabulary.[190]

What Kincaid describes is an enormous social "incitement to discourse." We are *pleasured*, as he says, by the endless circulation of stories about child molesters, danger to children and innocence lost. But, as Adler adds in her comments about "To Catch A Predator," our pleasures and identifications with these stories are so disturbing they must be *disavowed*. We can stand completely apart from pedophiles, morally righteous, all while we *crave, need and get ourselves close to* pedophilia. Kincaid continues, discussing Michael Jackson:

> Take the fun in being outraged with Michael Jackson as boy-lover, and telling our friends how outraged we are. And not just with Jackson either, but with the failure of others to be as loving to children as we are: "Can you imagine anyone letting a son sleep with that man?" . . . Had Michael Jackson not existed, we would have been forced to invent him, which is, of course, what we did.[191]

We "shift the vocabulary," as Adler says, by expressing outrage at the very existence of such books as the *Pedophile's Guide*, then by spending hours building Facebook pages and Twitter communication logs about how outrageous it is that Amazon could carry them.[192] Congress "transforms sex into discourse," as Foucault would say, by holding press conferences disavowing the conclusions of psychologists who conclude that child sexual abuse does not always cause the kind of intense harm we all believe it does—again, the vote was 355 to zero.[193]

The law does not stand apart from these social narratives; it participates in them. The law participates by constructing the pedophile, then providing the righteous punishment society decides he so deserves. As Kincaid writes, "Pedophiles have not really been, as we like to say, 'othered,' or marginalized; they have been removed from the species, rendered unknowable."[194] Understanding this construction is crucial to understanding how "[c]hild pornography has become a thought crime," as Adler argues.[195] Efforts to deal with pedophilia have also

190. Adler, *Perverse*, *supra* note 17, at 268–70.

191. Kincaid, *Producing*, *supra* note 186, at 243.

192. Adler, *Perverse*, *supra* note 17, at 270 ("Censorship is just a way of shifting the vocabulary.").

193. FOUCAULT, *supra* note 187, at 17–22 (discussing "the great process of transforming sex into discourse"); *see supra* note 8 and accompanying text.

194. KINCAID, EROTIC, *supra* note 18, at 88.

195. Adler, *Inverting*, *supra* note 22, at 995.

arguably resulted in *status* crimes—criminalizing statuses or identities rather than criminal acts. Judge Gregory's dissent in *Whorley* expresses serious concern about the "right to use our imaginations to create fantasies," but on the other side of the liberties he raises is—what I would argue drives Judge Niemeyer's opinion—the specter of the pedophile.[196] In Judge Niemeyer's majority opinion, the "right to use *our* imaginations to create fantasies" is not what is at stake. What is at stake is the right *for pedophiles*—the unknowable, wholly Other, evil nonhumans—to use their imaginations to create fantasies. Who is going to complain much about that?[197] Pedophiles are "cultural demon[s]," monsters: the only way we remain unpossessed, unmonstrous, is to remain silent to whatever rights they might have, or to find a way to dismiss them.[198] That is precisely what the court does in *Whorley*.

This Part first outlines Judge Gregory's dissenting opinion, followed by a discussion of *Doe v. City of Lafayette, Indiana*, a Seventh Circuit case not involving pornography or obscenity but which deals with pedophilia and the freedom of thought more broadly.[199] This reading of *Doe* in turn highlights the construction of the pedophile in *Whorley*. Specifically, this comparison lends support to Judge Gregory's effort to expose *Whorley*'s policing of fantasy, essentially making the expression of certain thoughts illegal. Finally, this Part returns to the larger cultural narrative of pedophilia in which both *Whorley* and *Doe* play a part.

In the Seventh Circuit (en banc) decision in *Doe v. City of Lafayette, Indiana*, the court begins its opinion directly:

> John Doe has a long history of arrests and convictions for . . . child molestation, attempted child molestation, voyeurism, exhibitionism, and peeping. These crimes date back to 1978, when Mr. Doe went into a locker room at a local school, pulled down the swimsuit of a ten-year-old boy and performed oral sex on him.[200]

The description of Doe's history as a pedophile and child molester goes on through the 1980s and '90s.[201] The "crime" at the heart of this case occurred when Doe, driving home from work, stopped at a public park and watched five young teenagers playing baseball.[202] He thought about molesting them, but without touching or even approaching them, he drove away.[203] He immediately called his psychologist, upset about the possible encounter, and later described the incident to his Sexual Addicts Anonymous group.[204] An anonymous source reported Doe's

196. *Whorley III*, 550 F.3d 326, 353 (4th Cir. 2008) (Gregory, J., concurring in part and dissenting in part).
197. *See supra* note 34 and accompanying text.
198. KINCAID, EROTIC, *supra* note 18, at 88.
199. Doe v. City of Lafayette, Ind., 377 F.3d 757 (7th Cir. 2004) (en banc).
200. *Id.* at 758.
201. *Id.* at 758–59.
202. *Id.* at 774 (Williams, J., dissenting).
203. *Id.*
204. *Id.* at 775.

visit to the park to Doe's former probation officer (he was no longer on probation at this time), who contacted the local police department, parks department and a city attorney.[205] The parks department issued a permanent order banning Doe from entering any city park for any reason.[206]

Like the majority in *Whorley*, the majority in *Doe* rejects John Doe's first amendment claims. In fact, the court finds these claims to be entirely baseless, writing:

> He did not go to the park to advocate the legalization of sexual relations between adults and minors. He did not go into the park to display a sculpture, read a poem or perform a play celebrating sexual relations between adults and minors. He did not go into the park for some higher purpose of self-realization through expression. In fact, he did not go into the park to engage in expression at all. Rather, he went "cruising" in the parks "looking for children" to satisfy his sexual urges.[207]

