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I. INTRODUCTION

"It is difficult to imagine a more repulsive and cruel act, both to the individual involved and to our Nation, than ensnaring a young person in child pornography. It robs the child of his or her innocence and debases our society."[1] Although this is a strong statement, it accurately describes the pernicious plague that child pornography has become. Child pornography is a lucrative,[2] underground[3] business in which people profit by exploiting children. Furthermore, only pedophiles and child molesters consume child pornography,[4] since no other market exists for such images.[5] Finally, child pornography unfortunately engenders the creation of more child pornography.[6]

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1. *Child Pornography Prevention Act of 1995: Hearings on S. 1237 Before the Senate Comm. on the Judiciary*, 104th Cong. 14 (1996) [hereinafter *CPPA of 1995*] (statement of Kevin V. Di Gregory, Deputy Assistant Attorney General, U.S. Department of Justice).

2. *See Child Protection and Obscenity Enforcement Act and Pornography Victims Protection Act of 1987: Hearing on S. 703 and S. 2033 Before the Senate Comm. on the Judiciary*, 100th Cong. 1 (1990) (statement of Hon. Dennis DeConcini, U.S. Senator, Arizona) ("Child pornography has become a highly organized, multimillion-dollar industry preying on the youth of our country who are either unable to protect themselves or are induced into participating by those who they trust.").

3. *See CPPA of 1995*, *supra* note 1, at 22-23 (statement of Jeffrey J. Dupilka, Deputy Chief Postal Inspector for Criminal Investigations, U.S. Postal Inspection Service).

4. Pedophiles and child molesters use child pornography in several ways: (1) to sexually arouse themselves, which usually leads either to masturbation or to the sexual abuse of children; (2) to lower the inhibitions of children by making them think this is normal; (3) to instruct children on how to perform specific sexual acts; (4) to barter, trade or sell in order to obtain other sexually explicit images of children or information on how to obtain them; (5) to threaten children into silence. *See CPPA of 1995*, *supra* note 1, at 89-90 (statement of Bruce A. Taylor, President and Chief Counsel of The National Law Center for Children and Families).

5. *See Effect of Pornography on Women and Children: Hearing Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary*, 98th Cong. 31 (1985) [hereinafter *Effect*] (testimony of Kenneth V. Lanning, Special Agent, FBI).

6. Child pornography follows a cycle. First, the adult tries to educate the child about sexual acts by showing the child examples of pornography. Then, the pedophile explains to the child that this is accepted and normal behavior. Next, the pedophile

To the vast majority of Americans, child pornography is a noxious evil.[7] This view has bipartisan support among legislators who continually tighten child pornography laws in an effort to eradicate these materials from society.[8] Over the years, Congress has tried to stop both the supply and demand for such lurid materials; however, this process has been piecemeal.[9] For example, the most recent federal legislation in this area, the Child Pornography Prevention Act of 1996,[10] criminalizes the computer production and alteration of child pornography. Although the 1996 Act is a needed addition in the fight against child pornography, it simply redefines the "actus reus"[11] element of these crimes as past laws have done.

In contrast, the United States Court of Appeals for the Armed Services recently decided a case that broadened the "*mens rea*"[12] requirement in child pornography crimes. This

uses child pornography to convince the child that other children enjoy such activities with adults or peers. Child pornography is continually used to lower the inhibitions of the child. Eventually, the pedophile and child perform sexual acts together in some of the encounters. Finally, sexual encounters with the child are photographed or videoed. The key is that child pornography creates child pornography. *See* SHIRLEY O'BRIEN, CHILD PORNOGRAPHY 89-90 (1983), *reprinted in CPPA of 1995*, *supra* note 1, at 103-04. For a specific case example see *Effect*, *supra* note 5, at 33 (testimony of Kenneth V. Lanning).

7. Amazingly, two organizations publicly support sexual experimentation for children: the North American Man-Boy Love Association (NAMBLA) and the Rene Guyon Society. Both groups advocate the sexual liberation of consenting children over four years of age. Specifically, the Rene Guyon society's motto is "Sex by year eight or else it's too late." *Effect*, *supra* note 5, at 72. For a more complete view of their ideologies, see *id.* at 72-89.

8. *See CPPA of 1995*, *supra* note 1, at 1-3 (statement of Hon. Orrin G. Hatch, U.S. Senator, Utah).

9. *See* discussion *infra* Part II.B; *see also infra* note 44 and accompanying text (listing the major child pornography statutes passed by Congress since 1978).

10. Pub. L. No. 104-208, 110 Stat. 3009-26 to 3009-31 (1996). This statute created a new section of the Code, 18 U.S.C. § 2252A, specifically targeting computer generated child pornography.

11. *Black's Law Dictionary* defines "actus reus" as "[t]he 'guilty act.' A wrongful deed which renders the actor criminally liable if combined with mens rea." BLACK'S LAW DICTIONARY 36 (6th ed. 1990); *see also* United States v. Bailey, 585 F.2d 1087, 1118 (D.C. Cir. 1978) (defining actus reus as "the physical element of the crime"), *rev'd*, 444 U.S. 394 (1980); United States v. Bishop, 469 F.2d 1337, 1348 (1st Cir. 1972) (defining actus reus as "any guilty act").

12. *Black's Law Dictionary* defines "mens rea" as "an element of criminal responsibility: a guilty mind; a guilty or wrongful purpose; a criminal intent." *Id.* at 985; *see also* Morissette v. United States, 342 U.S. 246, 252 (1952) ("'[M]ens rea' [is used] to signify an evil purpose or mental culpability.").

case, *United States v. Maxwell*,[13] shifted or enlarged the "mens rea" or "scienter"[14] element of child pornography crimes contained in 18 U.S.C. § 2252[15] by adding "belief" as an acceptable mens rea standard. The current interpretation of this section—to be discussed in more detail later in this Note—requires a defendant to have "knowledge" that at least one of the performers involved in sexually explicit conduct is a minor before being criminally liable.

By focusing on the mens rea element of child pornography statutes, Congress' intent to eradicate child pornography is better realized. The current interpretation of 18 U.S.C. § 2252 requires the government to prove that an individual "knew" he distributed, received or possessed child pornography. Except when images depict a prepubescent child in sexually explicit conduct, the government has an almost insurmountable obstacle in proving that the accused individual had "knowledge" regarding the performers' minority status.[16] For example, com-

13. 45 M.J. 406 (C.A.A.F. 1996).

14. *Black's Law Dictionary* notes that "scienter" is "frequently used to signify the defendant's guilty knowledge." BLACK'S LAW DICTIONARY 1345 (6th ed. 1990). However, this Note will use the terms "mens rea," "scienter," "mental element," and "mental culpability" interchangeably as many court opinions and law reviews articles have done. *See, e.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64, 70-72 (1994); Moskal v. United States, 498 U.S. 103, 109 (1990); Osborne v. Ohio, 495 U.S. 103, 115 (1990); Colautti v. Franklin, 439 U.S. 379, 401 (1979); Morissette v. United States, 342 U.S. 246, 250-63 (1952); Christina Egan, *Level of Scienter Required for Child Pornography Distributors: Supreme Court's Interpretation of "Knowingly" in 18 U.S.C. § 2252*, 86 J. CRIM. L. & CRIMINOLOGY 1341, 1355-56 (1996); Jeffrey P. Kaplan and Georgia M. Green, *Grammar and Inferences of Rationality in Interpreting the Child Pornography Statute*, 73 WASH. U. L.Q. 1223, 1228-34 (1995); Patricia A. Burke, Note, United States v. X-Citement Video, Inc.*: Stretching the Limits of Statutory Interpretation?*, 56 LA. L. REV. 937 (1996).

15. This Note will focus on 18 U.S.C. § 2252 since this section punishes the three most typical child pornography crimes: distribution, receipt, and possession. Other provisions are worthy of note. Sections 2251 to 2252A and 2260 criminalize the production, distribution, possession, advertising and importation of child pornography. Sections 2253-55 and 2259 outline the criminal and civil remedies the government and victims have. Section 2256 defines the operative terms of Chapter 110. Section 2257 outlines the record-keeping requirements that all adult pornography producers must follow in order to show that no minors were involved in making their pornographic merchandise. Finally, section 2258 lays out the criminal liability for failure to report child abuse, of which child pornography is considered one form. *See* 18 U.S.C. §§ 2251-2252, 2253-2260 (1994); 18 U.S.C.A. § 2252A (West 1985, Supp. 1997).

16. When prosecuting individuals for child pornography violations, the government will usually focus on images containing prepubescent children since it will be easier to convince a jury that the accused individual "knew" the performers were

puter software can morph and alter images so as to make it seem a child is engaging in sexually explicit conduct when one is not,[17] making it almost impossible for the government to prove an individual knew a minor was involved. This burden of proving "knowledge" means that much child pornography depicting adolescent or pubescent minors goes unprosecuted. *United States v. Maxwell* is significant because it takes a different approach—relaxing the current mens rea standard of knowledge to a less demanding one.

In light of *United States v. Maxwell*, this Note will argue that for 18 U.S.C. § 2252[18] to effectively deter this repulsive conduct, a more relaxed mens rea standard of "belief" or "recklessness" is both theoretically justified by public policy and constitutional if properly limited. Although 18 U.S.C. § 2252 requires that (1) there be a minor and (2) the minor be engaged in sexually explicit conduct[19] before criminal liability is found,[20]

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minors. When pubescent or adolescent minors are depicted in sexually explicit conduct, the government has a harder time both proving the performers' minority and the accused's knowledge of such. Usually, the government will have to call a medical expert to testify that certain physiological traits of the performer, like hips or breasts, are those of a teenager due to their development. *See* Interview with Roger Young, Special Agent for the Federal Bureau of Investigation, in Las Vegas, Nev. (June 3, 1997).

17. *See CPPA of 1995*, *supra* note 1, at 21 (statement of Jeffrey J. Dupilka, Deputy Chief Postal Inspector for Criminal Investigations, U.S. Postal Inspection Service).

