Cornell Journal of Law and Public Policy

Volume 17
Issue 1 *Fall 2007*

Article 6

The Uncertain Fate of Virtual Child Pornography Legislation

Chelsea Mclean

THE UNCERTAIN FATE OF VIRTUAL CHILD PORNOGRAPHY LEGISLATION

*Chelsea McLean**

INTRODUCTION

In 2002 the Supreme Court struck down provisions of the Child Pornography Prevention Act of 1996 (the CPPA)[1] on the grounds that its provisions were unconstitutionally overbroad and therefore violative of

* B.A., The University of Wisconsin at Madison, 2005; Candidate for J.D., Cornell Law School, 2008; Articles Editor, *Cornell Journal of Law and Public Policy*, Volume 17. I am grateful to Augusta Wilson, Maria Hroncich and Jaime Senior for their thoughtful editing and suggestions. I also wish to thank my parents for their unending encouragement and support.

[1] Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009-26 (1996).

the First Amendment.[2] Specifically, the Court found, in *Ashcroft v. Free Speech Coalition*, that the statutory language prohibiting virtual child pornography —computer-generated images designed to resemble actual children or youthful adults depicted as minors—swept too broadly and prohibited constitutionally protected speech.[3] In striking those provisions, the Court rejected the government's secondary-effects argument that such depictions encourage child sexual abuse by whetting the appetites of pedophiles and luring children to participate in sexual acts.[4] Additionally, the Court dismissed the government's claim that juries struggle to distinguish between actual and virtual children and that, because it can be very difficult to distinguish between actual and virtual child pornography, if virtual child pornography is not banned, it might provide a convenient defense for those charged with using actual children in the production of pornography.[5] Lastly, the Court reasoned that the CPPA did not properly regulate obscenity because the statute could easily be used to prosecute depictions that are not offensive to a community.[6]

Congress responded to the *Free Speech Coalition* decision by passing the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (the PROTECT Act).[7] The PROTECT Act is designed to successfully combat the ills of child pornography, while satisfying the constitutional requirements of free expression outlined by the Court in *Free Speech Coalition*.[8] In justifying the PROTECT Act, Congress largely abandons the secondary effects argument it relied so heavily upon in defending the CPPA, and instead emphasizes that the legalization of virtual child pornography hampers prosecutions for child pornography.[9]

While many agree that the revised statute complies with the standards set forth in *Free Speech Coalition*, in reality the exact parameters of that standard remain uncertain. For example, the Court in *Free Speech Coalition* emphasized that the goal of prosecuting child pornography is to prevent harm to children,[10] but it did not specifically define "harm." Similarly, the Court did not make clear where the line between "virtual" and "real" should be drawn. It did not consider, for example,

---

2 Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).

3 *Id.* at 256–58.

4 *Id.* at 251–54.

5 *Id.* at 249.

6 *Id.* at 254–56.

7 18 U.S.C. § 2251 (2000).

8 *Id.*

9 *Id.*

10 *Free Speech Coal.*, 535 U.S. at 249–50.

the issue of morphing innocent, non-sexual photographs of real children into pornographic images.

Despite these legal battles, child pornography industry continues to develop and to create increasingly realistic images due to advancements in digital technology. In light of these developments, this note will address the increasing complexities facing those prosecuting and adjudging child pornography cases and will argue that computer savvy pornographers armed with budding technology may exploit the Court's ban on prohibitions of virtual child pornography by arguing that the real children depicted are actually virtual. Specifically, this note will argue, in Part IV, that statutes regulating virtual child pornography as obscenity will and should be upheld by the Supreme Court, and further, that such laws are sufficiently broad to prevent the harmful effects of virtual child pornography. But before delving into that debate, this note provides some background on pornography litigation and legislation. Part I describes the history of obscenity and pornography regulation and jurisprudence. Part II examines the Supreme Court's opinion in *Ashcroft v. Free Speech Coalition.* Part III analyzes subsequent Congressional efforts to regulate virtual child pornography, namely the PROTECT Act of 2003. Finally, in Part IV, this note will consider what forms of child pornography are obscene, and if all child pornography can or should be found obscene under the *Miller v. California* standard, which asks whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest, depicts sexual conduct in a patently offensive way, and lacks serious literary, artistic, politic or scientific value.[11]

I. A HISTORICAL OVERVIEW OF THE PROBLEM AND THE LAW

A. THE PROBLEM: CHILD PORNOGRAPHY AND COMPUTER TECHNOLOGY.

By the mid-1980s, federal enforcement had nearly eliminated child pornography trafficking.[12] The production of child pornography was costly and difficult, and the exchange of child pornography was extremely risky.[13] The industry declined because pornographers and pedophiles could not easily find and interact with one another and still

---

[11] Miller v. California, 413 U.S. 15 (1973).

[12] U.S. Dep't of Justice, Child Exploitation and Obscenity Section: Child Pornography, http://www.usdoj.gov/criminal/ceos/childporn.html (last visited Feb. 11, 2007).

[13] *Id.*

remain anonymous to federal law enforcement.[14] However, all that changed with the advent of computer technology.[15]

The internet allowed pedophiles to congregate and to share pornographic depictions of children easily and at little cost.[16] Greater accessibility and anonymity meant that child pornography could be disseminated at an unprecedented rate.[17] Today, websites, e-mail, instant messaging, chat rooms, newsgroups, bulletin boards, and peer-to-peer networks all serve as means by which pedophiles may disseminate or receive child pornography.[18]

In addition to making it easier to share actual child pornography, the explosion of computer technology gave rise to virtual child pornography.[19] This pornography utilizes computer-generated images designed to resemble children and may also feature adults who appear to be minors[20] or "morphed images," which are innocent images of children digitally distorted into pornography.[21] Important here is the fact that while some pedophiles may primarily use child pornography to gratify themselves, others will use such images to justify their pathology and to convince children to willingly participate in sexual acts.[22] Thus, although the production of virtual child pornography does not directly harm actual children, it may have undesirable secondary effects.

B. THE HISTORY OF CHILD PORNOGRAPHY JURISPRUDENCE AND LEGISLATIVE ATTEMPTS TO REGULATE CHILD PORNOGRAPHY.

Pornography jurisprudence is rooted in the Court's treatment of obscenity.[23] While the First Amendment to the Constitution states that "Congress shall make no law . . . abridging the freedom of speech," the Court has long held that the protections of the First Amendment are not absolute.[24] In particular, the Court ruled in *Miller v. California* that lewd and obscene speech does not receive First Amendment protection because obscenity serves no crucial role in the exposition of ideas and has

---

14 *Id.*

15 *Id.*

16 *Id.*

17 *See id.*

18 *Id.*

19 Ashcroft v. Free Speech Coal., 535 U.S. 234, 239–40 (2002).

20 *Id.* at 234.

21 *Id.* at 242.

22 *Id.* at 241.

23 *See generally* Miller v. California, 413 U.S. 15 (1973); New York v. Ferber, 458 U.S. 747 (1982).

24 *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (noting that obscenity, libel, profanity, and fighting words are undeserving of First Amendment protection).

little social value.[25] The challenge is ascertaining what constitutes obscenity.