The court finds that there was no expressive element; "we have nothing approaching 'expression'; instead, we have *predation*."[208] Nor did the city, according to the court, punish Doe for pure thoughts. "The inescapable reality," the court writes,

> is that Mr. Doe did not simply *entertain thoughts*; *he brought himself to the brink* of committing child molestation. . . . To characterize the ban as directed at 'pure thought' would require us to close our eyes to Mr. Doe's actions. It also would require that we give short shrift to *Mr. Doe's condition as an admitted pedophile* . . . .[209]

Judge Williams, dissenting in *Doe*, aptly points out that the majority opinion has "secondary effects," one of which is to *deter* sex offenders from therapy.[210] "Once released back into our society, a former sex offender must feel free to seek therapy and must be supported in his efforts to control his urges rather than penalized. Why deter former sex offenders from one of the few treatments available? The importance of therapy cannot be understated."[211] Notably, Doe was voluntarily taking Depo-Provera, the "chemical castration" drug, after the incident at the park.[212] This entire case arose after Doe sought help from his psychologist and his Sexual Addicts Anonymous group.[213]

Perhaps society does not care about Doe's recovery, though. Doe's past acts

205. *Id.*
206. *Id.*
207. *Id.* at 763 (majority opinion).
208. *Id.* at 764 (emphasis added).
209. *Id.* at 767 (emphasis added).
210. *Id.* at 784 (Williams, J., dissenting).
211. *Id.*
212. *Id.* at 775. Depo-Provera, a drug that lowers the testosterone level in men, is thought to lower male sex drive. *See* B. Drummond Ayres Jr., *California Child Molesters Face 'Chemical Castration'*, N.Y. TIMES, Aug. 27, 1996, at A1.
213. *Doe*, 377 F.3d at 775 (Williams, J., dissenting).

may be seen as so monstrous as to create a mythical monster—one which, like monsters in literature, has but one possible fate: to be cast out from society.[214] For instance, in 2000, two British newspapers published pictures of convicted pedophiles in a "name and shame" media campaign.[215] The result? "A mob of 300 people were reported to have gone on a rampage outside the home of a man suspected to be a pedophile because he had worn a neck brace similar to one worn in one of the published photos. The group was mistaken."[216] The man in the neck brace with the unfortunate likeness was not left alone after the initial mob attack; a brick was thrown through an adjoining house's window, hitting yet another nonpedophile, the man's ex-wife.[217] A former police chief warned that the "name and shame" campaign could in fact "drive the perverts underground, making it more difficult for the authorities to monitor them," and could result in more "vigilante attacks."[218]

In a work examining "extreme deviance," Erich Goode and D. Angus Vail note that "pedophiles and child molesters are probably the most socially disvalued of all deviants in America" and that they have been increasingly greeted by "offender registries, community notification, civil commitments, and even castration."[219] The

214. For the complexities of cultural narratives concerning monsters, particularly the aspects of "monstrous" gender and sexuality, see generally, e.g., STEPHEN NEALE, GENRE (1980); KINCAID, EROTIC, *supra* note 18; THE HORROR FILM AND PSYCHOANALYSIS: FREUD'S WORST NIGHTMARE (Steven Jay Schneider ed., 2004); ANDREW TUDOR, MONSTERS AND MAD SCIENTISTS: A CULTURAL HISTORY OF THE HORROR MOVIE (1989).

215. *See* Angelides, *supra* note 46, at 80.

216. *Id.* at 80; *see also* Stephen Wright & James Mills, *Paedophile Vigilantes Attack the Wrong Man; As Photographs of Sex Offenders Are Published in the Wake of Sarah the Payne's Killing, Outpouring of Grief That Recalls the Tributes to Diana*, DAILY MAIL (London), Jul. 24, 2000, at 8–9 ("'The crowd were all shouting "paedophile." It was terrifying. I showed the police my driving licence and other documents and even went outside myself to try and explain.' . . . [P]olice installed a panic button in Mr. Armstrong's home in case trouble flared again.").

217. Wright & Mills, *supra* note 216.

218. *Id.*

219. ERICH GOODE & D. ANGUS VAIL, EXTREME DEVIANCE 150 (2008). There has been a fair amount of scholarship regarding these punishments. *See, e.g.*, LAURA J. ZILNEY & LISA ANNE ZILNEY, PERVERTS AND PREDATORS: THE MAKING OF SEXUAL OFFENDING LAWS (2009); LISA ANNE ZILNEY & LAURA J. ZILNEY, RECONSIDERING SEX CRIMES AND OFFENDERS: PROSECUTION OR PERSECUTION? (2009); Adler, *Perverse*, *supra* note 17; Jesse P. Basbaum, Note, *Inequitable Sentencing for Possession of Child Pornography: A Failure to Distinguish Voyeurs from Pederasts*, 61 HASTINGS L.J. 1281 (2010); Lystra Batchoo, Note, *Voluntary Chemical Castration of Sex Offenders: Waiving the Eighth Amendment Protection from Cruel and Unusual Punishments*, 72 BROOK. L. REV. 689 (2007); Rose Corrigan, *Making Meaning of Megan's Law*, 31 LAW & SOC. INQUIRY 267 (2006); Michael J. Duster, Note, *Out of Sight, Out of Mind: State Attempts to Banish Sex Offenders*, 53 DRAKE L. REV. 711 (2005); Joseph J. Fishcel, *Transcendent Homosexuals and Dangerous Sex Offenders: Sexual Harm and Freedom in the Judicial Imaginary*, 18 DUKE J. GENDER L. & POL'Y 277 (2010); Linda Gordon, *The Politics of Child Sexual Abuse: Notes from American History*, 28 FEMINIST REV. 56 (1988); Bret R. Hobson, Note, *Banishing Acts: How Far May States Go to Keep Convicted Sex Offenders from Children?*, 40 GA. L. REV. 961 (2006); Wayne A. Logan, *The Adam Walsh Act and the Failed Promise of Administrative Federalism*, 78 GEO. WASH. L. REV. 993 (2010); Jacob D. Mahle, Comment and Casenote, *We Don't Need No Thought Control:* Doe v. City of Lafayette, 74 U. CIN. L. REV. 235 (2005); Jennifer B. Siverts, Note, *Punishing Thoughts Too Close to Reality: A New Solution to Protect*