18. Since the whole text of § 2252 is too long to quote, this Note will quote relevant parts throughout the paper when required. *See infra* notes 19, 79, and 102. Since many of the subsections in 18 U.S.C. § 2252A follow the structure of § 2252, § 2252A can also be used. Also, because § 2252A deals with computer-generated child pornography, the need for a recklessness mens rea standard is evident, as one may never "know" if an actual child is used in the production of the image due to morphing and graphic software. *See CPPA of 1995*, *supra* note 1, at 24 (statement of Jeffrey J. Dupilka, Deputy Chief Postal Inspector, U.S. Postal Inspection Service). "A simple example of this would be a visual depiction in which a picture of an actual child's head is joined with a picture of an adult's body to create a new picture in which the child is depicted as engaged in sexual conduct." *Id.* at 17 (statement of Kevin V. Di Gregory, Deputy Assistant Attorney General).

19. "'[S]exually explicit conduct'" is defined as "actual or simulated—(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (B) bestiality; (C) masturbation; (D) sadistic or masochistic abuse; or (E) lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. § 2256(2) (1994).

20. Both 18 U.S.C. § 2252(a)(1)(A) and (a)(2)(A) use the phrase "the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct" to enumerate the required elements of the crime. This Note will use the phrases "minority element" or "use of a minor element" to refer to the language in

this Note will limit its focus to the mens rea requirement concerning the minority status of pornographic performers. Part II of this Note will summarize the relevant history and interaction between obscenity jurisprudence and child pornography jurisprudence as well as congressional action taken in child pornography legislation. Part III will discuss *United States v. Maxwell* and its reasoning. Part IV will argue that a mens rea standard of "belief" or "recklessness" is theoretically justified for the "use of a minor" element of § 2252 and is also constitutional if properly limited.

II. BACKGROUND

This Part will show the following: (1) that obscenity jurisprudence and child pornography jurisprudence are closely linked because constitutional doctrines found in obscenity law apply to child pornography law; and (2) that child pornography statutes and case law have dealt primarily with enlarging the *actus reus*, while little focus has been given to mens rea. This background is vital to an understanding of why the mens rea standard in § 2252 should be relaxed. The following Part sketchs the key cases in both obscenity jurisprudence and child pornography jurisprudence and the relationships between them.

A. Obscenity and Child Pornography

The First Amendment gives no one *carte blanche* freedom of speech; in fact, a few categories of speech are afforded no protection at all.[21] For example, while the Constitution secures free speech in order to protect the marketplace of ideas,[22] obscenity and child pornography have been enumerated as areas outside this protected marketplace.[23] The following cases

this section.

21. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . . ." (footnote omitted)).

22. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

23. *See Chaplinsky*, 315 U.S. at 571-72; *see generally* New York v. Ferber, 458

demonstrate the relationship between obscenity and child pornography in both the production/distribution and possession categories and show how similar legal principles are applied in a slightly different manner.

1. Production and distribution under Miller v. California *and* New York v. Ferber

Although the Supreme Court suggested earlier that obscenity lacks First Amendment protection,[24] not until 1957 did the Court first attempt to define obscenity.[25] During the next three decades, the Court struggled to define obscenity as a legal concept and to determine what test should be applied when distribution and production of obscenity were involved.[26] Finally in *Miller v. California*[27] the Court articulated a standard for obscenity, which is the current test:

> (a) whether "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.[28]

While the *Miller* decision solidified the definition of obscenity, it also sparked a debate on child pornography.[29]

U.S. 747 (1982) (holding the state's compelling interest in eradicating child pornography outweighs any possible First Amendment right a defendant may have).

24. *See Chaplinsky*, 315 U.S. at 571-72.

25. In *Roth v. United States*, 354 U.S. 476 (1957), the Court adopted its first obscenity standard: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489 (footnote omitted).

26. For a history of the Court's struggle on how to define obscenity between *Roth* and *Miller*, see Justice Brennan's dissent in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 80-83 (1973) (Brennan, J., dissenting).

27. 413 U.S. 15 (1973).

28. *Id.* at 24 (citations omitted) (quoting *Roth*, 354 U.S. at 489). Compare this test to the one in *Roth*, 354 U.S. at 489, and those mentioned in Brennan's dissent in *Paris Adult Theatre I*, 413 U.S. at 80-83.

29. Theoretically, the *Miller* obscenity definition would protect some child pornography if it possessed serious literary, artistic, political, or scientific value. The same protection could be extended if the material were not technically obscene, since child pornography was no longer presumed to constitute de facto obscenity. The fear that some child pornography would be upheld as constitutional under the *Miller* test

In *New York v. Ferber*,[30] the Court addressed how distribution of child pornography relates to the obscenity test in *Miller*, as well as how distribution of child pornography should be treated under First Amendment jurisprudence. *Ferber* is significant because the Court differentiates between child pornography and typical obscenity. The New York law at issue in *Ferber* criminalized the production and distribution of nonobscene child pornography, which was stricter than required by federal law. The Court listed several reasons why states, and presumably the federal government, had a compelling interest in eliminating child pornography and therefore had more leeway in criminalizing it.[31]

Further, the Court stressed how the child pornography test differed from the *Miller* holding: "A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole."[32] Although this test seems

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prompted Congress to pass the first federal child-pornography statute: The Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978). This original statute defined "minor" as "any person under the age of sixteen years." *Id.* at 2253(c)(1).

The 1977 Act criminalized the production of nonobscene as well as obscene child pornography. Because Congress feared that criminalizing the distribution of nonobscene child pornography would not be constitutional, under the 1977 Act, the distribution of child pornography incurred criminal liability only if the material was legally obscene

under the *Miller* test. *See* S. REP. NO. 95-438, at 17-18 (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 55.

30. 458 U.S. 747 (1982).

31. The Court gave five primary reasons why there should be greater leeway in criminalizing child pornography. First, "[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *Id.* at 756-57 (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)). Second, "[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children . . . ." *Id.* at 759. Third, "[t]he advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation." *Id.* at 761. Fourth, "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*." *Id.* at 762 (emphasis in original). Fifth, "[r]ecognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions." *Id.* at 763.

32. *Id.* at 764.

broad, there are some basic limits: prohibited conduct must be adequately defined, and there must be some form of mens rea before criminal liability will be imposed.[33]

2. Possession under Stanley v. Georgia *and* Osborne v. Ohio

Stanley v. Georgia[34] and *Osborne v. Ohio*[35] also show the relationship and interaction between obscenity jurisprudence and child pornography jurisprudence. *Stanley* dealt with an individual possessing obscene materials; *Osborne* dealt with an individual possessing child pornographic materials. Again the Supreme Court explained how child pornography differs from typical obscenity.

In *Stanley*, the Court decided that even though a state or federal government can criminalize the distribution and production of obscenity, one has a constitutional right to possess it.[36] The Court weighed the state's interest in protecting its citizens from the effects of obscenity against the individual's right to view such materials in the privacy of his or her home and determined that this privacy right was too great for the state to invade.[37]

However, the Court refused to extend the *Stanley* ruling to child pornography jurisprudence in *Osborne*.[38] As in *Stanley*, the Court in *Osborne* weighed the competing interests at issue. The *Osborne* Court concluded that a state has a compelling interest in protecting its children from the exploitation inherent

33. The Court stated that "[a]s with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state [and presumably federal] law, as written or authoritatively construed." *Id*. Also, "[a]s with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant." *Id*. at 765. Although the Court's opinion did not decide the issue decisively, Justice O'Connor's concurring opinion argued that this new test does away with the third *Miller* prong of "material with serious literary, scientific,
or educational value." *Id*. at 774 (O'Connor, J., concurring). She commented that the state may ban sexually explicit materials regardless of the value society may place on them. *See id*. at 774-75 (O'Connor, J., concurring). Society's interest in any such material is irrelevant "in protecting children from psychological, emotional, and mental harm." *Id*. at 775 (O'Connor, J., concurring).

34. 394 U.S. 557 (1969).

35. 495 U.S. 103 (1990).

36. *See Stanley*, 394 U.S. at 568.

37. *See id*. at 565-67.

38. 495 U.S. 103 (1990).

in child pornography.[39] Because "'safeguarding the physical and psychological well-being of a minor' is 'compelling,'"[40] prohibiting the possession of child pornography, even in the privacy of one's home, "passes muster under the First Amendment."[41] Even *Stanley* recognized that, in some situations, a compelling interest may override one's right of privacy.[42]

The *Miller*/*Ferber* and *Stanley*/*Osborne* decisions are significant for how they define the relationship between obscenity jurisprudence and child pornography jurisprudence. The tests in *Ferber* and *Osborne* show not only that child pornography is viewed in the same genus as obscenity, but also that the demanding standard in obscenity jurisprudence is sometimes relaxed when child pornography is at issue. Despite the relaxed standard, however, these cases show that the same jurisprudential principles that apply to obscenity also apply to child pornography. The significance of this relationship will be shown further in Part IV.C.2 because principles from obscenity jurisprudence will be used to support the constitutionality of a belief or recklessness mens rea standard for 18 U.S.C. § 2252.

B. Actus Reus and Mens Rea in Child Pornography Jurisprudence

Although the Court has demonstrated a connection between obscenity jurisprudence and child pornography jurisprudence, this connection deals primarily with the actus reus of both obscenity and child pornography crimes. Additionally, Congress has focused on enlarging the actus reus of these crimes with several amendments to the child pornography statutes. Understanding the emphasis placed on defining the actus reus elements rather than the mens rea standard of child pornography laws illustrates the significance of this Note's principal case, *United States v. Maxwell*.

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39. *See Osborne*, 495 U.S. at 108-11.

40. *Id.* at 109 (quoting New York v. Ferber, 458 U.S. 747, 756-58 (1982)).

41. *Id.* (quoting New York v. Ferber, 458 U.S. 747, 756-58 (1982)).

42. *See also Stanley*, 394 U.S. at 568 n.11 ("[W]e [do not] mean to express any opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials. . . . In such cases, *compelling reasons* may exist for overriding the right of the individual to possess those materials." (emphasis added)).

1. Actus reus and the evolution of child pornography laws

Although the *Ferber* and *Osborne* decisions are important in showing the link between obscenity jurisprudence and child pornography jurisprudence, their primary holdings dealt with defining the actus reus of child pornography crimes. Both *Ferber* and *Osborne* enlarged the actus reus of child pornography laws by criminalizing the acts of distribution and possession regardless of whether the material in question was legally obscene. Until *United States v. X-Citement Video*[43] was decided in 1994, the Court principally dealt with the actus reus aspect of child pornography jurisprudence.