In *Miller*, the Court set out a standard that defined obscene speech.[26] The Court developed a balancing test that asks:

> (a) [W]hether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work taken as a whole, lacks serious literary, artistic, political or scientific value.[27]

The Court observed that this standard is sensitive to the value sexual depictions might have in serious literary, artistic, political, or scientific works[28] and that it takes into account the values of the community in which the work was produced.[29]

Notably, *Miller* did not overrule the Court's decision in *Stanley v. Georgia*.[30] In *Stanley* the Court ruled that the government could not prohibit possession of obscene materials, reasoning that such regulations amounted to government mind control.[31]

In light of *Miller*, Congress enacted the Protection of Children Against Exploitation Act of 1977,[32] which made illegal the use of children under the age of sixteen in sexually explicit material.[33] However, the statute only dealt with commercial sale, and not mere trading.[34] Further, it penalized only those materials found obscene under the *Miller v. California* standard.[35]

Then, in *New York v. Ferber*, the Court held that child pornography involving actual children is a category of speech not protected by the Constitution and that such depictions may be prohibited despite the fact that they are not obscene.[36] The Court offered five justifications for disallowing child pornography.[37] First, the Court noted that the use of chil-

---

25 *Miller*, 413 U.S. at 25–26.

26 *Id.* at 24–25.

27 *Id.* at 25 (citations omitted).

28 *Id.* at 25–26.

29 *Id* at 30, 33.

30 394 U.S. 557 (1969).

31 *Id.* at 559.

32 Pub. L. No. 95–225, 92 Stat. 7 (codified as amended at 18 U.S.C. §§ 2251–53 (2000)).

33 *Id.* § 2251; *see also* S. REP. No. 95-438, at 5 (1977).

34 18 U.S.C. § 2251. The Act also prohibited the trafficking of juveniles for the purpose of prostitution. *Id.*

35 *Id.*

36 New York v. Ferber, 458 U.S. 747, 759–61 (1982).

37 *Id.* at 756–64.

dren in pornographic depictions is harmful to the physical, emotional, and mental health of the child and that this comprises a compelling government interest that warrants regulation.[38] Second, the Court found that the *Miller* standard for determining what is legally obscene does not adequately encompass the less extreme sexual depictions that child pornography includes.[39] Third, the Court observed that the advertising and selling of child pornography provides an economic incentive for the production of such material; a crime throughout the United States.[40] Fourth, the Court noted that the value of photographic depictions of children engaged in sexual acts is small, if not *de minimis*.[41] Lastly, the Court reasoned that recognizing child pornography as a category of unprotected speech was consistent with prior decisions limiting the First Amendment where the government's interest was especially strong and the value of the speech was minimal.[42]

Later, Congress enacted the Child Protection Act of 1984.[43] This statute reflected the insufficiency of previous legislation, which had resulted in only one conviction since 1978.[44] It raised the protected age from sixteen to eighteen,[45] eliminated the requirement that the material be obscene,[46] and removed the requirement that material be made or distributed for the purpose of commercial sale.[47] Subsequently, the Child Sexual Abuse and Pornography Act of 1986 prohibited advertisements the violator knew to be related to depictions of sexually explicit conduct by a minor from being mailed or otherwise transported in interstate or

---

38 *Id.* at 756–59.

39 *Id.* at 759–61.

40 *Id.* at 761–62.

41 *Id.* at 762–63.

42 *Id.* at 763–64.

43 Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (codified as amended at 18 U.S.C. §§ 2251–55 (West Supp. 2007)).

44 ATT'Y GEN.'S COMM'N ON PORNOGRAPHY: FINAL REPORT 604 (1986) [hereinafter FINAL REPORT]. Before such legislation, the Attorney General encouraged tougher enforcement and regulation of child pornography. *See id.*; *see also* Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439 (1997) (offering a detailed analysis of the history of congressional regulation of child pornography and examining the sufficiency and breadth of state interest).

45 98 Stat. 204.

46 *Id.*

47 *Id.*; *see also* United States v. Andersson, 803 F.2d 903, 906 (7th Cir. 1986) (holding that Congress intended that the Act penalize those who distribute child pornography, regardless of commercial motive); United States v. Smith, 795 F.2d 841, 846 (9th Cir. 1986) (holding that the Act does not exempt those who use but do not distribute child pornography). Congress's elimination of the obscenity requirement reflects the Supreme Court's holding in *New York v. Ferber* that child pornography is an unprotected category of speech. *See* 458 U.S. 747 (1982).

foreign commerce.[48] Additionally, the Child Abuse Victim's Rights Act of 1986 made such violators personally liable to their minor victims.[49]

Congress first addressed the connection between the rapidly developing computer industry and child pornography in the Child Protection and Obscenity Enforcement Act of 1988.[50] This legislation penalizes the use of computers in offering to buy or sell control of a minor for the purpose of sexually explicit conduct.[51]

In 1990, the Court in *Osborne v. Ohio* upheld an Ohio statute criminalizing mere possession of child pornography.[52] There, the defendant argued that there was insufficient state interest to criminalize mere possession and that the statute was unconstitutionally overbroad.[53] The Court cited evidence that pedophiles use child pornography to convince non-depicted children to willingly engage in sexual acts.[54] The Court found that the protection of both depicted and non-depicted children was a legitimate and compelling governmental interest, and therefore, unlike prohibitions of obscenity, prohibitions of child pornography were constitutional.[55] Additionally, the Court acknowledged that Congress has a legitimate and compelling interest in eliminating the market for child pornography.[56]

Finally, in *United States v. X-Citement Video, Inc.*,[57] the Supreme Court interpreted the Protection Against Sexual Exploitation Act of 1977[58] to contain a scienter requirement.[59] Although the statute was ambiguous on that point,[60] the Court reasoned that a contrary rule would penalize distributors who did not know the material they were selling

---

48 Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99–628, 100 Stat. 3510 (codified as amended at 18 U.S.C. §§ 2251, 2255 (West Supp. 2007)).

49 Child Abuse Victims' Rights Act of 1986, Pub. L. No. 99-500, 100 Stat. 1783, 74–75 (codified as amended at 18 U.S.C. § 2255 (West Supp. 2007)).

50 Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, § 7512, 102 Stat. 4485, 4486 (codified as amended at 18 U.S.C. § 2251A (West Supp. 2007)); *see also* John C. Scheller, Note, *PC Peep Show: Computers, Privacy, and Child Pornography*, 27 J. MARSHALL L. REV. 989, 1009–10 (1994).

51 Child Protection and Obscenity Enforcement Act § 7512.

52 495 U.S. 103, 112–13 (1990).

53 *Id.* at 107, 110–12.

54 *Id.* at 111.

55 *Id.* at 109–11. Under this rule, factors beyond the direct harm to depicted children could have constituted a compelling governmental interest where child pornography was concerned. United States v. Hilton, 167 F.3d 61, 70 (1st Cir. 1999) ("[C]onsiderations beyond preventing the direct abuse of actual children can qualify as compelling government objectives where child pornography is concerned.").

56 *Osborne*, 495 U.S. at 110.

57 513 U.S. 64 (1994).

58 Pub. L. No. 95–225, 92 Stat. 7 (codified as amended at 18 U.S.C. §§ 2251–53 (West Supp. 2007)).

59 A scienter requirement provides that the person possess knowledge of the nature of his or her act or omission. *See* BLACK'S LAW DICTIONARY (8th ed. 2004).