latter remedy has had surprisingly widespread support. California, Florida, Georgia, Oregon, Montana, Wisconsin, Iowa and Louisiana are among the states that have imposed forced chemical castration—administering Depo-Provera, the drug John Doe voluntarily took—for some sex offenders.[220] An editorial in *The New Yorker* advocated allowing sex offenders to voluntarily undergo *physical* castration, asking, "Why . . . resist the demands of men who are willing to risk sacrificing sexual activity in order to be free of their damaging impulses? . . . . If castration helps, why not let them have what they want?"[221] In the 1990s, Louisiana imposed a mandatory sentence of death or life in prison for adults who rape victims under age twelve.[222] In 2007, the American Bar Association Journal noted that Montana, South Carolina and Oklahoma had followed suit with similar laws.[223] Commenting on *State v. Wilson*, the Louisiana Supreme Court case that upheld the constitutionality of imposing the death penalty on a child rapist, one student note observed that "[i]n the last decade or two, society has come to view rapists whose victims are children as the gangrene of humanity, an infection in the limb of society that must be amputated in order to prevent the inevitable spreading of depravity to the healthy body of human morality."[224]

The foregoing themes of castration, amputation and casting off are consistent with the rhetoric of "obscenity" discussed in connection with *Whorley*, *supra.* Attorney Matthew Benjamin has suggested that the "intense regard for public

Children from Pedophiles, 27 T. JEFFERSON L. REV. 393 (2005); Marbree D. Sullivan, Comment, *The Thought Police: Doling Out Punishment for Thinking About Criminal Behavior in* John Doe v. City of Lafayette, 40 NEW ENG. L. REV. 263 (2005); Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435 (2010). Very recently, there have been prosecutions of *minors* who take sexually oriented pictures of themselves under child pornography laws, called "sexting" laws; in these cases, as Adler remarks, the "predator" and the "prey" are one and the same. *See* Adler, *To Catch a Predator*, *supra* note 39. Further commentary on this issue is beyond the scope of this Note. *See* Riva Richmond, *Sexting May Place Teens at Legal Risk*, N.Y. TIMES GADGETWISE BLOG (Mar. 26, 2009, 12:00 PM), http: //gadgetwise.blogs.nytimes.com/2009/03/26/sexting-may-place-teens-at-legal-risk/?scp=2&sq=sexting&st=cse ("One in five teens may be a child pornographer risking life in prison—for the crime of taking and distributing naked pictures of themselves. . . . The combination of poorly drafted laws, new technologies, draconian and inflexible punishments, and teenage hormones make [sic] for potentially disastrous results."). There has also already been sparse academic commentary on the issue. *See* Amy F. Kimpel, *Using Laws Designed to Protect as a Weapon: Prosecuting Minors Under Child Pornography Laws*, 34 N.Y.U. REV. L. & SOC. CHANGE 299 (2010); Sarah Wastler, *The Harm in "Sexting"?: Analyzing the Constitutionality of Child Pornography Statutes that Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers*, 33 HARV. J.L. & GENDER 687 (2010).

220. Ayres, *supra* note 212, at A1; Kristin Carlson, Commentary, *Strong Medicine: Toward Effective Sentencing of Child Pornography Offenders*, 109 MICH. L. REV. FIRST IMPRESSIONS 27, 31 (2010). The American Civil Liberties Union has opposed forced chemical castration as cruel and unusual punishment. *Id.* at 31.

221. Editorial, *Help for Sex Offenders*, THE NEW YORKER, Mar. 7, 1994, at 6.

222. *See* State v. Wilson, 685 So. 2d 1063 (La. 1996) (upholding this sentencing). Since *Furman v. Georgia*, the U.S. Supreme Court has not sanctioned capital punishment for crimes not resulting in the death of the victim. Jennifer L. Cordle, Note, State v. Wilson*: Social Discontent, Retribution, and the Constitutionality of Capital Punishment for Raping a Child*, 27 CAP. U. L. REV. 135, 135 (1998).

223. John Gibeaut, *A Deal with Death*, 93 A.B.A. J. 12, 13 (2007).

224. Cordle, *supra* note 222, at 135.

morality" at the center of obscenity law is often expressed "in terms of purity, pollution, and contamination."[225] He continues:

> Pollution rhetoric also affects society's sense of the appropriate punishment for criminal sexual behavior. Pervasive cultural associations between criminals and pollution encourage penological strategies that quarantine prisoners in spaces that reflect their degraded moral condition. The punishments designed for child pornographers illustrate this correspondence. . . . In one instance, the City Council of Jersey City barred such individuals from virtually the entire city. The pervasive connection between pollution anxieties and child pornography law surely accounts for this atypical visceral treatment of offenders *themselves* as pollutants.[226]

Analyzing and criticizing the "monster-making" rhetoric at the heart of legislation and jurisprudence dealing with minors, sex and obscenity does not imply that child sexual abuse is less than monstrous. Nor is it a recommendation that pedophiles be allowed to "express themselves." Nor is it to paint pedophiles as an oppressed minority. As Judith Butler has written in the context of global terrorism and national security, the "frame" of social and intellectual discussion "decides, in a forceful way, *what we can hear*, whether a view will be taken as explanation or as exoneration . . . ."[227] The heightened anxiety of the frame of pedophilia in society makes it all the more urgent to critically question "what we can hear," as "[c]hild pornography law is the new crucible of the First Amendment . . . test[ing] the limits of modern free speech law the way political dissent did in the times of Holmes and Brandeis."[228]