Congressional focus has also been on broadening the actus reus of child pornography crimes. Congress has amended the original 1977 Act five times, and each time the amendments have focused on criminal acts and not mental culpability.[44] None of these amendments, however, has dealt specifically with the mens rea of a defendant.

2. Mens rea and child pornography laws

Although legislative focus has been solely on defining the actus reus of child pornography crimes, the Supreme Court has

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43. 513 U.S. 64 (1994); *see* discussion *infra* Part IV.B.1.

44. In response to the *Ferber* decision, Congress passed the Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204-06 (1984), which amended the 1977 Act by eliminating the obscenity and commercial transaction requirements from the statute as well as changing the definition of a minor from 16 to 18 years old. *See CPPA of 1995*, *supra* note 1, at 24 (statement of Jeffrey J. Dupilka, Deputy Chief Postal Inspector for Criminal Investigations, U.S. Postal Inspection Service.). In 1986, Congress passed the Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, 100 Stat. 3510-11 (1986), amending the two previous acts by "[b]anning the production and use of advertisements for child pornography." *CPPA of 1995*, *supra* note 1, at 25. In 1988, Congress enacted the Child Protection and Obscenity Enforcement Act, Pub. L. No. 100-690, 102 Stat. 4485-503 (1988), which again amended the previous acts, by banning the use of computers to transmit both advertisements and visual depictions of child pornography. This act also prohibited the buying, selling, and temporary custody of children for the production of child pornography. *See CPPA of 1995*, *supra* note 1, at 25. In response to *Osborne*, Congress enacted the Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, 104 Stat. 4816-19 (1990), which prohibited the possession of child pornography. *See CPPA of 1995*, *supra* note 1, at 25. Finally, Congress passed the Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-26 to 3009-31 (1996), which banned the use of computers to create child pornography.

briefly considered mens rea standards in child pornography cases. In *Ferber*, the Court mentioned that at least some level of mens rea is needed in order for a child pornography statute to be constitutional.[45] Later, in *Osborne*, the Court upheld an Ohio child pornography statute that had no express mens rea requirement, because a default statute would apply a "recklessness" standard.[46] Because the main focus of both cases was on distribution and possession of child pornography, these two cases show the limited examination that the Court gave mens rea in child pornography law.

Finally in 1994, the Court decided *United States v. X-Citement Video*,[47] which focused on the mens rea requirement of child pornography laws. The Court ruled that a mens rea standard of knowledge must be inferred from 18 U.S.C. § 2252[48] despite its plain language.[49] The Court held that the word "knowingly," which was located in a different part of the statute, modified both the "use of a minor" and "sexually explicit conduct" elements.[50] Although the Court held that "knowledge" was the required mens rea standard for the "use of a minor" element of § 2252, the issue in this case was whether this statute was constitutional and not whether "knowledge" was the exclusive mens rea standard for child pornography crimes.[51] This distinction is crucial because this Note advocates a more relaxed mens rea standard.

In summary, Congress has focused only on what constitutes the actus reus of child pornography crimes, ignoring the mens rea aspect. And, while the Supreme Court has given some attention to the mens rea standard, it has focused primarily on defining the actus reus standard. Even in *X-Citement Video*, where the Court was merely saving § 2252, rather than articulating the only acceptable mens rea standard for the statute, the Court at least dealt with the mental intent

45. *See* New York v. Ferber, 458 U.S. 747, 765 (1982).

46. *See* Osborne v. Ohio, 495 U.S. 103, 115 (1990).

47. 513 U.S. 64 (1994).

48. *See id.* at 78.

49. *See id.* at 68; *see also* United States v. X-Citement Video, 982 F.2d 1285, 1289-90 (9th Cir. 1992), *rev'd*, 513 U.S. 64 (1994); *infra* note 79 and accompanying text.

50. *See* 513 U.S. at 69-78.

51. *See id.* at 67-69.

requirement of child pornography laws. Given this history, the importance of *United States v. Maxwell* is twofold. First, *Maxwell* represents a new focus on the mens rea requirement of child pornography laws. Second, *Maxwell* supports a more relaxed mens rea standard than the "knowledge" standard required in *X-Citement Video*.

III. *UNITED STATES V. MAXWELL*

A. The Facts

Prior to charges being brought against him, Colonel Maxwell, a respected officer with more than twenty-five years of service, was Commander of Goodfellow Technical Training Center at Goodfellow Air Force Base in Texas.[52] He had subscribed to America On-Line (AOL) before assuming command of the base.[53] Problems began for Maxwell when a conscientious citizen reported that individuals were trading child pornography via AOL.[54] Subsequently, the FBI investigated Colonel Maxwell, among others, for suspected child pornography trafficking on the Internet and seized the suspect material. Once the FBI realized that an Air Force officer was implicated in this investigation, it "contacted the Air Force Office of Special Investigations (AFOSI) and turned over a copy of all the seized material."[55] After receiving the information from the FBI, the vice-commander of the training center issued a search authorization for Maxwell's quarters, where his computer was seized.[56] A search of its hard drive found three visual images of child pornography.[57]

Maxwell was subsequently charged with violating 18 U.S.C. § 2252 for "knowingly transporting or receiving child pornography in interstate commerce."[58] The issue on appeal focused on the jury instruction the military judge gave. The judge instructed the jury to find Maxwell guilty if they felt he

52. *See* United States v. Maxwell, 45 M.J. 406, 410 (C.A.A.F. 1996).
53. *See* United States v. Maxwell, 42 M.J. 568, 573 (A.F. Crim. App. 1995).
54. *See Maxwell*, 45 M.J. at 412.
55. *Id.* at 414.
56. *See id.*
57. *See id.*
58. *Id.* at 410. The Military Code makes 18 U.S.C. § 2252 applicable as a criminal violation by the Federal Assimilation Crimes Act. *See* 45 M.J. at 410.

"knew *or believed* that one or more of the persons depicted were minors,"[59] which was different from *X-Citement Video*'s holding that one must "know" that one of the performers involved in sexually explicit conduct was a child.

The defense objected to the jury instruction, stating that "actual knowledge of the minority of the actors is an essential element of an offense under § 2252, not some sort of belief or supposition."[60] Accordingly, the defense argued, when the court allowed the military jury the opportunity to find Maxwell guilty of violating § 2252 simply because he *believed* a performer was a minor, it violated the "clear" language of the statute and the Supreme Court's interpretation of it.

B. The Court's Reasoning

The *Maxwell* court took a pragmatic approach with regard to both the defense's objection and the scienter requirement of § 2252. The most important issue for the court was whether the images were child pornography. After the court was satisfied that the prosecution's exhibits provided "ample evidence" that minors were involved, it then shifted its attention to the mens rea requirement.[61] The *Maxwell* court recognized that *X-Citement Video* imposed a mens rea requirement both for the nature of the conduct involved and for the age of the performers. However, the *Maxwell* court stated that

> Congress [did not] intend[] to erect a virtually insuperable barrier to prosecution by requiring that a recipient or a distributor of pornography must have knowledge of the actual age of the subject, which could only be proved by ascertaining

59. *Id.* at 424 (emphasis added). The military judge instructed the jury that before it could convict Maxwell of violating § 2252 they must find "[t]hat the receiving or transporting [of such depictions] was done knowingly: that is, that at the time the accused transported or received the visual depictions, he . . . knew or believed that one or more of the persons depicted were minors." *Id.* (alterations in original).

60. *Id.* By claiming that "actual knowledge" is needed for the "use of a minor" element of § 2252, the defense relied on *X-Citement Video*'s rationale that the word "knowingly" modifies both the "sexually explicit conduct" and "use of a minor" elements of this statute. *See* United States v. X-Citement Video, 513 U.S. 64, 78 (1994).

61. *See Maxwell*, 45 M.J. at 424.

> his identity and then getting a birth certificate or finding someone who knew him to testify as to his age.[62]

The court then reasoned that since Congress did not desire such an "insuperable barrier" of obtaining birth certificates for each performer,[63] once the government had proved that the images were child pornography, it "then was only necessary to prove that appellant believed [the performers] were minors."[64]

Oddly, the court did not support its use of the belief instruction in the text of the opinion but rather in a footnote.[65] There, the court bolstered its pragmatic approach by concluding that Congress could not have intended the insuperable barrier of an "actual knowledge" standard. The *Maxwell* court's main support for finding the instruction valid hinged on the fact that, of the cases it had found,[66] none "dealt with the validity of the proposition that a belief that the actor is under 18 does not comply with § 2252(a)(2)."[67] Coupled with the assertion that no courts had held this jury instruction invalid, the *Maxwell* court then explained that other courts have upheld language that both expressly and implicitly supported a more relaxed mens rea standard.[68] These cases either involved express jury instructions using a "recklessness" standard[69] or situations in which the "knowledge" requirement was functionally satisfied by the defendant's conduct.[70]

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62. *Id.*

63. The court seems to neglect *United States v. United States District Court for the Central District of California*, 858 F.2d 534 (9th Cir. 1988), where the Ninth Circuit held that under § 2252 a defendant did not have to know the actual ages of performers, only that they were minors. *See id.* at 537-38. The Ninth Circuit's holding seems a more reasonable reading of § 2252 than that of the *Maxwell* court.

64. *Maxwell*, 45 M.J. at 424.

65. *See id.* at 425 n.7.

66. *See* United States v. Cedelle, 89 F.3d 181 (4th Cir. 1996); United States v. Kimbrough, 69 F.3d 723 (5th Cir. 1995); United States v. Burian, 19 F.3d 188 (5th Cir. 1994).

67. *Maxwell*, 45 M.J. at 425 n.7.

68. *See id.*

69. *See id.* (citing *Kimbrough*, 69 F.3d at 733).

70. *See id.*

IV. ANALYSIS

This Part will argue that a "belief" or "recklessness" mens rea requirement for 18 U.S.C. § 2252[71] is both theoretically justified and constitutional. Part A will examine the weaknesses in *Maxwell*'s analysis. Part B will examine the theoretical justifications for a more relaxed mens rea standard for § 2252 which the *Maxwell* court used as well as one justification not mentioned in that case. Part C will illustrate how this same mens rea standard is constitutional when either child pornography or non-child pornography is involved.