60 *X-Citement Video*, 513 U.S. at 68–69.

was pornographic.[61] Further, the Court noted that it was judicial practice to presume a scienter requirement for offenses against public morals.[62]

Shortly thereafter, Congress acknowledged the phenomenon of virtual child pornography.[63] It found that depictions of child sexual activity that were indistinguishable from depictions of actual children were just as likely to successfully aid pedophiles in molesting children as depictions of actual children.[64] Further, Congress concluded that a blanket ban on all forms of child pornography would encourage pedophiles to destroy such material, thereby reducing the market for the sexual exploitation of children.[65] Lastly, Congress noted that technological advances in digital image editing meant that those charged with possession of actual child pornography would argue that such images were virtual, and that eventually the two types of images would be indistinguishable.[66] Therefore, Congress concluded it would be impossible for the State to prove beyond a reasonable doubt that the pornography depicted actual children.[67]

In light of these findings, Congress passed the Child Pornography Prevention Act in 1996 (the CPPA).[68] The statute expanded the definition of child pornography to include any depiction that "is, or appears to be, of a minor engaging in sexually explicit conduct."[69] Additionally, the statute proscribed the marketing of child pornography, making the advertisement, promotion, presentation, description, or distribution of a minor engaged in sexually explicit conduct illegal.[70] Lastly, the CPPA permitted an affirmative defense requiring a defendant to prove that the depictions at issue featured only adults and that the defendant did not convey the impression that the images were of actual children.[71]

II. THE CASE: ASHCROFT V. FREE SPEECH COALITION

In 1997, the Free Speech Coalition, a California trade association representing the adult-entertainment industry, challenged the constitutionality of the CPPA in the U.S. District Court for the Northern District

---

61 *Id.* at 69.

62 *Id.* at 70–72.

63 Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009, 26–31; *see also* S. REP. NO. 104-358 (1996).

64 S. REP. NO. 104–358, at 2.

65 *Id.* at 3.

66 *Id.* at 16, 20.

67 *Id.*

68 Child Pornography Prevention Act § 121.

69 § 121, 110 Stat. at 3009–28.

70 *Id.*

71 *Id.*

of California.[72] The adult entertainment association argued that section 2256(8)(B) of the CPPA prohibiting "any visual depiction, including any photograph, film, video, picture, or computer generated image or picture [that] is, or appears to be, of a minor participating in a sexually explicit conduct" violated the First Amendment's guarantee of freedom of speech.[73] Additionally, the association challenged the constitutionality of section 2256(8)(D) of the CPPA that defined child pornography to include any sexually explicit image that was "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" it contains "a minor engaging in sexually explicit conduct."[74]

The association claimed that its members did not use children in their pornographic works, but that they believed some of these works might nonetheless be prohibited under the CPPA's expansive definition of child pornography.[75] The U.S. District Court for the Northern District of California disagreed and awarded summary judgment to the government.[76] The district court noted that it was highly unlikely that adaptations of sexually explicit literary or artistic works would be penalized.[77] The Court of Appeals for the Ninth Circuit reversed, finding that the challenged provisions were substantially overbroad and prohibited materials that were neither obscene nor produced using actual children.[78] The court reasoned that Congress could not ban this kind of speech because of its tendency to persuade viewers to commit crimes.[79] A dissenting judge, however, opined that virtual child pornography, like obscenity and pornography using real children, should be treated as a category of

---

72 Free Speech Coal. v. Reno, No. C 97-0281VSC, 1997 WL 487758 (N.D. Cal. Aug. 12, 1997), *aff'd in part, rev'd in part*, 198 F.3d 1083 (9th Cir. 1999), *pet. for rehearing en bank denied*, 220 F.3d 1113 (9th Cir. 2000), *aff'd sub nom.* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).

73 *Free Speech Coal.*, 535 U.S. at 241.

74 *Id.* at 257.

75 *Id.* at 243. Other respondents in the suit included "Bold Type, Inc., the publisher of a book advocating the nudist lifestyle; Jim Gingerich, a painter of nudes; and Ron Raffaelli, a photographer specializing in erotic images." *Id.*

76 *Id.*; *see also* Free Speech Coal. v. Reno, 1997 WL 487758 (issuing summary judgment in favor of the government in response to plaintiff's challenge to the constitutionality of the Child Pornography Protection Act).

77 *Free Speech Coal.*, 535 U.S. at 243 (citing Petition for Writ of Certiorari, *Free Speech Coal.*, 538 U.S. 510, 62a–63a (No. 00-795)).

78 *Id.* (citing Free Speech Coal. v. Reno, 198 F.3d 1083, 1096 (9th Cir. 1999)). The Court of Appeals voted to deny the petition for rehearing en banc over the dissent of three judges. *Id.* at 243–44 (citing Free Speech Coal. v. Reno, 220 F.3d 1113, 1113 (9th Cir. 2000)).

79 *Id.* at 243.

speech not protected by the First Amendment.[80] Four other circuit courts agreed with the 9th Circuit dissenter's reasoning and sustained the act.[81]

The Supreme Court of the United States, in an opinion authored by Justice Kennedy, agreed with the Ninth Circuit and held the CPPA constitutionally invalid on its face.[82] The Court reasoned that the material prohibited by the CPPA was neither obscenity under the *Miller* standard nor pornography depicting actual children engaged in sexual acts, as dictated by *Ferber*.[83] The Court found that the CPPA was unconstitutionally overbroad on its face because it prohibited a substantial amount of protected speech.[84]

First, upon examining section 2256(8)(B), the "appears to be" provision of the CPPA, the Court reasoned that the CPPA did not regulate obscenity because it extended to material involving minors engaged in sexual activity without regard to the *Miller* requirements.[85] In particular, the Court noted that the CPPA did not require that material appeal to the prurient interest or contravene community standards but rather that it merely contain sexually explicit activity involving minors.[86] Further, the Court observed that the CPPA did not demand that prohibited images be patently offensive.[87] Justice Kennedy explained that under the CPPA, creators of works depicting seventeen year-olds engaging in sexual activity could be prosecuted, despite the fact that such behavior is commonplace in society and such images are generally accepted as valid in art and literature.[88] He reasoned that such works are not patently offensive as required by *Miller*.[89] Justice Kennedy found that such works had artistic or literary redeeming value, noting that even films that merely explored teenage sexuality and did not contain child actors could be prosecuted under the statute.[90] Finally, the Court reasoned that the CPPA could not be said to regulate obscenity because its prohibitions of child pornography were not related to community standards, as required by *Miller*.[91]

---

80 *Id.* (citing Free Speech Coal. v. Reno, 198 F.3d at 1097 (Ferguson, J., dissenting)).

81 *Id.* at 244 (citing United States v. Fox, 248 F.3d 394 (5th Cir. 2001); United States v. Mento, 231 F.3d 912 (4th Cir. 2000); United States v. Acheson, 195 F.3d 645 (11th Cir. 1999); United States v. Hilton, 167 F.3d 61, (1st Cir. 1999) *cert. denied*, 528 U.S. 844 (1999)).

82 *Id.* at 234.

83 *Id.* at 246–51.

84 *Id.* at 258.

85 *Id.* at 246.

86 *Id.*

87 *Id.*

88 *Id.* at 246–47.