III. FANTASY, OBSCENITY AND THE ARTS

A. THE RIGHT TO FANTASIZE

1. Judge Gregory's Dissents in *Whorley*: A "Constitutional Safe Harbor" for Obscenity

Judge Gregory dissented strongly in *Whorley*, both on the panel and in the denial of rehearing en banc.[229] In contrast to Judge Niemeyer's approach in the majority opinion, Judge Gregory first reminds us of the Supreme Court's magisterial

225. Matthew Benjamin, *Possessing Pollution*, 31 N.Y.U. REV. L. & SOC. CHANGE 733, 737 (2007).

226. *Id.* at 769–70 (emphasis in original); *see also* Mona Lynch, *Pedophiles and Cyber-Predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation*, 27 LAW & SOC. INQUIRY 529 (2002). For more on the operation of "pollution" in the law more generally, both in "natural environments" and "human environments," see John Copeland Nagle, *The Idea of Pollution*, 43 U.C. DAVIS L. REV. 1 (2009).

227. JUDITH BUTLER, PRECARIOUS LIFE: THE POWERS OF MOURNING AND VIOLENCE 4–5 (2006).

228. Adler, *Inverting*, *supra* note 22, at 921.

229. *Whorley IV*, 569 F.3d 211, 211–14 (4th Cir. 2009) (Gregory, J., dissenting from the denial of rehearing en banc); *Whorley III*, 550 F.3d 326, 343–53 (4th Cir. 2008) (Gregory, J., concurring in part and dissenting in part).

pronouncement in *Stanley* that "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds."[230] He even cites the Universal Declaration of Human Rights, which claims the freedom of speech as "the highest aspiration of the common people."[231] From the beginning, Judge Gregory sees *Whorley* as an important case that has at its core the most basic liberties, ones that cannot be taken away no matter how despicable their holders.[232]

Judge Gregory outlines Supreme Court obscenity and child pornography jurisprudence at length.[233] On the one hand, he expresses doubts about obscenity law, observing that the "Supreme Court's attempts to define obscenity for over half a century, including its enunciations of differing standards for obscenity and child pornography, reveal one truth: a material's obscenity, or lack thereof, ultimately depends on the subjective view of at least five individuals."[234] This opinion echoes, among other opinions, Justice Harlan's dissent-in-part in *Roth*, over fifty years ago: "The Court seems to assume that 'obscenity' is a peculiar genus of 'speech and press,' which is as distinct, recognizable, and classifiable as poison ivy is among other plants."[235] It also echoes Justice Douglas's dissent in *12 200-Foot Reels*: "by what right under the Constitution do five of us have to impose our set of values on the literature of the day?"[236] On the other hand, Judge Gregory asserts that "in every society, there are fundamental norms of decency and morality that cannot be transgressed if that society is to function in a healthy and productive manner."[237] Protecting children is undoubtedly a fundamental norm of decency and morality.[238]

Judge Gregory is most concerned by the ruling regarding the emails. He notes that the email correspondence was between "consenting adults."[239] The emails Whorley sent and received (most were received) were "a series of engaging in fantasies on the internet of one person talking about their fantasy, and another

230. Stanley v. Georgia, 394 U.S. 557, 565 (1969). Consider also the argument that Blasi makes:

> [T]he basic commitment to free expression and inquiry must be considered one of the central features of the American constitutional regime. One need not blot from vision the intermittent periods of widespread, systematic repression of dissenters to appreciate the importance of free speech in the development of the American republic.

Blasi, *supra* note 93, at 456.

231. *Whorley III*, 550 F.3d at 343 (Gregory, J., concurring in part and dissenting in part) (quoting Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948)).

232. *See Whorley IV*, 569 F.3d at 214 (Gregory, J., dissenting from the denial of rehearing en banc) ("This is an important and difficult case . . . .").

233. *See Whorley III*, 550 F.3d at 343–46.

234. *Id.* at 346.

235. Roth v. United States, 354 U.S. 476, 497 (1957) (Harlan, J., concurring in the result in No. 61, dissenting in No. 582).

236. United States v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 137 (1973) (quoted in *Whorley III*, 550 F.3d at 346 (Gregory, J., concurring in part and dissenting in part)).

237. *Whorley III*, 550 F.3d at 346 (Gregory, J., concurring in part and dissenting in part).

238. *Id.*

239. *Id.* at 343.

asking questions about what they've done, what they haven't done."[240] No real children were discussed.[241] Judge Gregory thinks it "obvious" that the district court should have dismissed the charges based on the emails "because the Supreme Court has never come close to holding that the private fantasies of an adult are not protected by the First Amendment."[242]

Judge Gregory also sees the logic of the Supreme Court's child pornography decisions, back to *Ferber*, as relevant in considering the emails: because "the regulation of [the emails] is unsupported by the economic and moral concerns implicated in suppressing child pornography that uses actual children," the application of the obscenity statute to Whorley violates the First Amendment.[243] Judge Niemeyer glosses over Gregory's concerns, however, in his terse opinion supporting the denial of rehearing en banc: "Whorley violated criminal statutes regulating obscenity, and his convictions may not be forgiven because his conduct was prompted by his sexual fantasies."[244]

If the emails and cartoon pictures were analyzed as possible child pornography, it would seem that under *Ashcroft* and *Ferber*, some harm to actual children would need to be shown or presumed. The Court in *Ashcroft* stated that virtual child pornography creates no victims and records no crime—if this is true for virtual child pornography, it would seem true for fictional cartoon pictures and emails describing fantasies of imagined children.[245] But because the emails and cartoon pictures can be swept into the category of obscenity under the PROTECT Act, Judge Niemeyer would have us believe there is no first amendment problem.

