

Journal of Law and Policy

Volume 12

Issue 1

SCIENCE FOR JUDGES I:

Papers on Toxicology and Epidemiology

Article 6

2003

A Problem of "Virtual" Proportions: The Difficulties Inherent in Tailoring Virtual Child Pornography Laws to Meet Constitutional Standards

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Recommended Citation

Jasmin J. Farhangian, *A Problem of "Virtual" Proportions: The Difficulties Inherent in Tailoring Virtual Child Pornography Laws to Meet Constitutional Standards*, 12 J. L. & Pol'y (2003).

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**A PROBLEM OF “VIRTUAL” PROPORTIONS:
THE DIFFICULTIES INHERENT IN
TAILORING VIRTUAL CHILD
PORNOGRAPHY LAWS TO MEET
CONSTITUTIONAL STANDARDS**

*Jasmin J. Farhangian**

The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.

—Justice Anthony Kennedy¹

It is only through computer systems and the mail that child pornography exists today.

—Alabama Senator Jeff Sessions²

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¹ Ashcroft v. Free Speech Coalition, 535 U.S. 234, 253 (2002) (noting the danger posed to the First Amendment when the Government “seeks to control thought or to justify its laws for that impermissible end”).

² United States Senator Jeff Sessions Press Release, (Sept. 16, 2002), available at <http://sessions.senate.gov/headlines/child.htm> (stating Alabama Senator Jeff Sessions’ support for the 2002 anti-child pornography bill). Sessions states that child pornography laws to date have been hugely successful in eliminating child pornography from bookstores. *Id.* He alludes to the fact that efforts should be focused on enacting legislation to serve as the basis for prosecuting individuals who perpetuate child pornography on the Internet. *See id.*

INTRODUCTION

A defendant stands before the court to challenge his conviction for possession of child pornography.³ The government points to images of child pornography found on the defendant's computer hard drive. The defendant asserts that this evidence should not form the basis for a conviction since the images do not depict real children at all. Rather, he asserts that the images are computer generated. Furthermore, he insists that the government prove beyond a reasonable doubt that the images are real.

Concern by the United States Government over the realization of this exact scenario helped form the basis for proposed legislation titled the Child Obscenity and Pornography Prevention Act of 2002 (COPPA of 2002)⁴ and the Child Obscenity and Pornography Prevention Act of 2003 (COPPA of 2003).⁵ The COPPA of 2002 and 2003 were never enacted into law but the Senate ultimately incorporated the virtual child pornography prohibitions contained in the COPPA of 2002 and 2003 into the Prosecutorial Remedies and Other Tools to End the Exploitation of

³ See *infra* note 51 (citing numerous state statutes which criminalize child pornography). See also *New York v. Ferber*, 458 U.S. 747, 773 (1982) (finding that New York state statute prohibiting the dissemination of child pornography was not substantially overbroad and did not violate the First Amendment).

⁴ H.R. 4623, 107th Cong. (2d Sess. 2002) (entitled, "An act to prevent trafficking in child pornography and obscenity, to proscribe pandering and solicitation relating to visual depictions of minors engaging in sexually explicit conduct, to prevent the use of child pornography and obscenity to facilitate crimes against children, and for other purposes"). The bill was passed by the House in June 2002 and referred to the Senate on June 26, 2002. See *id.* The COPPA of 2002 was struck down in the Senate in February 2003. See *id.* Following its demise in the Senate, the House proposed the Child Obscenity and Pornography Prevention Act of 2003. See H.R. 1161, 108th Cong. (2003).

⁵ H.R. 1161, 108th Cong. (2003). The 2003 bill retains the same title as the COPPA of 2002, namely, "An act to prevent trafficking in child pornography and obscenity, to proscribe pandering and solicitation relating to visual depictions of minors engaging in sexually explicit conduct, to prevent the use of child pornography and obscenity to facilitate crimes against children, and for other purposes." *Id.*

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Children Today Act (PROTECT Act),⁶ which was signed into law by President Bush on April 30, 2003.⁷

The COPPA of 2002 and 2003 and the PROTECT Act were a direct response to the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*,⁸ in which the Court held unconstitutional two provisions of the Child Pornography Prevention Act of 1996 (CPPA), one of which placed a ban on "virtual" child pornography.⁹ The legislation, proposed by Attorney General John Ashcroft, attempted to rectify the problems with the CPPA by tailoring virtual child pornography laws to meet constitutional standards.¹⁰ Congressman Lamar Smith of Texas, the bill's sponsor, stated that Congress tried to respond to the specific objections voiced by the individual Supreme Court justices in *Ashcroft* and that he was confident that the COPPA of 2002 would

⁶ 18 U.S.C. § 2252 (2003); S. 151, 108th Cong. (1st Sess. 2003) (titled, "A Bill to Amend Title 18, United States Code, With Respect to the Sexual Exploitation of Children").