89 *Id.*

90 *Id.* at 247–48. Justice Kennedy pointed to contemporary, critically-acclaimed films such as *Traffic* and *American Beauty* as examples of the value of artistic depictions of teenage sexuality in modern society. *Id.*

91 *Id.* at 248–49.

However, the Court did add that:

> While we have not had occasion to consider the question, we may assume that the apparent age of persons engaged in sexual conduct is relevant to whether a depiction offends community standards. Pictures of young children engaged in certain acts might be obscene where similar depictions of adults, or perhaps even older adolescents, would not.[92]

Nevertheless, the Court held that the CPPA was not directed at obscenity and that obscene materials are regulated by a separate statute.[93]

Second, the Court held that the CPPA could not be found constitutional under *Ferber* because it covered material that was not directly connected to the sexual abuse of children.[94] Justice Kennedy noted that, unlike *Ferber*, where the prohibited material was determined to be "intrinsically related" to the sexual abuse of children, pornography that does not utilize actual children in its production does not serve as a permanent record of a child's abuse, nor does the ongoing circulation of such material harm actual children.[95] While the government argued that the images could lead to instances of child abuse, the Court responded that any causal link was attenuated and that subsequent harm depended upon a viewer's immeasurable capacity to commit subsequent illegal acts.[96] Still, the government contended that even these indirect harms were sufficient because, as *Ferber* acknowledged, child pornography is rarely valuable speech.[97] The Court, however, rejected this contention on two grounds. Justice Kennedy reasoned first that *Ferber* dealt with the production of child pornography and not the message it communicated, and second that *Ferber* did not hold that child pornography is by definition without value.[98] He noted that *Ferber* recognized some child pornography as having significant value and that the very images prohibited by the CPPA were acknowledged as alternative ways to create literary and artistic works that explore the sexuality of minors without using actual minors in the production of pornographic works.[99] Thus, the Court found, *Ferber* provided no support for a statute which rid the distinction between virtual and actual child pornography, penalizing the former as well as the latter.[100]

---

92 *Id.* at 240.
93 *Id.*
94 *Id.* at 249–51 (citing New York v. Ferber, 458 U.S. 747, 761 (1982)).
95 *Id.* at 249–50.
96 *Id.* at 250.
97 *Id.*
98 *Id.* at 250–51.
99 *Id.* at 251.
100 *Id.*

Despite the Court holding that CPPA was inconsistent with both *Miller* and *Ferber*, the government sought to justify the prohibitions on other grounds.[101] First, the government contended that the statute was necessary because pedophiles may use virtual child pornography to convince minors to engage in sexual activity.[102] In particular, the government argued that virtual child pornography may be shown to children reluctant to engage in sexual activity as evidence that other children are "having fun" performing similar acts.[103] The Court, however, rejected this argument, noting that cartoons, video games, and candy could all be used to entice children to engage in sexual acts but that such items could not reasonably be prohibited merely because of their potential for misuse.[104] The Court noted that the Government is free to penalize adults who provide unsuitable materials to children, but that it cannot ban speech appropriate for adults simply because it may reach children.[105]

Second, the government asserted that virtual pornography "whets the appetites of pedophiles and encourages them to engage in illegal conduct."[106] The Court dismissed this argument as well, reasoning that that the tendency of speech to encourage illegal acts is not a valid reason to prohibit it.[107] Justice Kennedy emphasized the Court's long-standing recognition of the distinction between words and deeds, or ideas and conduct.[108] While Justice Kennedy acknowledged that the government may regulate speech that incites imminent lawless action and is likely to produce such action, he noted that here, the government had shown at best a remote link between speech that might encourage thoughts leading to child abuse and that such an attenuated link was insufficient to sustain the statute.[109]

Third, the government argued that prohibition of virtual child pornography was necessary to eliminate the market for child pornography using actual children.[110] In particular, the government contended that virtual images are indistinguishable from images of real children and are part of the same market and are often traded.[111] However, the Court responded that if virtual images were indeed indistinguishable from real

---

101 *Id.* at 251–55.
102 *Id.* at 251–52.
103 *Id.* at 241.
104 *Id.* at 251.
105 *Id.* at 252–53.
106 *Id.* at 253.
107 *Id.*
108 *Id.*
109 *Id.* at 253–54.
110 *Id.* at 254.
111 *Id.*

ones, few pornographers would risk criminal sanction by abusing real children when artificial, computerized images would suffice.[112]

Lastly, the government argued that the existence of virtual child pornography makes it more difficult to prosecute pornographers who do produce material using actual children.[113] The government cited expert findings that suggested it is difficult to determine whether a given image depicts actual children or was created using computer technology.[114] Thus, the government claimed, prohibition of both types of pornography was necessary to prevent defendants in possession of pornography showing actual children from evading criminal sanction by arguing that such images are computer generated.[115] The Court found this argument unconvincing as well, noting that the purpose of the overbreadth doctrine is to ensure that the government may not ban lawful speech as a means to eliminate unlawful speech.[116]

To escape the reach of Court's objection, the government responded that the Court should read the CPPA as a law, shifting the burden to the accused to prove the speech is lawful and not, as a statute, prohibiting expression.[117] In particular, the government pointed to the affirmative defense provided by the statute that allowed the defendants to avoid conviction for non-possession offenses by demonstrating that "the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children."[118] The Court, however, found this affirmative defense to be incomplete and insufficient. It noted that the government poses serious constitutional difficulties by shifting the burden to the defendant to prove that his speech is not unlawful.[119] The Court reasoned that some defendants may endure substantial hardship in demonstrating that the speech in question is lawful.[120] For instance, where the defendant did not produce the work himself, he may have no way of proving the identity or existence of the actors.[121] Further, the Court explained that even producers themselves may not have maintained the records necessary to satisfy the burden of proof.[122] "Even if an affirmative defense can save a statute from First Amendment challenge," the Court expounded, "here the defense is in-

112 *Id.*
113 *Id.*
114 *Id.*
115 *Id.* at 254–55.
116 *Id.* at 255.
117 *Id.*
118 *Id.* (citing 18 U.S.C. § 2252A(c) (2006)).
119 *Id.*
120 *Id.* at 255–56.
121 *Id.* at 255.
122 *Id.* at 256.

complete and insufficient, even on its own terms."[123] Justice Kennedy noted that defendants charged with possessing, as opposed to distributing, prohibited works could not avail themselves of the affirmative defense, even if the images they possessed feature only adult actors.[124] Additionally, the Court found that the affirmative defense provided no protection to defendants who produce images using computer technology or other means that do not depict adult actors as minors.[125] Therefore, the Court concluded that the affirmative defense was insufficient to sustain the CPPA.[126]

Finally, the Court examined section 2256(8)(D), the provision of the CPPA that prohibited pornography "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct."[127] The government claimed that the difference between this provision and section 2256(8)(B) was that "the 'conveys the impression' provision requires the jury to assess the material at issue in light of the manner in which it is promoted," but that such a determination would depend primarily upon the content of the proscribed work.[128] The Court, however, replied that the jury's analysis would require little judgment about the content of the work beyond determining that the work is sexually explicit.[129] Rather, the Court reasoned, the CPPA prohibited sexually explicit works that do not contain youthful actors or images simply because they are packaged or promoted as depicting the sexuality of minors and, further, criminalized possession of such images even where the possessor realizes that the work was mislabeled.[130] Thus, the Court concluded, section 2256(8)(D) was also overbroad and in violation of the First Amendment.[131]

In his concurrence, Justice Thomas acknowledged the government's asserted interest in assuring that those defendants who possess and distribute pornographic materials depicting real children do not escape conviction by asserting that the images they possess are computer generated, thereby raising a reasonable doubt as to their guilt.[132] However, Justice Thomas maintained that imaging technology was not yet sophisticated enough to create images identical to real children, noting that no defen-

---

123 *Id.*

124 *Id.*

125 *Id.* (citing 18 U.S.C. § 2252(c) (2006)).