Judge Gregory's answer, in his dissent from the denial of rehearing en banc, is even clearer than in his panel opinion:

> Where the state has a legitimate interest in regulating obscene materials—for example, where those materials are being commercially traded and/or where those materials are the product of the abuse or exploitation of their subjects—the First Amendment's protections may not apply. But where the only articulable interest in regulation is a fear of the expression of certain kinds of thoughts, *even obscenity must be given a constitutional safe harbor*. "*Stanley* rests on the proposition that freedom from governmental manipulation of the content of a man's mind necessitates a ban on punishment for the mere possession of the memorabilia of a man's thoughts and dreams, unless that punishment can be related to a state interest of a stronger nature than the simple desire to proscribe obscenity as such."[246]

The facts that Whorley marshals to paint a picture of harmless fantasy—the

240. *Id.* at 348.
241. *Id.*
242. *Id.*
243. *Id.* at 343.
244. *Whorley IV*, 569 F.3d 211, 211 (4th Cir. 2009) (Niemeyer, J., supporting the denial of rehearing en banc).
245. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 250 (2002).
246. *Whorley IV*, 569 F.3d at 213–14 (Gregory, J., dissenting from the denial of rehearing en banc) (quoting United States v. Reidel, 402 U.S. 351, 359 (1971)) (emphasis added).

emails were not commercial, nor were they the product of abuse or exploitation of anyone—are irrelevant to the majority's analysis. The majority seems to say that there is no right to fantasize for pedophiles. Judge Gregory, on the other hand, would provide "a constitutional safe harbor" for obscenity in cases "where the only articulable interest in regulation is a fear of the expression of certain kinds of thoughts."[247] But given the intensity of the fear and the overwhelming desire to punish and cast pedophiles out of society, the notion that the public would accept such a "safe harbor" seems absurd. Judge Gregory's defense of the constitutional right of pedophiles to trade emails about horrible things thus seems almost pointless, but it is not. Such "a stark example of speech suppression" seen in the criminalization of fantastical emails hollows out the First Amendment, for all of us.[248]

2. Judge Williams's Dissent in *Doe v. City of Lafayette, Ind.*: The Child Molester's Right to Fantasize

Judge Williams conceives of the case differently from the majority in *Doe*, arguing that the "question . . . is whether the First Amendment protects a citizen who goes to a venue and thinks about committing a crime."[249] Judge Williams thinks it undoubtedly does, considering the long-standing rule that government does not have the power to control its citizens' minds, and heeding "the crucial distinction between thinking and acting on those thoughts."[250] Judge Williams notes that in *Ferber*, *Osborne* and *Ashcroft*, actual harm suffered by minor participants in pornography was an essential component of the holdings that child pornography was not protected.[251] Here, no one was harmed, affected or apparently even cognizant of Doe's presence at the park or his status as a pedophile.[252]

Judge Williams also raises the eighth amendment prohibition on punishing a citizen based on his or her status.[253] In *Robinson v. California*, the Supreme Court invalidated a statute making addiction to narcotics illegal, holding that the statute's criminalization of a mere status violated the protection against cruel and unusual punishment.[254] Judge Williams asks whether it would be proper (and constitutional) to sanction criminal punishment of a bank robber ("a crime, like child molestation, with a high rate of recidivism") who stands in the parking lot of a bank and contemplates robbing it, or a drug addict who stands outside a dealer's

247. *Id.*
248. *Whorley III*, 550 F.3d at 350 (Gregory, J., concurring in part and dissenting in part) (quoting *Ashcroft*, 535 U.S. at 244).
249. Doe v. City of Lafayette, Ind., 377 F.3d at 778 (en banc) (Williams, J., dissenting).
250. *Id.*
251. *Id.* at 778–79.
252. *Id.* at 779.
253. *Id.* at 782.
254. *Id.*; *see* Robinson v. California, 370 U.S. 660 (1962).

house thinking about buying drugs but leaves without doing so.[255] Surely, it would not. This is because, as the Supreme Court said in *Robinson*, "a law which made a criminal offense of" being mentally ill, afflicted with leprosy or infected with a venereal disease "would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[256]

Also, as Adler notes, the distinction between thought/speech and action is a core element of first amendment law.[257] In *Whorley*, Judge Gregory attempts to preserve this distinction when he says, "just as the fantasies of a drug addict are his own and beyond the reach of government . . . the fantasies of a child pornographer should be as well."[258] However, as Adler further argues, and as discussed in Part I of this Note, child pornography law rejected this distinction.[259] *Ferber* upheld the criminalization of the *depictions* of crimes.[260] The *Osborne* Court upheld the criminalization of *mere possession* of child pornography, and found persuasive the idea that the possession of child pornography could be criminalized based on the fact that pedophiles might *use* child pornography to *seduce* children.[261] As noted earlier, the idea that speech may be suppressed because of *bad uses to which it might be put* is unique in first amendment law. Judges Gregory and Williams try to distinguish the *thoughts* of pedophiles from the *actions* of child molestation, but the child pornography cases show that for pedophiles, speech and action are bound together in a way unheard of for nonpedophiles.

Judge Williams recognizes that pedophilia is a particularly culturally sensitive topic. For this reason she proposes that we look at the examples of drug addicts and bank robbers, "analogies removed from the sensitive context of child molestation."[262] But child molestation and pedophilia are more than just "sensitive contexts" in contemporary culture, as discussed in Part II, *supra*. Commenting on the Amazon affair of 2010, former chief of the U.S. Justice Department's child

255. *Doe*, 377 F.3d at 783 (en banc) (Williams, J., dissenting).

256. *Robinson*, 370 U.S. at 666.