A. Weaknesses in the U.S. v. Maxwell *Decision*

The principle question the *Maxwell* court asked was whether or not the images in question involved minors.[72] Because the court was "satisfied" that the government had proven the images did involve minors, it "then was only necessary to prove that [the defendant] believed they were minors."[73] Even though the court discussed the "knowledge or belief" instruction, the focus of the *Maxwell* court was whether the actus reus of the crime was met. Therefore, one problem with *Maxwell* is that it downplays mens rea analysis in child pornography convictions.

This Note contends that mens rea should be emphasized, and that in some limited instances a mens rea standard of "belief" or "recklessness" could support a conviction even though no child is actually portrayed in the pornography.[74] At a minimum, both mens rea and actus reus should be regarded with the same level of importance, and in some cases, mens rea should take precedence due to the unique psychological effects child pornography has on pedophiles.[75]

Another problem in *Maxwell* is the court's justification for a more relaxed mens rea standard. Although footnote seven

71. This Note will concentrate on § 2252, which prohibits distribution, receipt and possession of images depicting minors in sexually explicit conduct. *See* 18 U.S.C. § 2252 (1994). The same arguments can also be applied, however, to § 2251, which deals with the actual production and advertisement of such images, and § 2252A, which was patterned after § 2252, and deals primarily with computer generated and altered images that are made to resemble minors engaged in sexually explicit conduct. *See* 18 U.S.C. § 2251 (1994); 18 U.S.C.A. § 2252A (West 1994).

72. *See Maxwell*, 45 M.J. at 424. The court even called it the "crucial fact." *Id.*

73. *Id.*

74. *See* discussion *infra* Part IV.C.2.

75. *See infra* notes 178-80.

provided support for its holding, the *Maxwell* court's reasoning was as strong as it could have been. First, the court could have argued for a statutory interpretation in favor of the "belief" standard; and second, the court's reliance on pragmatism and precedent-setting examples could have been more fully developed. These weaknesses, however, do not diminish the theoretical justification of the "belief" or "recklessness" standard.

B. The "Belief" or "Recklessness" Standard is Theoretically Justified

1. Statutory interpretation

A key approach the *Maxwell* court should have used to justify a more relaxed mens rea standard is statutory interpretation. In laying out a persuasive argument as to why "belief" or "recklessness" should be established as the mens rea standard for the minority element of § 2252, this Note does not promote or specifically use one statutory interpretation theory over another, even though the proper interpretation of § 2252 is open to academic debate.[76] Instead, this section will outline the Supreme Court's reasoning[77] in *United States v. X-Citement Video*[78] to illustrate that "belief" or "recklessness" can be interpreted into 18 U.S.C. § 2252 based solely on the reasoning the Court used.

In *X-Citement Video*, the Supreme Court addressed the constitutionality of § 2252(a) and whether or not a mens rea requirement could be construed regarding the "use of minor" element. Previously, the Ninth Circuit had ruled that the natural reading of 18 U.S.C. § 2252(a)(1) and (2) did not require

76. *See* Egan, *supra* note 14 (arguing that a recklessness standard would have been a more appropriate scienter level than knowledge); Burke, *supra* note 14 (arguing that knowledge is the only appropriate mens rea standard for § 2252); Matthew S. Queler, Recent Development, *The Increased Need for Stronger Anti-Child Pornography Statutes in the Wake of* United States v. X-Citement Video, Inc., *115 S.Ct. 464 (1994)*, 18 HARV. J.L. & PUB. POL'Y 929 (1995) (arguing that the Court should have adopted a strict liability standard for § 2252 like the Food, Drug and Cosmetic Act).

77. This Note does not argue that the majority opinion was better reasoned than the dissent. The Court's opinion is used simply to show that, under its reasoning, "belief" could be interpreted as modifying "minor" in § 2252. Therefore, no mention will be made of the dissent's position or analysis in this Note.

78. 513 U.S. 64 (1994).

a defendant to possess any knowledge of either the performers' minority status or the sexually explicit conduct.[79] Because the First Amendment requires some level of mens rea regarding these two statutory elements,[80] the Ninth Circuit held § 2252 unconstitutional.[81] Under the Ninth Circuit's reasoning, "knowingly" would modify only those verbs in clauses (a)(1) and (2) and would not modify the minority or sexually explicit conduct elements in (a)(1)(A) and (a)(2)(A) "because they are set forth in independent clauses separated by interruptive punctuation."[82] However, the Supreme Court concluded this interpretation would lead to absurd results[83] that Congress did

79. *See* United States v. X-Citement Video, 982 F.2d 1285, 1289-90 (9th Cir. 1992), *rev'd*, 513 U.S. 64 (1994). The statutory language at issue in *X-Citement Video* is:

> (a) Any person who—
>
> (1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct;
>
> (2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce by any means or through the mails, if—
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct.

18 U.S.C. § 2252 (1994).

80. *See X-Citement Video*, 982 F.2d at 1290-92.

81. *See id.* at 1292.

82. U.S. v. X-Citement Video, 513 U.S. 64, 68 (1994).

83. The Supreme Court explained, saying:

> If we were to conclude that "knowingly" only modifies the relevant verbs in § 2252, we would sweep within the ambit of the statute actors who had no idea that they were even dealing with sexually explicit material. For instance, a retail druggist who returns an uninspected roll of developed film to a customer "knowingly distributes" a visual depiction and would be criminally liable if it were later discovered that the visual depiction contained images of children engaged in sexually explicit conduct. . . . Similarly, a Federal Express courier who delivers a box in which the shipper has declared the contents to be "film" "knowingly transports" such film.

Id. at 69. For the "absurd results" statutory canon, see *Public Citizen v. Department of Justice*, 491 U.S. 440, 453-55 (1989) (stating that the court should search for other evidence of congressional intent if a literal reading of the statute would "compel an odd result"); *United States v. Turkette*, 452 U.S. 576, 580 (1981) (stating that "absurd

not intend. To remedy this absurd situation, the Court found that "some form of scienter is to be implied in a criminal statute even if not expressed, and that a statute is to be construed where fairly possible so as to avoid substantial constitutional questions."[84] Therefore, to save the statute and avoid any constitutional doubts about it, the Court held in *X-Citement Video* that "the term 'knowingly' in § 2252 extends both to the sexually explicit nature of the material and to the age of the performers."[85]

In arguing that "knowingly" modifies "minor" in § 2252, the Supreme Court supported its reasoning with three principles. The first principle was that criminal statutes need to be interpreted "to include broadly applicable scienter requirements, even where the statute by its terms does not contain them."[86] The second principle dealt with the legislative history and congressional intent. The third principle was the Court's desire to avoid constitutional doubts whenever possible.

a. Mens rea and Morissette v. United States. To support the first principle, the Court relied on the landmark case of *Morissette v. United States*[87] and its progeny. Although criminal statutes require a mens rea standard for the essential elements of the crime, public welfare offenses (e.g. traffic violations) are an exception to this rule.[88] The Court found that § 2252 does not qualify as a public welfare offense primarily because

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results are to be avoided"); and *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) (stating that although an absurd result may be within the literal meaning of the statute, such a result may not have been intended).

84. *X-Citement Video*, 513 U.S. at 69.

85. *Id.* at 78.

86. *Id.* at 70.

87. 342 U.S. 246 (1952). The Court also relied upon *Staples v. United States*, 511 U.S. 600, 619 (1994) (holding that "the background rule of the common law favoring mens rea should govern interpretation of §5861(d) [The National Firearms Act]" requiring the Government to show that the defendant knew that his AR-15 possessed features making it illegal under the act) (emphasis in original); *Liparota v. United States*, 471 U.S. 419, 433 (1985) (holding that 7 U.S.C. §2024(b)(1) has a mens rea requirement such that the Government "must prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations"); and *United States v. United States Gypsum Co.*, 438 U.S. 422, 423 (1978) (holding that "[a] defendant's state of mind or intent is an element of a criminal antitrust offense" although the Sherman Act does not refer to intent or state of mind with regard to the proscribed conduct).

88. *See X-Citement Video*, 513 U.S. at 71 (citing Morissette v. United States 342 U.S. 246, 255 (1952)).

"[p]ersons do not harbor settled expectations that the contents of magazines and film are generally subject to stringent public regulation."[89] Rather, the Court found that this "statute is more akin to the common-law offenses against the 'state, the person, property, or public morals,' that presume a scienter requirement in the absence of express contrary intent."[90] Additionally, the fact that "harsh penalties"[91] loom over those violating § 2252 tends to indicate that it is not a public welfare offense.[92]

Because § 2252 does not qualify as a public welfare offense, *Morissette* "instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct."[93] The Court found that the "use of a minor" element was one that determines guilty conduct because nonobscene images of adults engaging in sexually explicit conduct would receive First Amendment protection.[94] Because those involved in the production of nonobscene adult pornography would expect to be free from prosecution, the Court found that "the age of the performers is the crucial element separating legal innocence from wrongful conduct"[95] and thus required some level of mens rea.

b. Legislative history. The legislative history behind the passage of § 2252 was the second factor the Supreme Court used to justify a "knowledge" mens rea standard in *X-Citement Video*. The Court indicated that since § 2252 has evolved and been amended over the past two decades, it is not clear whether "knowingly" modifies the sexually explicit nature and minority elements found in clauses 1(A) and 2(A).[96] Nevertheless, the Court argued that Congress was at least knowledgeable of the Court's decision in *Smith v. California*[97] when drafting the statute. *Smith* held that a statute would violate the First Amendment if it omitted the mens rea requirement regarding

89. *Id.*
90. *Id.* at 71-72 (quoting *Morissette*, 342 U.S. at 255).
91. *Id.* at 72.
92. *See id.* at 72.
93. *Id.*
94. *See id.*
95. *Id.* at 73.
96. *See id.*
97. 361 U.S. 147 (1959).

the obscenity of a particular image.[98] Further, in *X-Citement Video*, the Court stressed that it would not "impute to Congress an intent to pass legislation that is inconsistent with the Constitution,"[99] even if Congress did not have *Smith* in mind when passing this legislation.