126 *Id.*

127 *Id.* at 257 (quoting 18 U.S.C. § 2256(8)(D)).

128 *Id.* (quoting Brief for the Petitioners at 18, n.3, Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002) (No. 00-795)).

129 *Id.*

130 *Id.* at 258.

131 *Id.*

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

dant had been shown to have been acquitted based on a "virtual defense," and that given this, such a speculative interest could not support a statute as expansive as the CPPA.[133] Having said as much, Justice Thomas acknowledged that technology may develop to the point where it becomes impossible for the prosecution to demonstrate that a pornographic image is of a real child, and that under those circumstances, it may be appropriate for the government to regulate virtual child pornography.[134]

In her dissent, Justice O'Connor, with whom Chief Justice Rehnquist and Justice Scalia joined, found that the CPPA's prohibition against virtual child pornography was not overbroad.[135] In particular, Justice O'Connor asserted that the CPPA's ban on virtual child pornography did not fail strict scrutiny because the Government has a compelling interest in protecting the nation's children that is furthered by efforts to combat sexual predators and real child pornography.[136] Justice O'Connor recognized the effects of virtual child pornography, noting that such images whet the appetites of pedophiles are used to seduce children and may be utilized as means for defendants charged with possession of real child pornography to escape criminal sanction.[137] Like Justice Thomas, Justice O'Connor acknowledged that rapidly developing computer technology may soon produce virtual images that are indistinguishable from images of real children.[138] Further, while Justice O'Connor agreed with the majority that the CPPA's prohibition of youthful adult pornography violated the First Amendment, she maintained that the CPPA drew a meaningful distinction between the two classes of pornography, virtual child pornography and youthful adult pornography, by providing an affirmative defense for the latter but not the former.[139]

---

133 *Id.*

134 *Id.* Justice Thomas also commented that the Court left open the possibility that a broader affirmative defense could make a statute constitutional. *Id.* However, he qualified that by stating that he "would not prejudge . . . whether a more complete affirmative defense is the only way to narrlowly tailor a criminal statute that prohibits the possession and dissemination of virtual child pornography." *Id.* at 260 (Thomas, J., concurring).

135 *Id.* at 263 (O'Connor, J., dissenting).

136 *Id.*

137 *Id.*

138 *Id.* at 264 (O'Connor, J., dissenting). In light of this fact Justice O'Connor argued that the Court should read the "appears to be" provision of the CPPA as meaning "virtually indistinguishable from" so that the provision would not cover sexually explicit cartoons or statues of children. *Id.* Justice O'Connor reasoned that this narrower interpretation would avoid the constitutional hurdles of overbreadth and lack of narrow tailoring. *Id.* at 265 (O'Connor, J., dissenting).

139 *Id.* at 266–67 (O'Connor, J., dissenting). In light of her reasoning, Justice O'Connor concluded that she would reject the CPPA's prohibition of material that "conveys the impression" that it contains real child pornography, but would uphold the prohibition on pornographic images that "appear to be" of children so long as it is not directed at youthful adult pornography. *Id.* at 267 (O'Connor, J., dissenting).

Similarly, Chief Justice Rehnquist, in his dissent, asserted that he would have reversed the Court of Appeals' decision and held the CPPA to be constitutional in its entirety.[140] Justice Rehnquist maintained that the CPPA could be interpreted to reach only those images virtually indistinguishable from images of real children.[141] Notwithstanding Justice Rehnquist's dissent, however, the Court ruled that the CPPA was unconstitutional, and suggested that Congress should draft a narrower law in order to comply with the First Amendment.

III. HERE WE GO AGAIN: THE PROTECT ACT OF 2003

A. CONGRESSIONAL FINDINGS SUPPORT THE AMENDED LEGISLATION.

After the *Free Speech Coalition* decision was issued, both houses of Congress scrambled to enact legislation that would pass constitutional muster but still effectively combat child pornography.[142] Congress deemphasized the secondary-effects argument that it had advanced in favor of prohibiting virtual child pornography and instead, taking a cue from Justice Thomas's concurrence, focused on the likelihood that a defense of virtual pornography could inhibit prosecutions for actual child pornography.[143] Specifically, Congress pointed to post-*Free Speech Coalition* cases in which a defendant had successfully argued that the alleged child pornography was actually a virtual creation.[144] Further, the National Center for Missing and Exploited Children (NCMEC) testified in front of the House Judiciary Committee's Subcommittee on Crime (Subcommittee).[145] In its testimony, NCMEC displayed both real and virtual pictures, demonstrating their similarity. The Subcommittee found that an ordinary person viewing the pictures would find it difficult, if not impossible, to distinguish between real and virtual images.[146] In fact, the technical components of digital images of real and virtual children are identical and, as a result, even a skilled expert might not be able to sepa-

---

140 *Id.* at 267–73 (Rehnquist, C.J., dissenting).

141 *Id.* at 268 (Rehnquist, C.J., dissenting).

142 *See* S. 151, 108th Cong. (2003); H.R. 1161, 108th Cong. (2003); H.R. 4623, 107th Cong. (2002). The House versions of the proposed amended legislation were titled the Child Obscenity and Pornography Prevention Acts of 2002 and 2003 (COPPA). *See* H.R. 1161; H.R. 4623. The Senate version was labeled the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT), eventually the title of the enacted bill. *See* S. 151; H.R. 1161.

143 PROTECT Act, Pub. L. No. 108-21, § 501(9), 117 Stat. 650, 677 (2003) ("After [the 1999 Ninth Circuit Court of Appeals decision in *Free Speech Coalition*,] prosecutions generally have been brought in the Ninth Circuit only in . . . a fraction of meritorious child pornography cases.").

144 S. REP. NO. 108-2, at 4–5 (2003).

145 *Id.* at 5.

146 *Id.*

rate virtual from real.[147] The difficulty in identifying child victims is only further complicated by the global nature of the child pornography industry[148] and by the anonymity of the internet.[149] Thus, Congress concluded that the availability of a virtual defense could create a reasonable doubt as to the authenticity of alleged child pornography in every case.[150] Lastly, NCMEC, who maintains a database of sexually exploited children, asserted that since *Free Speech Coalition*, they had been contacted by numerous prosecutors threatening to drop child pornography charges if the NCMEC could not identify the minors pictured.[151] NCMEC further testified that many prosecutions were in fact dismissed as a result of prosecutors being unable to identify the depicted children.[152]

Additionally, Congress found that while a defense of virtual child pornography might prove successful, it is essentially illusory because most child pornography utilizes real children.[153] Experts testified before Congress that, while the computer technology exists to create virtual images, it is a time consuming and expensive process and that child pornography depicting actual children is more cost-effective.[154] Nevertheless, Congress feared that producers and distributors might hamper prosecutions by making subtle and inexpensive computer enhancements to images, thereby rendering children unidentifiable or implying that they are virtually produced.[155]

---

147 *See id.*; *see also* Timothy J. Perla, Note, *Attempting to End the Cycle of Virtual Pornography Prohibitions*, 83 B.U. L. REV. 1209, 1218 (2003) (asserting that there is no absolute difference between real and virtual images because both are essentially comprised of a mere aggregation of indistinguishable data); Webopedia.com, Definition of Digital, http://www.webopedia.com/TERM/d/digital.html (last visited Dec. 3, 2007).