257. *See* Adler, *Inverting*, *supra* note 22, at 972–73 ("As Thomas Emerson wrote, '[t]he central idea of a system of freedom of expression is that a fundamental distinction must be drawn between conduct which consists of "expression" and conduct which consists of "action."'" (quoting THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 17 (1970))).

258. *Whorley III*, 550 F.3d 326, 350 (4th Cir. 2008) (Gregory, J., concurring in part and dissenting in part).

259. *See* Adler, *Inverting*, *supra* note 22, at 982, 986 (describing *Ferber*'s "ero[sion] of the speech/action distinction . . . introduc[ing] the idea that a representation can be banned because of the underlying illegal act that produced it" and "[c]hild pornography law['s] conflat[ion of] act and image on a rhetorical as well as a legal level").

260. New York v. Ferber, 458 U.S. 747, 756 (1982) ("[W]e are persuaded that the States are entitled to greater leeway in the regulation of *pornographic depictions* of children.") (emphasis added); Adler, *Inverting*, *supra* note 22, at 982.

261. Osborne v. Ohio, 495 U.S. 103, 111 (1990) (holding that "Ohio may constitutionally proscribe the possession and viewing of child pornography" and recognizing "evidence" that "suggests that pedophiles use child pornography to seduce other children into sexual activity").

262. Doe v. City of Lafayette, Ind., 377 F.3d 757, 783 (7th Cir. 2004) (en banc) (Williams, J., dissenting).

exploitation and obscenity section, attorney Patrick Trueman, said, "Pedophilia and child molestation are *universally condemned*."[263] Although the Supreme Court stated in *Stanley* that "State . . . control [of] the moral content of a person's thoughts . . . may be a noble purpose, but *it is wholly inconsistent with the philosophy of the First Amendment*," in the context of something so "universally condemned," the First Amendment bends.[264] Pedophiles have no right to be free of such state control. As Judge Williams concludes, when it is a crime to go somewhere, to think about doing illegal things and then to decide against doing those things, "the freedoms guaranteed by the First Amendment are virtually meaningless."[265]

B. CHILDREN, OBSCENITY AND THE THREAT TO THE ARTS

The federal courts, or at least some judges, hesitate when the subject of the arts is raised, even in the context of the unsavory fantasies and tastes of pedophiles. Justice Kennedy's majority opinion in *Ashcroft* invokes artistic fictions to show that the CPPA is overbroad:

> William Shakespeare created the most famous pair of teenage lovers, one of whom is just 13 years of age. . . . The movie, *Traffic*, which was nominated for Best Picture . . . portrays a teenager [who eventually] trade[s] sex for drugs . . . *American Beauty* [portrays] a teenage girl engag[ing] in sexual relations with her teenage boyfriend, and another yields herself to the gratification of a middle-aged man.[266]

The concurring opinions in *Ferber* illustrate a similar concern.[267]

Judge Gregory locates Whorley's emails in a "zone of expression accepted as having artistic value."[268] He analyzes the case in a similar vein as *Ashcroft*, citing such novels as Walker's *The Color Purple*, Faulkner's *Absalom, Absalom!*, Nabokov's *Lolita* and the film *American Beauty* to argue that

> the iconic books and movies above render unsustainable the claim that writings describing sexual acts between children and adults, generated by fantasy, have no demonstrated socially redeeming artistic value. If the writers of the aforementioned books and movie scripts e-mailed the sections of their work that described the sexual relationship between the minor and the adult to a willing recipient, presumably both the writer and the recipient could have been subject to prosecution for sending or receiving obscene material under § 1462.[269]

263. Cheryl Wetzstein, *Amazon.com Draws Criticism for Selling Pedophilia Book*, WASH. TIMES, Nov. 12, 2010, A5 (emphasis added).

264. Stanley v. Georgia, 394 U.S. 557, 565–66 (1969) (emphasis added).

265. *Doe*, 377 F.3d at 785 (en banc) (Williams, J., dissenting).

266. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 247–48 (2002).

267. *See supra* note 105.

268. *Whorley III*, 550 F.3d 326, 349 (4th Cir. 2008) (Gregory, J., concurring in part and dissenting in part).

269. *Id.*

Judge Gregory is thus worried about the effects of the holdings in *Whorley* on the arts.

Judge Niemeyer would likely reply that obscenity law provides a definite safeguard for artists and writers who need not worry so long as their work satisfies the *Miller* test and is thus not judged "obscene."[270] But, as Adler points out, the *Miller* test is no protection at all in the contemporary "postmodern" world: "the very foundation of *Miller*, the belief that some art is just not good enough or serious enough to be worthy of protection, mirrors the Modernist notion that distinctions could be drawn between good art and bad, and that the value of art was objectively verifiable."[271] Moreover, "the most basic premise of *Miller*: that art can be distinguished from obscenity" is probably invalid.[272] Some artists and writers are *deliberately offensive* and create works that fly in the face of "seriousness."[273] Adler raises the example of the performance art of Karen Finley, which includes "smear[ing] food into her genitals . . . defecat[ing] onstage" and graphic descriptions of "violent and bizarre sex acts with priests, children, relatives, and the handicapped."[274] Finley and anyone else who makes sexually explicit art is at risk of prosecution; "the chilling effect is incalculable."[275]

The chilling effect is *especially* incalculable in the case of art involving intersecting themes of children, pedophilia and sex. Support is scarce for those who experiment with issues of child sexuality in their work. For instance, the release of Adrian Lyne's 1997 film adaptation of Nabokov's *Lolita* was delayed, or the film itself was banned, in several countries.[276] One of the stars of the film, Jeremy Irons, commented, "The whole subject [of pedophilia] should be discussed sensibly, rationally, morally, kindly and generously without the tabloid headlining, opinion-making rubbish that is spewed out by moralists and politicians who want to jump on a bandwagon."[277] It is easy to jump on the bandwagon of censorship of sexually explicit materials concerning children, though, in a culture where child molestation is seen as "worse than murder."[278] The review rightly asks the following questions to highlight the threat to the arts that such censorship entails: "If *Lolita* should be banned under the bogus banner of preventing paedophilia why stop there? Why not ban Shakespeare or ancient Greek tragedy where incest, rape and other acts of violence abound?"[279]

The foregoing examples involve known works either already widely accepted as

270. *See* Miller v. California, 413 U.S. 15, 24 (announcing three-part test).