While both the legislative history and debates seem to be opaque as to whether Congress intended "knowingly" to modify the minority element,[100] the Court did find two things persuasive with regard to having "knowingly" modify "sexually explicit conduct."[101] First, it argued that when § 2252 was originally enacted, "obscene" modified "visual or print medium" in clauses (a)(1) and (a)(2).[102] Assuming Congress' awareness of the *Smith* case, "knowingly" was to modify "obscene," at the very least.[103] However, in light of *Ferber* and in an effort to broaden the scope of § 2252, Congress, in 1984, amended § 2252 by eliminating "obscene" from both (a)(1) and (2). The Court remarked that when § 2252 was expanded to its full constitutional limits in 1984, Congress never expressly stated that by eliminating "obscene" from the statute it was thereby also eliminating the mens rea requirement that had been

98. *See id.* at 149; *see also X-Citement Video*, 513 U.S. at 73 (citing 123 Cong. Rec. 30935 (1977)).

99. *See X-Citement Video*, 513 U.S. at 73 (citing Yates v. United States, 354 U.S. 298, 319 (1957), *overruled by* Burks v. United States, 437 U.S. 1, 18 (1978)).

100. *See id.* For a brief history of the evolution of this statute, see *id.* at 74-77.

101. *See* Egan, *supra* note 14, at 1364.

102. Originally, § 2252 read as follows:

> (a) Any person who—
>
> (1) knowingly transports or ships in interstate or foreign commerce or mails, for the purpose of sale or distribution for sale, any *obscene* visual or print medium, if—
>
> (A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual or print medium depicts such conduct; or
>
> (2) knowingly receives for the purpose of sale or distribution for sale, or knowingly sells or distributes for sale, any *obscene* visual or print medium that has been transported or shipped in interstate or foreign commerce or mailed, if—
>
> (A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual or print medium depicts such conduct;
>
> shall be punished as provided in subsection (b) of this section.

Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, § 2252(a)(1) & (2), 92 Stat. 7, 7-8 (1978) (emphasis added).

103. *See X-Citement Video*, 513 U.S. at 74.

implicitly attached to the "character and content of the material."[104] Thus, according to the Court, "knowingly" still refers to the nature and content of the material at hand.

The Court's second legislative history argument on whether "knowingly" modifies the character and content of child pornography materials is found in a dialogue between Senators Percy and Roth. During the debates on the original child pornography bill, Senator Roth had submitted an amendment[105] which would add what would have been a precursor to § 2252 to the bill reported by the Senate Judiciary Committee.[106] On the Senate floor, Senator Percy asked Senator Roth whether, under the amendment (the precursor of § 2252), a

> distributor or seller must have either, first, actual knowledge that the materials do contain child pornographic depictions or, second, circumstances must be such that he [the distributor] should have had such actual knowledge, and that mere inadvertence or negligence would not alone be enough to render his actions unlawful?

Senator Roth replied:

> That is absolutely correct. This amendment, limited as it is by the phrase "knowingly," insures that only those sellers and distributors who are consciously and deliberately engaged in the marking of child pornography . . . are subject to prosecution . . . .[107]

Both the history behind the 1984 amendment to § 2252 and the dialogue between Senators Roth and Percy convinced the Court that the legislative history persuasively suggests that "knowingly" modifies the sexually explicit conduct element of the statute. However, the Court was less persuaded that the legislative history and floor debates indicated that "knowingly" likewise modified the "minor" element in the same subsection.[108] Nevertheless, the Court reasoned that since both elements are the sole language in both subsections (a)(1)(A) and

104. *Id.* at 74.

105. One of the amendment's paragraphs restricted any person from "knowingly transport[ing or] ship[ping any] visual medium depicting a minor engaged in sexually explicit conduct." *Id.* at 75 (citing 123 CONG. REC. 33047 (1977)).

106. *See id.*

107. *Id.* at 76 (quoting 123 CONG. REC. 33050 (1977)).

108. *See id.* at 77.

(2)(A), grammatically it would be "difficult to conclude that the word 'knowingly' modifies one of the elements . . . but not the other."[109]

c. Constitutional avoidance doctrine. The avoidance of constitutional doubts was the third principle by which the Supreme Court, in *X-Citement Video*, justified using "knowingly" to modify "minor" in § 2252. The Court reasoned that previous cases[110] had suggested that the absence of a mens rea requirement would incur "serious constitutional doubts."[111] Therefore, the Court must interpret a statute in a way that would eliminate such doubts "so long as such a reading is not plainly contrary to the intent of Congress."[112] Because Congress had intended "knowledge" to modify key elements of the statute, the Court would not be ruling contrary to congressional intent when it extended "knowingly" to both the sexually explicit nature and the minority requirements in subsections (a)(1)(A) and (2)(A).

A weakness in the Court's reasoning is that although the *Morissette* line of cases, the legislative history, and the avoidance doctrine all require some level of mental culpability, none of these three reasons supports the idea that only "knowledge" or "knowingly" should modify "minor" in § 2252.[113] In fact, a "belief" or "recklessness" mens rea standard may be read into § 2252 based on the same reasons the Court articulated in *X-Citement Video*.

d. "Belief" or "recklessness" mens rea *and the* X-Citement Video *Court's three arguments.* Precedent was the basis for the first argument the Supreme Court made to support a mens rea standard of "knowledge." The Court relied on four cases[114] to support its extension of "knowingly" to modify the statutory elements contained in subsections (1)(A) and (2)(A). Although

109. *Id.* at 77-78.

110. *See id.* at 78. The Court cited *Osborne v. Ohio*, 495 U.S. 103 (1990); *New York v. Ferber*, 458 U.S. 747 (1982); *Hamling v. United States*, 418 U.S. 87 (1974); and *Smith v. California*, 361 U.S. 147 (1959) to support its position.

111. *X-Citement Video*, 513 U.S. at 78.

112. *Id.* (citing Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 575 (1988)).

113. *See* Egan, *supra* note 14, at 1376 (arguing that none of the three reasons the Court articulated mandated a knowledge mens rea).

114. *See supra* note 110 and accompanying text.

some of these cases explicitly advocate requiring "knowledge"[115] as the appropriate mens rea standard, to read this as the only possible rule emanating from these cases is too restrictive.[116] The general rule is that criminal intent must be present for each element of the crime. The first question asked by the Court in these cases was not "Does 'knowledge' or 'knowingly' apply to the elements of the crime?" but rather "Must the act in question be construed to include intent as an element?" Only after answering "yes" to the second question does the Court try to determine a necessary level of intent.[117] Furthermore, in some cases, the Court held that the defendant only needs to know that the underlying activity he is pursuing is prohibited and not that he has "knowledge" of each element of the crime.[118]

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115. Christina Egan provides a good analysis of how the word "knowingly" was applied in the cases cited in *X-Citement Video*:

> The Court relied on Morissette v. United States and Liparota v. United States which both extended the word "knowingly," modifying only the verbs in the statute, to apply to the element separating criminal from innocent conduct. However, the Court also relied on Staples v. United States where the Court employed knowledge as the appropriate level of scienter despite the fact that the statute did not include any words indicating mens rea. Thus, the general rule of these cases does not direct the Court to apply whatever level of scienter is present elsewhere in the statute; rather, the rule instructs the Court to presume a scienter requirement in the absence of contrary congressional intent.

Egan, *supra* note 14, at 1376 n.240.

116. *See id.* at 1376.

117. *See* Staples v. United States, 511 U.S. 600, 619 (1994) ("In short, we conclude that the background rule of the common law favoring mens rea should govern interpretation of §5861(d) in this case."); United States v. United States Gypsum Co., 438 U.S. 422, 434-447 (1978); Morissette v. United States, 342 U.S. 246, 263-73 (1952).

118. *See Staples*, 511 U.S. at 618-619:

> [W]e note only that where, as here, dispensing with mens rea would require the defendant to have knowledge only of traditionally lawful conduct, a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a mens rea requirement. In such a case, the usual presumption that a defendant must know the facts that make his conduct illegal should apply.

Id.; *see also* Liparota v. United States, 471 U.S. 419 (1985):

> To prove that petitioner knew that his acquisition or possession of food stamps was unauthorized, for example, the Government need not show that he had knowledge of specific regulations governing food stamp acquisition or possession. Nor must the Government introduce any extraordinary evidence that would conclusively demonstrate petitioner's state of mind. Rather, as in any other criminal prosecution requiring mens rea, the Government may prove by reference to facts and circumstances surrounding

Just as in the first principle, the avoidance doctrine does not mandate the use of "knowingly" to modify "minor" in § 2252. The avoidance doctrine simply instructs the Court to interpret a statute so that it avoids serious constitutional doubts, without going "plainly contrary" to congressional intent.[119] Again, there is no mention that "knowledge" is the only acceptable mens rea standard that removes constitutional doubts while staying in the general limits of congressional intent. In fact, the Court has already upheld a "recklessness" mens rea standard in *Osborne v. Ohio*.[120] In *Osborne*, the Court indicated that the "recklessness" mens rea standard "plainly satisfies the requirement laid down in *Ferber* that prohibitions on child pornography include some element of scienter."[121]

Therefore, the Court's reasoning hinges on the second factor of legislative history, because the first and third factors do not expressly state or require "knowledge" as the only mens rea standard. Although the Court easily found that "knowingly" modified all elements in subsections (1)(A) and (2)(A) by examining the legislative history, this same approach could have likewise found a more relaxed standard of either "recklessness" or "belief" to be legitimate. The Court acknowledged that the legislative history dealing with the minority element of the statute was opaque at best.[122] Since Congress had intended for one to know the character and content of the material at issue and because that modified one of the two elements in subsection (1)(A) and (2)(A), the Court found "as a matter of grammar"[123] that "knowingly" should also apply to the minority element.[124] Using grammar rules to determine the mens rea is the same procedure for which the Court chided both the Ninth Circuit and the dissent, as they both argued, in *X-Citement Video*, that the "correct" level of

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the case that petitioner knew that his conduct was unauthorized or illegal. *Id*. at 434 (footnote omitted).

119. *See* United States v. X-Citement Video, 513 U.S. 64, 78 (1994) (citing Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council, 485 U.S. 568, 575 (1988)).

120. *See* Osborne v. Ohio, 495 U.S. 103, 115 (1990); *see also* discussion *infra* Part IV.B.3.

121. *Osborne*, 495 U.S. at 115.