148 *See* Yaman Akdeniz, International Developments Section of Regulation of Child Pornography on the Internet: Cases and Materials, http://www.cyber-rights.org/reports/interdev.htm (last visited Nov. 10, 2007) (describing arrests for child pornography abroad) [hereinafter International Developments].

149 *See* Perla, *supra* note 147, at 1222–24. Perla explains that the only records of online pornography trading are logs. *Id.* at 1222. Computer servers manage logs in order to bill their users, to keep track of how many "hits" they receive, or to identify computer hackers. *Id.* at 1222–23. Logs detail where a file came from and where it went. *Id.* at 1223. However, since logs utilize a great deal of memory, they are often discarded. *Id.* Further, servers sometimes choose to log only certain activities, thus it is possible to exchange pornography without being logged. *Id.* In fact, sophisticated users may encrypt the files they send, thereby concealing their identities, their crimes, or both. *Id.* at 1224.

150 S. Rep. No. 108-2, at 5 (2003).

151 *Id.*

152 *Id.*

153 S. Rep. No. 108-2, at 6.

154 *Id.*

155 *Id.*

B. THE LAW IS ENACTED AS THE PROTECT ACT.

Ultimately, the House and Senate versions of the amended legislation were combined and passed as the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (the PROTECT Act).[156] While the PROTECT Act retains many of the provisions of the CPPA, it makes several critical changes to satisfy the parameters of *Free Speech Coalition*.[157] First, the PROTECT Act amends the definition of child pornography under § 2256(8)(B) to include any digital image "that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct."[158] Thus, the PROTECT Act discards the "appears to be" and "conveys the impression" language that the Court deemed unconstitutional in *Free Speech Coalition*, choosing language that reaches substantially less material because it requires that there be no arguable difference between the alleged image and that of a real child.[159] Additionally, Congress defined "sexually explicit conduct," as used in the statute, as "graphic" sexual conduct.[160]

Second, Congress removed the pandering provision from the definition of child pornography[161] and drafted a separate section prohibiting only virtual images of minors engaged in sexually explicit conduct that are knowingly advertised, promoted, presented, distributed or solicited in a manner that reflects the belief, or are intended to cause another to believe, that they are obscene.[162] Thus, by permitting virtual depictions of non-graphic sexually explicit conduct and allowing promotion of non-obscene works, Congress remedied the overbreadth problem and ensured that award-winning films like *American Beauty* and *Traffic* were not targeted by the statute.[163] Finally, by adding a knowledge requirement, Congress protects individuals in possession of materials pandered as child pornography by someone earlier in the distribution chain so long as those individuals do not pander the materials as or believe that the materials are child pornography .[164]

Lastly, the PROTECT Act expands the affirmative defense provided by the CPPA, which had been previously available only to the pornographers who used "youthful-looking adults" in their images and films.[165] This amendment reflects the Court's suggestion in *Free Speech*

156 18 U.S.C. § 2256 (2000).
157 *Id. See generally* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).
158 18 U.S.C. § 2256(8)(B).
159 *See id.* § 2256(8)(B)–(D); 535 U.S. at 241, 257.
160 *Id.* § 2256(2)(B)(i)–(iii).
161 *See id.* § 2256(8)(D) (repealed 2003).
162 *Id.* § 2252A(a)(3)(B).
163 *See id.* § 2252(8)(B); *see also* Ashcroft v. Free Speech Coal., 535 U.S. at 247–48.
164 *See* 18 U.S.C. § 2252A(a); *see also Free Speech Coal.*, 535 U.S. at 258.
165 *See Free Speech Coal.*, 535 U.S. at 256.

Coalition that a more complete affirmative defense might save the statute.[166] Under the amended version of § 2252A(c), persons charged under the provisions of the PROTECT Act prohibiting the trafficking, possession with the intent to sell, and mere possession of child pornography may assert an affirmative defense if "(1) (A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and (B) each such person was an adult at the time the material was produced; or (2) the alleged child pornography was not produced using any actual minor or minors."[167] Thus, the statute no longer bans virtual child pornography and instead focuses exclusively on images of actual children. However, the amended affirmative defense continues to place the burden on a defendant to demonstrate that the pornography at issue does not depict an actual child and further, is not available to those charged with pandering under § 2252A(a)(3)(B). Thus, a defendant charged with possession is still required to demonstrate that the images at issue do not depict actual children—a difficult task if the defendant has no way to ascertain the origin of a particular image.[168]

While the Supreme Court has not yet ruled on the constitutionality of the PROTECT Act, it will soon render an opinion. On October 30, 2007, the Court heard oral arguments in *United States v. Williams*.[169] Williams was prosecuted under the PROTECT Act's possession[170] and pandering[171] provisions after sending hyperlinks to child pornography in an online chat room.[172] Williams pleaded guilty but on appeal, urged that his conviction was invalid because the PROTECT Act's pandering provision is unconstitutionally vague and overbroad.[173] The Eleventh Circuit agreed and held the PROTECT Act unconstitutional.[174] On certiorari to the Supreme Court, the government argued that the PROTECT Act is neither vague nor overbroad because it only prohibits speech that is not protected by the First Amendment.[175] Additionally, the government contended that the Act's pandering provision is valid because it

---

166 *Id.*

167 18 U.S.C. § 2252A(c)(1)(A)–(B), (2).

168 *See id.* § 2252A(c); *see also Free Speech Coal.*, 535 U.S. at 255-56.

169 *See* Supreme Court o the United States October Term 2007, *available at* http://www.supremecourtus.gov/oral_arguments/argument_calendars/MonthlyArgumentCalNovember2007.pdf

170 18 U.S.C. § 2252A(a)(5)(B).

171 *Id.* at § 2252A(a)(3)(B).

172 *See* United States v. Williams, 444 F.3d 1286, 1288–89 (11th Cir. 2006), *cert granted*, 127 S.Ct. 1874 (2007).

173 *See id.* at 1289.

174 *See id.* at 1308–09.