271. Amy Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359, 1364 (1990) [hereinafter Adler, *Post-Modern Art*].

272. *Id.* at 1369.

273. *Id.* at 1367–69.

274. *Id.* at 1369.

275. *Id.* at 1373.

276. *See* Richard Phillips, *A Mature Film About Sexual Obsession*, WORLD SOCIALIST WEB SITE (Apr. 9, 1999), http://www.wsws.org/articles/1999/apr1999/lol-a09.shtml.

277. *Id.*

278. KINCAID, EROTIC, *supra* note 18, at 202.

279. Phillips, *supra* note 276.

valuable works of art or acknowledged as deliberately, politically provocative. The chilling effects of *Whorley* and the PROTECT Act, however, are even more insidious for recent works that have yet to enter the protection of the canon. In A. M. Homes's *The End of Alice*, for instance, the speaker writes from prison, where he sits for the extremely gruesome rape and murder of a young girl, which is recounted in passages that includes decapitation, genital mutilation and post-mortem intercourse.[280] The novel's intent to disturb and get under our skin is apparent in the first paragraph, which encapsulates all of the contradictions and tensions discussed above:

> Who is she that she should have this afflicted addiction, this oddly acquired taste for the freshest of flesh, to tell a story that will start some of you smirking and smiling, but that will leave others set afire determined this nightmare, this horror, must stop. Who is she? What will frighten you most is knowing she is either you or I, one of us. Surprise. Surprise.[281]

Critic Daphne Merkin, reviewing *The End of Alice* in the *New York Times*, begins by asking: "What can you say about a 19-year-old girl who likes to chew on fresh scabs from the knee of a 12-year-old boy? What can you say about a love story that . . . stops at various depraved stations . . . ?"[282] Merkin continues,

> [Homes's] book does boast enough graphic—even lurid—sexual description to bring out the Pat Buchanan lurking inside the most sophisticated of readers, but . . . some critics . . . have reacted as though the author had committed an actual offense for which she should be handcuffed and led away, rather than what one might call a crime of the imagination.[283]

Merkin calls the book "not particularly likable," which might be putting it lightly.[284] However, she also observes that the book's "best moments are quietly observed and [its] underlying themes are more serious than prurient. 'The End of Alice' is concerned with the fluid nature of identity . . . ."[285] Merkin further speculates that "one of Ms. Homes's implicit intentions . . . is precisely to perforate the text, to violate the courteous and airtight space that is presumed to exist between any given work and its audience . . . the author . . . keeps homing in on 'Herr Reader' the better to implicate him in the ugly goings-on."[286] But ultimately, the issue lies not in the novel's merits; it lies in the fact that we cannot have debates about its merits if the novel itself is chilled by the threat of criminalization.

Underlying these legal discussions of artistic merit and the protection of art is the anxiety that comes with the specter of pedophilia. When someone creates a

280. A. M. HOMES, THE END OF ALICE 269 (1996).
281. *Id.* at 11.
282. Daphne Merkin, *Random Objects of Desire*, N.Y. TIMES, Mar. 24, 1996, at 14 (reviewing A. M. HOMES, *supra* note 280).
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.*

fiction involving children in sexual situations, several fears arise. Attorney Lawrence Stanley observes:

> For many, the depiction of nude minors raises fears that such depictions may sexually stimulate some individuals or motivate them to act in a sexual way with a minor. Others perceive such depictions to be symbolic of sexual license gone awry. . . . [W]hat if the photographer actually has erotic feelings for his or her subject?[287]

We may jump to the defense of Homes as a "serious" writer, but where did the novel's fantasies come from? Homes's novel may have more in common with the fantasies revealed in Whorley's email correspondences than we may care to acknowledge. But the point is *not* to insinuate that Homes is a pedophile. The point is to question the dividing line between the monsters and the rest of us, and to ask what we really fear when we cast them out.

Judge Gregory argues that "writings describing sexual acts between children and adults, *generated by fantasy*," may have "socially redeeming artistic value."[288] Of art, Adler writes, "As soon as we put up a boundary [of what "art" is] an artist will violate it . . . ."[289] It is this instability of art—what it is, why an artist chooses the subject she does, how she deals with it, why boundary crossings seem of such interest to her—that, combined with the threat of pedophilia, helps create the impulse to put up a wall of any kind possible. The obscenity provisions in the PROTECT Act are an example. Although Judge Niemeyer attempts to provide a tidy ending to Whorley's case—he violated federal obscenity laws, and that is all—Judge Gregory's worried speculations about the future of artistic expression in the Fourth Circuit (and possibly beyond) spill over. Judge Gregory is persuasive on this point, and it is not only the fantasies of pedophiles that are at risk. As one commentator notes, "the same justifications used to suppress pedophiles' free speech rights could also be used to curtail the rights of gays, interracial couples, and any group not in the majority."[290] In fact, at certain historical points, it was "homosexuals," racial minorities and immigrants that served as cultural "monsters" needing punishment and containment.[291] As the Court stated in 1969, before *Miller*, *Ferber* or the panic over pedophilia and child molestation took hold of society, "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."[292]

287. Lawrence A. Stanley, *Art and "Perversion": Censoring Images of Nude Children*, 50 ART J. 20, 25 (1991).

288. *Whorley III*, 550 F.3d 326, 349 (4th Cir. 2008) (Gregory, J., concurring in part and dissenting in part).