122. *See* X-Citement Video, 513 U.S. at 73.

123. *See id.* at 77.

124. *See id*. at 77-78.

mens rea depended on where "knowingly" was located in the statute.[125]

A better approach in determining the requisite level of mens rea for the minority element would be to look in the legislative history for any specific mention of mens rea and the minority of performers. If none are found, the Court should focus on the general intent of the legislation instead of concentrating on a hybrid analysis of textual context and unrelated legislative history.

Congress' general intent toward all the child pornography statutes is to include some form of mens rea, even though the legislative history of the original statute and its many amendments do not mention the requisite mens rea standard for "minor." The Roth/Percy exchange is evidence of some level of mens rea. The Senators discussed that a distributor has to be "consciously" engaged in the business and either have "actual knowledge" or "circumstances must be such that he *should have had* such actual knowledge."[126] An accused may act either recklessly or merely believe that material he has is child pornography and still satisfy the requirement laid out in the dialogue above that one "should have known."[127]

Further, Congress continually amends § 2252 in an effort to enlarge the actus reus to the fullest extent possible under the Constitution in order to eradicate child pornography from society.[128] This desire to expand the criminal aspects of child pornography suggests that Congress would want the same expansive approach taken with the mens rea requirement. Requiring "knowledge" as the mens rea standard for the minority element falls short of this intent.[129] A "recklessness" or "belief" standard would satisfy both the constitutional requirement to have some form of mens rea, while, at the same time, prohibiting child pornography to the fullest extent possible as expressed by the general intent of child pornography legislation.

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125. *See* Egan, *supra* note 14, at 1377 (arguing that the 1984 Act after *New York v. Ferber* manifested Congress' intent to prohibit child pornography distribution to the fullest extent, which a knowledge mens rea standard would not accomplish).

126. *X-Citement Video*, 513 U.S. at 75-76 (quoting 123 CONG. REC. 33050 (1997)).

127. *Id.*

128. *See supra* note 44 and accompanying text.

129. *See* Egan, *supra* note 14, at 1377.

This Part illustrates several things, all showing that statutory interpretation provides the strongest claim for a more relaxed mens rea standard as it would read into 18 U.S.C. § 2252 a "belief" or "recklessness" requirement. First, the Supreme Court's arguments supporting a "knowledge" mens rea standard for the minority element of § 2252 can also justify a less demanding standard like "belief" or "recklessness."[130] Second, the principles and argument that the Court used in supporting its position do not mandate that "knowledge" is the only requisite mens rea standard for child pornography crimes. Third, even if courts adopt a more relaxed mens rea standard through statutory interpretation, due to the conflicting interpretations of § 2252, Congress should amend the statute to allow a "belief" or "recklessness" standard in order to resolve the legal conflict as well as broaden the criminal scope of the current child pornography statute.

2. The pragmatism argument

The pragmatism argument is based on a functional approach to jurisprudence. According to pragmatism, the right approach is one that actually works and not one that depends on form or title. The *Maxwell* court illustrated this approach by discussing the correctness of the jury instruction. The court could not believe that, when passing § 2252, Congress would "erect a virtually insuperable barrier to prosecution by requiring that a recipient or a distributor of pornography must have knowledge of the actual age of the subject."[131] The argument's crux is that because it would be impossible for the government to prove that one "actually knew" the specific age of a performer, as a practical matter one's belief that a minor is involved is what Congress intended. Essentially, the "knowledge" requirement is just a form which the belief standard functionally satisfies. Because the belief standard works, it is therefore practical and should be adopted under this theory. Whether or not this is what Congress intended is open to debate, because the legislative history is sparse on

130. This has been argued by some in academia. *See* Egan, *supra* note 76; Queler, *supra* note 76.

131. United States v. Maxwell, 45 M.J. 406, 424 (C.A.A.F. 1996).

which mens rea standard should apply for the "use of a minor" element of § 2252.[132]

Other courts have used a pragmatic argument both expressly and implicitly to justify a more relaxed mens rea standard.[133] The *Maxwell* court mentioned *United States v. Duncan*[134] and *United States v. Brown*[135] in its attempt to bolster its pragmatic approach. In both cases, the respective courts claimed to rely on an "actual knowledge" mens rea standard for the "use of a minor" element of § 2252 when, in all practicality, they used a belief paradigm. In both cases, custom agents made controlled deliveries to the defendants and then arrested them minutes later, thereby not allowing the defendants the opportunity to fully inspect and "know" that the delivered items were in fact child pornography.[136]

In *Duncan*, the Seventh Circuit held that sufficient evidence existed to prove that the defendant had actual "'knowledge . . . that the photographs he had ordered were to depict children engaged in sexually explicit conduct.'"[137] The court found the evidence sufficient to show that the defendant "knew" the images contained child pornography merely because the defendant had relied on the contents of the advertisements and titles when ordering the images.[138] As the *Maxwell* court articulated: "Surely, common experience teaches that advertisements and titles of offerings are only evidence of a belief in what they say, not actual knowledge. Yet the court [in *United States v. Duncan*] said that was sufficient to satisfy the statutory requirement of knowledge."[139]

A similar situation occurred in *Brown*. There, the Third Circuit found that the defendant's knowing receipt of child

132. *See* discussion *supra* notes 96-109 and accompanying text.

133. The fact that other courts have used the pragmatic approach gives rise to a precedent argument. Although this is true, this Note uses these cases to illustrate how the pragmatism argument works with regard to 18 U.S.C. § 2252.

134. 896 F.2d 271 (7th Cir. 1990).

135. 862 F.2d 1033 (3d Cir. 1988).

136. *See Duncan*, 896 F.2d at 272-74; *Brown*, 862 F.2d at 1033-36.

137. *Maxwell*, 45 M.J. at 424 n.7 (quoting United States v. Duncan, 896 F.2d 271, 277 (7th Cir. 1990)).

138. *See id.* Some of the advertisements included "'boys and girls in sex action'; 'Young boys in sex action fun,'" with titles such as "School Girls and Boys," "Lolita," "Loving Children," and "Joyboy." *Id.*

139. *Id.* (citation omitted).

pornography "was proved by 'his strong interest in receiving child pornography . . . and his solicitation of child pornography as expressed in his letter and other correspondence.'"[140] Further, the *Brown* court stated that "[defendant's] understanding on that score came from the catalogue and, based on the catalogue's description . . . , the jury was justified in concluding that Brown believed it depicted minors engaged in sexually explicit conduct."[141] Again, it is common sense that when one reads the cover of something, that person does not have "actual knowledge" of everything or even the key things within it. Because the *Brown* court ruled that the "knowledge" mens rea standard was met, it thereby implied that a "belief" mens rea standard was legally valid for § 2252.

In both cases, the courts were satisfied that the "knowledge" mens rea modifying the minority element of § 2252 was fulfilled by the defendants' belief. Based on external circumstances, both defendants believed that the images they had received, or were to receive, involved child pornography. Obviously, neither defendant really knew the images were child pornography based on an actual perception of the merchandise, but rather they believed they were such based on advertisements. These cases give a more pragmatic approach to § 2252 by reading in a "belief" criteria that will fulfill the "knowledge" mens rea standard.

Pragmatism's strength is its functionality. Because a belief standard better achieves Congress's overall goal of eradicating child pornography, it should be adopted. Likewise, when courts functionally use the defendant's belief to satisfy the knowledge mens rea standard, the argument follows that this more relaxed standard should be incorporated into the statute.

3. Examples of relaxed mens rea standards in federal cases

Because the Supreme Court has not directly held that knowledge is the only acceptable mental culpability for child pornography crimes, decisions in the federal courts—including the Supreme Court—can be used to support a more relaxed mens rea requirement. The *Maxwell* decision enumerated prior

140. *Id.* (quoting United States v. Brown, 862 F.2d 1033, 1038 (3d Cir. 1988)).
141. *Id.* (quoting *Brown*, 862 F.2d at 1039).

decisions[142] that allowed a more relaxed mens rea standard for § 2252 to support its analysis that *X-Citement Video's* use of "knowledge" to modify the "use of a minor" element is not exclusive, and therefore a lower level of scienter may be allowable. Although *Maxwell* did use persuasive authority, it omitted key cases that would have supported its analysis more persuasively.

A key case not mentioned in *Maxwell*, but which suggested that a more relaxed mens rea standard than "knowledge" may be constitutional, is *Osborne v. Ohio*.[143] While *Osborne* focused primarily on the privacy right versus the compelling state interest conflict, the Court also ruled that a "recklessness" mens rea standard was applicable to that state's statute.[144] Although the mens rea requirement was not expressly written into this statute, "recklessness" was applied pursuant to the Ohio default statute that required at least "recklessness" wherever mens rea was needed but had not been expressly stated.[145] Because the Court did not strike down the statute as overbroad or unconstitutional due to the "recklessness" *mens rea*, a more relaxed mens rea requirement than knowledge can satisfy the general rule that all elements of serious crime, especially child pornography crimes, need an intent requirement.[146]

Another area in which the courts have implicitly supported a "belief" standard in some fashion is the pandering doctrine.[147] The principal case discussing pandering is *Ginzburg v. United States*.[148] In this case, Ginzburg had sent out circulars describing the material he had for sale. Some of the materials included articles about sexual relations that had appeared in professional journals and a report of a psychotherapist who advocated more leeway in sexual relations.[149] Ginzburg also offered a handbook that originally had been published and sold

142. *See* United States v. Maxwell, 45 M.J. 406, 424 n.7 (C.A.A.F. 1996).

143. 495 U.S. 103 (1990).

144. *See id.* at 115.

145. *See id.*

146. *See* discussion *supra* Part IV.B.1.

147. The Court defined pandering as "'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.'" *Id.* at 467 (quoting Roth v. United States, 354 U.S. 476, 495-96 (1957)).

148. 383 U.S. 463 (1966).