175 *See id.* at 1303–05.

requires intent and that the law is necessary to combat child pornography.[176]

While it is not yet clear how the Court will rule, the constitutionality of the PROTECT Act remains uncertain for numerous reasons. Notably, the difficulties in establishing the affirmative defense and the burden placed on the defendant in doing so raise questions of due process.[177] Further, the statute's prohibition of virtual child pornography that is "virtually indistinguishable" from actual pornography raises concerns similar to those expressed by the Court in *Free Speech Coalition*.[178] In light of the questionable validity of the PROTECT Act and the ever-changing battlefield of child pornography prosecutions,[179] treating virtual child pornography as a form of obscenity remains a feasible and effective approach. In fact, along with the PROTECT Act, Congress proposed a resolution that called for aggressive enforcement of existing federal obscenity laws.[180] While this bill was never enacted, it reflects Congressional awareness that obscenity law may serve as a worthy tool in the war against child pornography.[181]

IV. TREATING VIRTUAL CHILD PORNOGRAPHY AS A FORM OF OBSCENITY

A. DOES THE SHOE FIT?

While the Court in *Free Speech Coalition* refused to treat virtual child pornography as a category of speech wholly undeserving of First Amendment protection,[182] the Court has firmly held that obscene speech is subject to outright bans.[183] As noted in Part II, the Court in *Miller v. California* announced that speech may be prohibited as obscenity if the average person applying contemporary community standards would find that the work, taken as a whole, (1) appeals to the prurient interest, (2) contains depictions or descriptions of sexual conduct that are patently offensive, and (3) lacks serious literary, artistic, political or scientific

---

176 *See id.*

177 *See Free Speech Coal.*, 535 U.S. at 255 ("The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful.").

178 *See id.*

179 *See* United States. v. Kimbrough, 69 F.3d 723, 732–33 (5th Cir. 1995) (discussing the requisite mens rea for child pornography offenses).

180 *See* H.R. Con. Res. 445, 107th Cong. (2002) ("Whereas vigorous enforcement of obscenity laws can help reduce the amount of 'virtual child pornography' now readily available to sexual predators . . . it is the sense of Congress that the Federal obscenity laws should be vigorously enforced throughout the United States.").

181 *See id.*

182 *See* 535 U.S. at 236.

183 *See* Miller v. California, 413 U.S. 15, 36–37 (1973).

value.[184] While *Miller* permits prohibitions on the production and distribution of obscenity,[185] *Stanley v. Georgia* ruled that the government may not prohibit possession of obscenity.[186] Thus, while all virtual pornography could ostensibly constitute obscenity, the possession of obscene virtual pornography cannot be regulated under a statute prohibiting obscenity.[187]

Notwithstanding that complication, however, it may be useful to examine whether virtual child pornography constitutes obscenity under the *Miller* standard.[188] First, the term "contemporary community standards" must be defined in relation the internet, a geographically unbounded terrain.[189] While the Court had previously rejected a national standard, it upheld the application of community standards online in *Ashcroft v. American Civil Liberties Union*, where the National Coalition for Sexual Freedom and Photographers brought suit alleging that such a community standard was unconstitutional under *Miller*.[190] The Court recognized that refusal to permit national standards online would make regulation of illegal expression online impossible, and further, noted that publishers of internet content knowingly choose a medium that reaches across state lines.[191] Thus, a national contemporary community standard governing virtual child pornography will not invalidate a statute prohibiting virtual child pornography as a form of obscenity.[192]

Second, *Miller* requires that a work, taken as a whole, appeals to a prurient interest.[193] While modern society embraces various forms of sexual expression, meaning perhaps that the scope of the "prurient interest" is fairly limited,[194] it would seem that if anything fits that category it is a lurid fascination with children. However, virtual images of children that appeal to pedophiles may appear innocent to the average person. Thus, a picture's prurient appeal may be subjective and may not be recognized under the *Miller* standard.[195] Inherent in the very nature of most

---

184 *Id.* at 24.

185 *See id.* at 36–37.

186 394 U.S. 557, 568 (1969).

187 *See id.*

188 *See Miller*, 413 U.S. at 24–25.

189 *See id.* at 30–33. The Court in *Miller* noted that the American adversary system has traditionally allowed triers of fact to defer to the standards of their community, and that to require a State to adhere to a national community standard would be "an exercise in futility." *Id.* at 30. Further, the Court recognized that "[p]eople of different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Id.* at 33.

190 535 U.S. 564, 564 (2002).

191 *See id.* at 576–77.

192 *See id.*

193 *Miller*, 413 U.S. at 24.

194 *Id.*

195 *See id.*

child pornography, and especially virtual child pornography given that is created with pedophiles in mind, however, is its prurient appeal and consequently, this prong of *Miller* arguably does not obstruct treatment of virtual child pornography as obscene speech.[196]

Third, *Miller* demands that images depict patently offensive sexual conduct. Like prurient appeal, patently offensive sexual conduct is arguably part and parcel of child pornography. This category is characterized by indisputable repugnancy, and as a result, this prong of *Miller* will usually be easily satisfied.[197] Furthermore, the Court in *Free Speech Coalition* clearly noted that the apparent ages of the individuals depicted in pornography are relevant to whether or not community standards are offended, suggesting that depictions of children would not be required to reach the same level of offensiveness as depictions of adults would in order to meet the "patently offensive" standard.[198]

Fourth and finally, *Miller* requires that a work lack serious literary, artistic, political or scientific value.[199] As a preliminary matter, it is unlikely that computer-generated virtual child pornography could ever have any serious literary, artistic, political or scientific value given that it is created and traded with pedophiles' libidos in mind.[200] However, even if such images did arguably contain such value, it is unlikely that that value could be enough to give them constitutional protection.[201] Additionally, this prong of the obscenity standard reasonably ensures that treatment of virtual child pornography as obscenity is not overbroad in that mainstream film, scientific manuals and legitimate artwork would be exempt under this category because such works have serious artistic or scientific value.[202]

While, as the Court pointed out in *Free Speech Coalition*, all material that is technically "virtual child pornography" may not constitute obscenity,[203] all material that the Government seeks to prohibit as child

---

196 *Id.* at 24–25. The Court, in describing "patent offense," gave examples that demonstrated, but did not exhaust, the meaning of the term, specifically "representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated" or "representation [sic] or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.* at 25.

197 Furthermore, *Miller* does not require statutes to include the language of the obscenity standard, rather it is enough that the statute describe the type of material the State finds patently offensive. *See id.* at 24.

198 Ashcroft v. Free Speech Coal., 535 U.S. 234, 240 (2002).

199 *Miller*, 413 U.S. at 24.

200 *Id.*

201 *See id.*

202 *Id.*; *see also Free Speech Coal.*, 535 U.S. at 247–48.

203 *See Free Speech Coal.*, 535 U.S. at 246. Under the CPPA, the Court found that pictures in psychology literature, as well as films depicting the horrors of sexual abuse were prohibited. *Id.* Further, the Court noted that pictures of what appear to be 17 year-olds participating in sexually explicit activity "do not in every case contravene community standards." *Id.*

pornography is considered obscene. In fact, much of the difficulty in regulating child pornography may stem from difficulty in articulating what precisely "child pornography" connotes.[204] Thus, the *Miller* obscenity test—a flexible, value-laden standard—is an ideal vehicle for identifying and prohibiting dangerous forms of virtual child pornography.[205]

B. OBSCENITY LAW SHOULD REACH POSSESSION OF VIRTUAL CHILD PORNOGRAPHY.

While the vast majority of computer-generated virtual pornography satisfies the demands of *Miller*,[206] prohibition of possession of virtual child pornography remains problematic given *Stanley*'s refusal to extend obscenity prohibitions to possession offenses.[207] Therefore, prohibition of the possession of obscene virtual child pornography marks the intersection of the Court's reasoning in *Stanley* and *Osborne*. In the former, the Court held that "mere private possession of obscene matter cannot constitutionally be made a crime."[208] The Court reasoned that the justifications for prohibiting the distribution and production of obscene materials do not carry into the home, noting that "[i]f the First Amendment means anything, it means that a State has no business telling a man sitting alone in his own house, what books he may read or what films he may watch."[209] The Court criticized Georgia's efforts to prohibit possession of obscenity as an effort to control the moral content of its residents' thoughts.[210]

The Court significantly departed from *Stanley*'s reasoning in *Osborne*[211] where, after holding in *Ferber* that child pornography, like obscenity, is unprotected speech,[212] it ruled that the categorical ban on child pornography may extend to possession of such materials.[213] The *Osborne* Court recognized that the government has a legitimate interest in destroying the underground child pornography market to protect the victims of child pornography.[214] However, as in *Ferber*,[215] the Court in

---

204 Technically, the phrase child pornography denotes any sexual depiction of a minor, that is, someone under the age of 18. However, clearly society has not condemned all such depictions and has stigmatized a narrower class of child pornography. *See generally* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).