289. Adler, *Post-Modern Art*, *supra* note 271, at 1378.

290. Russell, *supra* note 70, at 1496.

291. This is not to position "pedophilia" as one in a long line of "oppressed" people who deserve "liberation." It is only to recognize that many times, the overwhelmingly punitive societal hatred of a certain social group can have regrettable consequences, and that critical thinking is necessary in every such case.

292. Stanley v. Georgia, 394 U.S. 557, 565 (1969). The intense cultural fixation on child sexual abuse is remarkably new. Adler argues that "the awareness of child sexual abuse as a significant social

IV. CONCLUSION

"The 20 cartoons forming the basis of [counts one through twenty] showed prepubescent children engaging in graphic sexual acts with adults. They depicted actual intercourse, masturbation, and oral sex, some of it coerced."[293] The fictional children, whoever they were, were "show[n]" having "actual intercourse" (by which we might assume the court means penetrative sex), masturbation and oral sex, some—only some—of it "coerced." The court does not describe the cartoons further. How the fictional children were coerced, and how we are to know, remains a mystery. The fictional children remain safe—that is, fictional, now that Whorley has been caught and convicted. Whorley's taste for fictional children will not, for at least the term of his sentence, be transformed into a danger to real children. But what about the stranger, the doctor, the teacher, the priest, Michael Jackson's ghost?[294] We may not have to "worry" about Phillip R. Greaves, the author of *The Pedophile's Guide to Love and Pleasure*, discussed *supra,* either.[295] He was arrested in December of 2010 after mailing a copy of his book from Colorado to Florida on charges of "distribution of obscene material depicting minors engaged in harmful conduct . . . a third-degree felony."[296]

Philip Jenkins, writing in 2001, stated, "though virtually any visual images involved in this trade [of child pornography] are prohibited, words are subject to constitutional protections."[297] Jenkins counted on these protections to do his research online.[298] These protections are clearly being eroded. Judge Gregory, dissenting from the denial of rehearing en banc in 2009, wrote, "I am hard pressed to think of a better modern day example of government regulation of private thoughts than what we have before us in this case: convicting a man for the

problem began only in the late 1970s, a few years before the Supreme Court heard *New York v. Ferber* . . . ." Adler, *Perverse*, *supra* note 17, at 218 (citing DAVID FINKELHOR, A SOURCEBOOK ON CHILD SEXUAL ABUSE 10 (1986)). *See also generally* Scheper-Hughes & Stein, *supra* note 17 (discussing "The 'Discovery' of Child Abuse").

293. *Whorley III*, 550 F.3d at 331.

294. *See* KINCAID, EROTIC, *supra* note 18, at 9–10. Kincaid writes:

> We have figured the crisis of sexual child abuse as a demonic trap, a tale of terror from which there is no escape. What we have here is an 'epidemic' of child molesting, a 'National Emergency,' but we seem to have devised the problem as an untreatable disease. . . . We have plotted the mystery story so that it can have no solution and no ending.

Id.; *see also* Kincaid, *Producing*, *supra* note 186, at 243–45 (analyzing popular joke about "Michael Jackson's driveway").

295. *See supra* notes 11–16 and accompanying text.

296. *Polk Sheriff: Pedophilia Book Author Arrested on Obscenity Charges*, BAY NEWS 9 (Dec. 20, 2010), http://www.baynews9.com/article/news/2010/december/185471/Polk-Sheriff:-Pedophilia-book-author-arrested. Greaves has been charged under Florida state laws, not federal obscenity laws as Whorley was. *Id.*; *see also* Michael Sheridan, *Phillip R. Greaves, Author of 'Pedophile's Guide to Love and Pleasure,' Arrested*, N.Y. DAILY NEWS (Dec. 20, 2010), http://www.nydailynews.com/news/national/2010/12/20/2010-12-20_phillip_r_greaves_author_of_pedophiles_guide_to_love_and_pleasure_arrested.html.

297. JENKINS, *supra* note 34, at 19.

298. *Id.* at 19–20.

victimless 'crime' of privately communicating his personal fantasies to other consenting adults."[299] This Note has tried to lend support to Judge Gregory's dissenting opinions (no other judge on his circuit has done so) and to highlight the background of the case and the issues surrounding it. At least two Justices on the Supreme Court have recognized Congress's efforts to legislate around the Court's holdings regarding child pornography.[300] This Note has argued that the courts have participated in larger cultural narratives of this historical moment regarding pedophilia and children, and that deeper and more courageous thought about these cultural narratives and the courts' participation in them is necessary. The point is not to "advocate the rights of pedophiles," nor is it to excuse the harms they may cause, nor is it to impugn the efforts to address those harms when they occur. But when the freedoms of expression, speech and thought are themselves at stake, more thought into how these stakes have been constructed is critical.

As British psychotherapist Adam Phillips has argued, "One can, and should, disapprove of the sexual abuse of children without denying that it raises some unsettling questions about sexuality, about its uncertain measure in our lives."[301] Having the "right to use our imaginations to create fantasies" sometimes means being left with extremely unsettling questions, fears and anxieties, which, like sexuality itself, "a story which can never be brought to a close," cannot be legislated, judged or wished away.[302]

299. Whorley IV, 569 F.3d 211, 212 (4th Cir. 2009) (Gregory, J., dissenting from the denial of rehearing en banc).

300. United States v. Williams, 553 U.S. 285, 321 (Souter, J., dissenting) (joined by Ginsburg, J.).

301. ADAM PHILLIPS, PROMISES, PROMISES: ESSAYS ON POETRY AND PSYCHOANALYSIS 101 (2001).

302. Whorley III, 550 F.3d 326, 353 (4th Cir. 2008) (Gregory, J., concurring in part and dissenting in part); ROSE, *supra* note 52, at 4.