149. *See id.* at 467.

to members of the medical and psychiatric profession before the publication rights were sold to him.[150] In fact, this handbook had ostensible therapeutic value, and many had found the handbook helpful in their professional practice.[151]

Notwithstanding that the materials had some artistic or scientific value to them, the Court found that Ginzburg had pandered them in a sexually motivated way. The Court held that if the obscenity of the materials is debatable, then the purveyor's emphasis on the sexually provocative nature of the matter may be decisive in finding them legally obscene.[152] The Court stated: "[Ginzburg] proclaimed its obscenity; and we cannot conclude that the court below erred in taking [his] own evaluation at its face value and declaring the book as a whole obscene despite the other evidence."[153] Moreover, the Court held that there is no First Amendment problem in determining whether the materials are obscene when probative value is given to the fact that the items were pandered.[154]

To summarize, when pornography is advertised based solely on its prurient appeal, in debatable situations, such pandering may be probative in determining legal obscenity. Since *Ginzburg* deals with obscenity, it would also apply to child pornography cases as explained in Part II.A. In other words, when one believes or makes others believe that an item offered for sale is child pornography, in reasonably close situations, the fact the item is pandered should be probative as to whether it will be considered child pornography.

Although the strongest type of precedent—an on-point ruling from the Supreme Court—is lacking here, the "other case examples" argument is still persuasive in support of a more relaxed mens rea standard for § 2252. The Supreme Court decisions in *Osborne* and *Ginzburg* support a more relaxed mens rea standard. In *Osborne,* the Court explicitly held a "recklessness" mens rea standard constitutional, and in *Ginzburg*, the Court laid out the pandering doctrine which would allow an individual to be prosecuted in debatable

150. *See id.* at 471-72.
151. *See id.* at 472.
152. See *id.* at 470.
153. *Id.* at 472 (footnote omitted).
154. *See id.* at 474.

situations merely on his belief that the materials he was selling were obscene or contained child pornography.[155]

4. A summary of all approaches

Each of the three approaches—pragmatism, precedent, and statutory interpretation—provides justification for a "belief" or "recklessness" mens rea standard for § 2252. However, together they provide a compelling argument for allowing such a standard. The primary purpose of this Part is to offer the theoretical justification for using a more relaxed mens rea standard for § 2252. Surely, a court that uses the more relaxed standard should explain both its statutory interpretation approach as well as its view of how the judiciary should act.

As mentioned before, the easiest way to minimize this legal and academic conflict is for Congress to amend § 2252 to relax the mens rea standard. One of the primary reasons for this Part is to give Congress the rationale and record by which it could justify amendment of the current mens rea standard—as interpreted by the Supreme Court in *X-Citement Video*. With this justification, Congress can amend the statute without falling into the same problem it encountered with the original 1977 child pornography statute. Congress, in the 1977 statute, refused to hold distribution of child pornography to a lower standard solely on the misguided belief that the Supreme Court would strike it down as unconstitutional.[156] This misguided belief stemmed from Congress' erroneous interpretation of existing case law. This Part shows Congress that "knowledge" is not the only mens rea standard for child pornography crimes, but a more relaxed standard of "belief" or "recklessness" is also theoretically justified. The next section will show how this more relaxed mens rea standard withstands both common-law and constitutional scrutiny.

C. The "Belief" or "Recklessness" Standard is Constitutional

This Part will illustrate how a "belief" or "recklessness" mens rea standard satisfies both the common-law tradition and constitutional requirements. Moreover, this Part will argue

155. *See* discussion *infra* Part IV.C.2.a.

156. *See supra* note 29.

that a new doctrine should be developed in child pornography jurisprudence to incorporate an area not fully prohibited under current First Amendment interpretation: when someone believes he possesses child pornography but in actuality does not.[157]

The following table shows the current state of child pornography jurisprudence. The diagram illustrates cases that have deemed adequate a particular mens rea standard for the minority element of § 2252. Cases without parentheses indicate those cases that specifically held the mens rea standard in question valid; cases in parentheses either implied or stated in dictum that the specific mens rea standard is or may be valid.

157. *See* discussion *infra* Part IV.C.2.b.

MENS REA OF THE "USE OF A MINOR" ELEMENT	**SUPPLY**[158]		**DEMAND**	
	DISTRIBUTION		POSSESSION	
KNOWLEDGE	*X-Citement Video*[159]		(*X-Citement Video*)	
BELIEF/ RECKLESSNESS	ACTUAL CHILD[160]	NO CHILD[161]	ACTUAL CHILD	NO CHILD
	Maxwell[162] & *Kimbrough*[163]	Pandering doctrine (*Ginzburg*)[164]	(*Osborne*)[165] (*Maxwell*)[166]	?

This Part's focus is whether those areas that use "belief" as a mens rea standard can survive both in the common-law tradition and under a constitutional framework.

1. Belief and actual-child pornography

The Belief/Actual-Child Pornography category is the easiest in which to justify a more relaxed mens rea standard for § 2252. In this category, the individual believes he possesses child pornography and the pornography actually does involve minors.

158. "Receipt" of child pornography is also criminalized in 18 U.S.C. § 2252. However, this table will use a simple dichotomy of supply and demand. Because "receipt" of child pornography can mean either "receipt" for later distribution or for current possession, for purposes of this table, "receipt" is analyzed under either supply or demand analysis. *See* 18 U.S.C. § 2252 (1994).

159. 513 U.S. 64 (1994).

160. This section deals with pornographic materials that involve a person under the age of eighteen who is engaged in sexually explicit conduct. *See* 18 U.S.C. § 2256(1), (2) (1994).

161. This section deals with pornographic materials that appear to involve a person under age eighteen, but who legally is an adult.

162. 45 M.J. 406 (C.A.A.F. 1996); *see* discussion *supra* Part III.

163. 69 F.3d 723 (5th Cir. 1995); *see* discussion *supra* Part IV.B.3.

164. 383 U.S. 463 (1966); *see* discussion *supra* Part IV.B.3.

165. 495 U.S. 103 (1990); *see* discussion *supra* Part IV.B.3.

166. 45 M.J. 406 (C.A.A.F. 1996); *see* discussion *supra* Part III.

Under the common law, before one is found guilty, the individual must satisfy both the actus reus and mens rea elements of the particular crime. In *Morissette*, the Court articulated that "[c]rime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand."[167] In this category, both common-law elements are satisfied. First, the individual satisfies the actus reus element when he distributes or possesses child pornography. Second, the individual fulfills the mens rea requirement when he believes the material in question contains child pornography.

Along with fulfilling the common-law requirements, this category is also constitutional. The Court in *Ferber* stated two limits to child pornography jurisprudence, despite the lack of protection the First Amendment offers to this area: first, the proscribed conduct must be adequately defined; and second, there must be some element of mens rea before criminal responsibility may be imposed.[168] Here, the first constitutional barrier is met because the statute adequately defines that the proscribed materials must contain minors engaged in sexually explicit conduct. Also, the second constitutional barrier is met because the individual must "believe" or act "recklessly" in order to be prosecuted. Notice again that *Ferber* does not require one level of mens rea over another; it just requires that an individual have some level of mental culpability. As described above, the Belief/Actual Child Pornography category fulfills both the common-law and constitutional requirements.

2. Belief and no-child pornography

The Belief/No-Child Pornography category poses more problems than the previous one. In this category, the individual believes he possesses child pornography, but all the performers are legally adults. The individual's belief that the materials in question contain child pornography satisfies both the common-law requirement that the individual possess an "evil-meaning mind" and the constitutional limitation that the crime contain some level of mens rea. This category is problematic primarily

167. Morissette v. United States, 342 U.S. 246, 251 (1952).
168. *See* New York v. Ferber, 458 U.S. 747, 764-765 (1982).

for two reasons. First, if the pornographic materials does not contain a minor, then the individual has not satisfied the actus reus under the common-law. Second, § 2252 requires the material in question to contain visual depictions that involve a minor engaging in sexually explicit conduct before subsections (a)(1)(B), (a)(2)(B), (a)(3)(B)(ii), and (a)(4)(B)(ii) can be satisfied.[169] If no minor is depicted in the pornography, an individual technically cannot be found criminally liable under § 2252.

The major critique[170] of this category is the impossibility[171] argument or defense. The thrust of this argument is that when materials are not child pornography no crime has been committed despite the individual's belief that they are.[172] Implicit in this argument is the idea that, even though an individual possesses an "evil mind," society is not harmed when no criminal act is committed.[173] However, the modern trend is to eliminate any impossibility defense for criminal defendants.[174] For example, one of the aims of the Model Penal Code is to reject the impossibility defense altogether except when neither the actor nor his conduct pose a serious threat to

169. *See* 18 U.S.C. § 2252 (1994).

170. A mistake of fact or ignorance argument is not applicable due to the nature of an accused's conduct in child pornography scenario above. Typically, a defendant is relieved of criminal liability when a mistake of fact precludes him from possessing the culpable mental intent required for the crime. *See* 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 78 (15th ed. 1993). For example, in *Morissette v. United States*, the defendant was found not guilty of conversion since he believed the scrap metal had been abandoned and therefore did not possess the required mental culpability necessary for "knowingly" converting it. *See* Morissette v. United States, 342 U.S. 246 (1952). However, in the child pornography situation, the individual believes that what he possesses or distributes happens to be images involving minors engaged in sexually explicit conduct. In this situation, a mistake of fact is not a defense since the individual would be guilty of another offense "had the facts been as he believed them to be." 1 TORCIA, *supra*, § 78. The role of the mistake of fact defense is to negate the mens rea of an individual. Since the emphasis here is that an individual has the requisite mental intent, this defense is not applicable.

171. This Note will not go into the distinction between legal and factual impossibility due to the modern trend of rejecting such a defense all together. *See* 4 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 697 (15th ed. 1996); MODEL PENAL CODE § 5.01 cmt. 3 (Official Draft and Revised Comments 1985).

172. *See* MODEL PENAL CODE § 5.01 cmt. 3(b) (Official Draft and Revised Comments 1985).

173. *See id.*

174. *See* 4 TORCIA, *supra* note 171, § 699; *see also* MODEL PENAL CODE § 5.01 n. 89 (Official Draft and Revised Comments 1985) (citing state criminal statutes that have eliminated the impossibility defense).

society.[175] Courts have also convicted individuals whose conduct technically did not satisfy the actus reus element of a crime, but who had the requisite mental intent.[176] For example, individuals have been convicted of drug-related offenses when they believed they possessed a controlled substance, when in actuality they possessed talc or some other benign substance.[177]

Even when the impossibility defense has been applied, it has been due to the innocuous nature of the individual's conduct. This is the not the case with child pornography. One harm society suffers is specifically from an individual's belief that the images before him are child pornography. Whether the performers are actually minors is irrelevant in this regard, because to the viewer "they are perceived as minors to the psyche."[178] The harm occurs when the pedophile views these pictures because the viewing chemically and structurally alters the brain, making it easier not only to fantasize about having sexual relations with children but also to become emotionally and sexually aroused.[179] The perception that children are involved coupled with masturbatory activities not only creates the illness but also perpetuates it.[180] Since the aim of child

175. *See* MODEL PENAL CODE § 5.01 cmt. 3(b) (Official Draft and Revised Comments 1985).