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

206 *Id.* at 24.

207 *See* Stanley v. Georgia, 394 U.S. 557 (1969).

208 *Id.* at 559.

209 *Id.* at 565.

210 *Id.*

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

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

213 *See Osborne*, 495 U.S. 103.

214 *Id.* at 110–11.

215 *Ferber*, 458 U.S. at 756–58 (stating that the State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling" and that legislative judgment

Osborne stressed the State's compelling interest in safeguarding the physical and psychological well being of children.[216] Noting *Ferber*'s finding that the advertising and selling of child pornography provides an economic incentive to produce the material, the Court concluded that it is reasonable for a state to prohibit the possession of child pornography to reduce that incentive and thereby prevent further harm to actual children.[217] Thus, persuading the Court that harm to actual children results from virtual child pornography may be an obstacle to getting it to prohibit possession of obscene virtual material. Nevertheless, the Court in *Free Speech Coalition* did hint that it would accept this connection as genuine if made with regard to *obscene* virtual child pornography.[218]

Given the Court's implicit willingness to allow prohibition of obscene virtual child pornography[219] and its recognition of the fact that the underground market in child pornography makes prosecution for production and distribution difficult,[220] it remains possible that the Court will extend its reasoning in *Osborne* to statutes prohibiting possession of obscene virtual child pornography.[221] Additionally, prohibition of possession may be upheld because the Court's chief concern in *Free Speech Coalition*, namely that the CPPA as enacted was overbroad and could potentially reach valuable creative expression, is remedied by prohibiting only obscene virtual depictions of children engaged in sexually explicit activity.[222] Taken together, these interests warrant a categorical ban on obscene virtual child pornography.

---

that the use of children as subjects of pornographic materials is harmful to the psychological, emotional, and mental health of the child easily passes muster under the First Amendment).

216 *Osborne*, 495 U.S. at 109.

217 *Id.* at 109–10 (citing *Ferber*, 458 U.S. at 756–58).

218 *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 246, 249–51 (2002). The Court compared the reasoning of *Ferber* and *Miller* to the CPPA, concluding that neither supported the statute. *Id.* In doing so, the Court suggested that if it were to find a basis in either case the CPPA would be constitutional. *Id.* at 249–51. Notably, in concluding that the CPPA could not be said to regulate obscenity because there was no link between the prohibitions contained within the CPPA and the "affront to community standards" element of the definition of obscenity, the Court did not point to *Stanley*'s holding that possession of obscene materials cannot be banned. *See id.* at 246–49.

219 *See id.* at 246, 249–251.

220 *Osborne*, 495 U.S. at 110–11 ("since the time of our decision in *Ferber*, much of the child pornography market has been driven underground; as a result, it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution").

221 *Id.*

222 *See Free Speech Coal.*, 535 U.S. at 248.

C. USE OF OBSCENITY LAW TO PROHIBIT VIRTUAL CHILD PORNOGRAPHY MAY POSE DIFFICULTIES, BUT IT REMAINS THE MOST FEASIBLE WAY TO COMBAT VIRTUAL CHILD PORNOGRAPHY.

At least one author has opined that the use of obscenity law to prosecute virtual child pornography presents complications apart from those associated with prohibiting possession.[223] Specifically, this author contends that by subjecting virtual child pornography to the obscenity standard, prosecutors will be put in the difficult position of choosing whether to prosecute what they believe to be an image of an actual child as virtual or real.[224] This decision is a crucial one because, while a prosecutor might easily demonstrate that a particular pornographic work is obscene, he would face the heavy burden of proving that the image depicts an actual child.[225] Thus, the concern is that prosecutors will forego prosecutions of actual child pornography if they cannot identify the child and will instead treat such cases as examples of obscene virtual child pornography.[226]

While prosecution of actual child pornography as actual child pornography is preferable, it remains a mere ideal given the uniformity of virtual and real images.[227] Surely, charging images wherein the minor cannot be identified as obscene virtual child pornography is superior to charging such images as actual child pornography and having the defendant successfully argue that there is a reasonable doubt as to the images' authenticity given that real and virtual images are "virtually indistinguishable" and the minor pictured cannot be verified as real.[228] While the PROTECT Act as it stands attempts to penalize "virtually indistinguishable" images, the affirmative defense removes liability for possession of virtual images.[229] Although the burden rests on a defendant charged with possession to show that the images at issue are not real, the

---

223 *See* Virginia F. Milstead, Note, *Ashcroft v. Free Speech Coalition: How Can Virtual Child Pornography be Banned Under the First Amendment?*, 31 PEPP. L. REV. 825, 867 (2004).

224 *Id.*

225 As noted, it is difficult to locate the sources of online images because the web of internet pornography trading is tangled and difficult to track. Further, many images traded within the United States originated in foreign countries. *See* Akdeniz, *supra* note 148; Perla, *supra* note 147 at 1222–24.

226 *See* Milstead, *supra* note 223, at 853.

227 *See* S. REP. NO. 108-2, at 4–5 (2003); *see also* Perla, *supra* note 147, at 1218; International Developments, *supra* note 148.

228 *See* S. REP. NO. 108-2, at 4–5 (2003); Akdeniz, *supra* note 148; *see also* Perla, *supra* note 147, at 1218.

229 *See* 18 U.S.C. § 2252 (2003).

mere inclusion of this exemption will substantiate a defendant's claim that there exists a reasonable doubt as to his guilt.[230]

CONCLUSION

While the PROTECT Act serves as a useful resource to prosecutors charged with combating child pornography,[231] it continues to pose constitutional concerns similar to those raised by the CPPA in *Free Speech Coalition*.[232] Moreover, the PROTECT Act is incomplete because it does not sufficiently prohibit virtual child pornography,[233] a category of speech shown to cause real harm to actual children. Given these shortcomings, Congress should consider future legislation that would treat virtual child pornography as a form of obscenity, a category of speech the Supreme Court has deemed wholly undeserving of First Amendment protection.[234] Lastly, while *Stanley* does not permit prohibition of possession of obscenity,[235] the Supreme Court should recognize that a congressional ban on the production and distribution of obscene virtual child pornography will not be effective unless possession of obscene virtual child pornography is prohibited as well.

230 *See id.*
231 *See id.*
232 Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).
233 18 U.S.C. § 2252 (2003).
234 Miller v. California, 413 U.S. 15 (1973).
235 Stanley v. Georgia, 394 U.S. 557(1969).