176. *See* 4 TORCIA, *supra* note 171, § 697 nn.79-87 (citing case where individuals have been found guilty of committing crimes that were "impossible" to commit due to the individuals inability to satisfy the actus reus of the particular crime).

177. *See* People v. Siu, 271 P.2d 575 (Cal. Dist. Ct. App. 1954) (holding defendant guilty of attempting to violate narcotics laws although defendant actually possessed talcum powder which he thought was heroin); State v. Glover, 594 A.2d 1086 (Me. 1991) (holding that defendant was properly convicted for attempted trafficking in narcotics even though the substance he possessed was baking soda); People v. Culligan, 434 N.Y.S.2d 546 (N.Y. App. Div. 1980) (holding that a defendant may be found guilty of attempting to sell narcotics when he sold aspirin he believed to be cocaine); *see also* 4 TORCIA, *supra* note 171, § 699 n.95 (listing cases where individuals have been convicted of crimes that were "impossible" to accomplish).

178. *CPPA of 1995*, *supra* note 1, at 36 (statement of Victor Cline, Emeritus Professor of Psychology, University of Utah).

179. *See id.* at 37-41 (citing JUDITH REISMAN, SEXUALLY EXPLICIT MEDIA/IMAGES (SEMI) AND THE HUMAN BRAIN (1996) (statement of Dee Jepson, President, Enough is Enough).

180. *See id.* at 115 (statement of Victor Cline, Emeritus Professor of Psychology, University of Utah). For an example of how child pornography engenders the underlying pathology, see *CPPA of 1995 supra* note 1, at 35 (statement of Victor Cline, Emeritus Professor of Psychology, University of Utah) ("In the case of pedophiles, the overwhelming majority, in my clinical experience, use child pornography and/or create it to stimulate and whet their sexual appetites which they masturbate to, then later use as a model for their own sexual acting-out with

pornography laws is to eliminate child pornography from society, Congress, by doing so, also aids in eradicating the underlying illness which it engenders.

Even though an impossibility argument may not be very persuasive, there are inherent limitations to prosecuting someone based on his belief that the images in question contain child pornography. Notably, cases that deal with a "belief" or "recklessness" mens rea standard are very limited, if not nonexistent, when no actual child pornography is involved. For example, if a performer is prepubescent an individual will have "knowledge" that a minor is involved. Alternatively, a person will have "knowledge" that he *does not* possess child pornography when the performers are noticeably adults despite the fact some female performers may have their hair in pigtails and carry dolls.

The typical situation that will occur in the Belief/No-Child Pornography category involves performers who are eighteen or nineteen but still look young enough to be depicted as minors. Here, adult performers are portrayed as pubescent teenagers. Additionally, one may reasonably believe that the materials in question are child pornography based on external circumstances such as an asking price higher than regular adult pornography, a purchase on the black market, or advertisements that indicate minors are involved. The next Part will analyze in more detail how adult pornography may constitutionally be prohibited solely on an individual's "belief" or "recklessness" that the materials are child pornography.

a. Supply-side/distribution. Although articulated in an obscenity setting, the pandering doctrine found in *Ginzburg v. United States*[181] would apply to those situations in which one believes or leads others to believe that the material in question actually constitutes child pornography. This doctrine can be applied in child pornography jurisprudence based on the close relationship that child pornography shares with obscenity law as described in Part II.A. As explained in *Ginzburg*, the fact that an individual panders the material as child pornography will be probative only if the visual depictions are debatably

children.").

181. 383 U.S. 463 (1966).

child pornography.[182] Merely pandering the material as such will not, by itself, render the material child pornography when, for example, all performers are clearly adults.

A more relaxed standard for the pandering doctrine would be justified in a child pornography setting.[183] This Note will not focus on this principle, but will illustrate how the existing pandering doctrine limits would apply to the Belief/No-Child Pornography category. First, there must be a debatable conclusion that the material at issue contains child pornography.[184] Thus, visual depictions of prepubescents and mature adults would not qualify under this limitation since there would be no debatable issue, only a foregone conclusion that the material was either child pornography or not. Second, the material must be "openly advertised to appeal to the erotic interest of their customers."[185] In this case, the "erotic interest of their customers" would mean that the material must be advertised either expressly or in a clearly implicit[186] manner as child pornography. Third, there needs to be some form of commercial transaction since what is at issue is the "business of pandering."[187] At a minimum, the transaction needs to involve an exchange of money; however, a commercial transaction could include quid pro quo trades or other forms of barter in acquiring child pornography. Although the distribution scenario under the Belief/No-Child Pornography category may not per se fulfill all the requirements of common-law or constitutional jurisprudence, an individual should incur criminal liability simply because the images are pandered in a manner that represents them as child pornography.

b. Demand-side/possession. As with the supply-side scenario of the Belief/No-Child Pornography category, the

182. *See* discussion *supra* Part IV.B.3.

183. *See* discussion *supra* Part II.A.

184. *See Ginzburg*, 383 U.S. at 471; discussion *supra* Part IV.B.3.

185. *Ginzburg*, 383 U.S. at 467 (quoting Roth v. United States, 354 U.S. 476, 495-96 (1957) (Warren, J., concurring)); *see* discussion *supra* Part IV.B.3.

186. For example, a clearly implicit manner would be to label the images as involving fifteen-year-olds. Although the words "child" or "kiddie porn" are not used, it is clearly implicit that if the performers are fifteen, they are minors, and thus the materials are child pornography.

187. *See Ginzburg*, 383 U.S. at 466 ("We view the publications against a background of commercial exploitation of erotica solely for the sake of their prurient appeal." (footnote omitted)); discussion *supra* Part IV.B.3.

demand-side does not fulfill the actus reus requirement under the common law. However, when possession is concerned, this scenario is further limited in comparison to the supply-side/distribution catagory. First, the demand side does not have a pandering-like doctrine that would criminalize certain limited conduct. Second, the right of privacy is a decisive trump in the demand side when possession is concerned.[188] Although the Court held in *Osborne v. Ohio*[189] that the government's compelling interest to protect children outweighs the right of privacy to possess child pornography, in the demand-side scenario, technically, no child pornography is involved. Therefore, where *Osborne* may be controlling due to the individual's belief that he possesses child pornography, *Stanley v. Georgia*[190] applies since there is no actual child pornography involved. Under *Stanley*, so long as the visual depictions do not contain minors engaging in sexually explicit conduct, an individual is free to possess the images even if they are legally obscene.[191]

This Note argues that the courts should develop a pandering-like doctrine that criminalizes the possession of debatable child pornography even though *Stanley* technically applies when an individual possesses materials that do not depict minors. A *reverse-pandering doctrine* is needed. Just as with the original pandering doctrine, this new doctrine should contain limits that would apply to the possession of materials that one believes to be child pornography but technically are not.

Similar to the original pandering doctrine, one limitation on the reverse-pandering doctrine should be that the images in question must debatably contain a minor engaged in sexually explicit conduct.[192] This doctrine would only cover those materials involving a young adult portrayed as a pubescent teenager. Images depicting prepubescents or those who are obviously adults would not fall under this category.

188. *See* discussion *supra* Part II.A.2.

189. 495 U.S. 103 (1990); *see* discussion *supra* Part II.A.2.

190. 394 U.S. 557 (1969); *see* discussion *supra* Part II.A.2.

191. *See* 394 U.S. 557; discussion *supra* Part II.A.2.

192. *See* discussion *supra* Parts IV.B.3., IV.C.2.a.; *see also* Ginzburg v. United States, 383 U.S. 463 (1966) (elaborating the pandering doctrine and its application to obscenity).

The circumstances surrounding the acquisition of these questionable materials would be the second limitation. These circumstances must put a reasonable person on notice that the materials contain child pornography. Factors to be considered would be the price one paid for the images; the manner in which one obtained the material (for example, on the black market rather than at a drugstore); how the images were advertised or marketed; and what the title and jacket cover depict.[193] The key is not whether one is stimulated by the material in question but whether a reasonable person would believe, under the circumstances, that he was acquiring child pornography.[194]

A third limitation is whether a child would believe that the material depicts a minor engaging in sexually explicit conduct. If a child could believe that the materials at issue depicted minors in sexually explicit conduct, it would be much easier to seduce him into committing the depicted acts.[195] Fundamental to child pornography statutes is the protection of children from victimization. Pedophiles and child molesters use child pornography to seduce children into committing the depicted acts. If children can believe that the materials at issue involve a minor, although technically they might not be child pornography, these materials can seriously lower the inhibitions of children and expose them to possible sexual exploitation.

V. CONCLUSION

Child pornography is a rampant crime that preys on the most vulnerable of our society: children. In response to these depraved actions, Congress has successfully focused on adequately defining the actus reus or criminal conduct in the many statutes and amendments passed over the years. The importance of *United States v. Maxwell* is not in its analysis but rather in the issues it raises. *Maxwell* is a needed starting point

193. *See* Queler, *supra* note 76, at 941.

194. While it is conceivable that there are some individuals who become sexually stimulated by viewing child models in commercial catalogues from Sears or JCPenney, this conduct could not be prosecuted under a reverse-pandering doctrine.

195. *See supra* notes 4, 6 and accompanying text.

in relaxing the mens rea standard for 18 U.S.C. § 2252, and thereby aiding in the eradication of child pornography.

A "belief" or "recklessness" mens rea that would modify the minority element of § 2252 is theoretically sound under pragmatism, precedent, and statutory interpretation approaches. Moreover, if properly limited, this relaxed mens rea standard is constitutional when both child pornography and non-child pornography is involved. Either Congress or the courts should take initiative to firmly establish this more relaxed mens rea standard at least for 18 U.S.C. § 2252, if not for all child pornography crimes.

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