⁷ See Joseph J. Beard, *Virtual Kiddie Porn: A Real Crime? An Analysis of the Protect Act*, 21-SUM ENT. & SPORTS LAW 3, 4 (2003) (stating that differences between the COPPA and the Senate version of this bill led to the enactment of the PROTECT Act).

⁸ 535 U.S. 234 (2002).

⁹ See 18 U.S.C. § 2256(8)(A)-(C) (2003). The CPPA defines "child pornography" as:

any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where: (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

Id. The second provision, which all nine justices agreed violates the First Amendment, proscribes visual depictions which "convey the impression" that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 257-88 (2002).

¹⁰ See H.R. 4623, 107th Cong. (2d Sess. 2002).

pass constitutional muster.¹¹ Congressman Smith felt equally strong about the constitutionality of the COPPA of 2003, which he also sponsored.¹²

This note addresses the constitutionality of the recent attempts to proscribe virtual child pornography, particularly as they face first amendment challenges the CPPA failed to survive. Part I describes virtual child pornography and discusses the development of virtual child pornography law. Part II discusses the Supreme Court's decision in *Ashcroft*, focusing on the government's reasons for asserting the necessity of a ban on virtual child pornography. Part III explores the ways in which legislation proscribing virtual child pornography responds to the government's concerns and introduces the newly-passed ban on virtual child pornography in the PROTECT Act. Part IV argues that any attempt to ban virtual child pornography will prove unsuccessful against a First Amendment challenge. Part V proposes that the government focus its resources on prosecuting offenders of child pornography who utilize technology to create computer-generated images of children rather than on attempting to pass constitutionally faulty legislation.

I. THE ORIGINS AND DEVELOPMENT OF CHILD PORNOGRAPHY LAW

It is well established that the First Amendment does not protect pornography that involves real children.¹³ Because child

¹¹ Julia Scheeres, *House Refines Virtual Porn Ban*, WIRED NEWS, (Jun. 27, 2002), available at <http://www.wired.com/news/business/0,1367,53510,00.htm>.

¹² See Congressman Lamar Smith Press Release, *Smith Bill to Fight Child Pornography Passes House*, (Apr. 10, 2003), available at <http://lamarsmith.house.gov/news.asp?FormMode=Detail&ID=210>. "If this legislation becomes law, child pornographers will be deterred, or prosecuted." *Id.*

¹³ See U.S. CONST. Amend. I. The First Amendment states, in pertinent part, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." *Id.* Although the First Amendment was originally construed to protect political and social speech, the Court has consistently held that the First Amendment also protects artistic and other types of speech, even if of a sexual nature. See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981) (holding that nude dancing, as a form of expression, is within the purview of protected free speech); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02

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pornography is not entitled to constitutional protection, legislation that proscribes its creation, possession and distribution is permissible.¹⁴ Virtual child pornography, however, creates a unique problem in that it involves the creation of pornography without the use of actual, live children.¹⁵ Computers have transformed the creation of child pornography into a realm not covered by existing law.¹⁶

A technique known as “morphing” allows a non-obscene image, such as a photograph of a real child scanned into a computer, to be transformed into an image of a child engaging in sexually explicit conduct.¹⁷ Morphing, short for “metamorphosing,” is a technique through which a computer fills in the blanks between dissimilar objects to create a combined image.¹⁸ For example, through graphics software, an individual can combine the image of a child’s face with that of an adult’s body, erase pubic hair and reduce breast or genital size to create a portrait

(1952) (holding that motion pictures, despite being made for commercial motives, are protected by the First Amendment); *Winters v. New York*, 333 U.S. 507, 510 (1948) (holding that the distinction between informative speech and speech for entertainment purposes is “too elusive” to deny entertaining expression constitutional protection); *see also* *Osborne v. Ohio*, 495 U.S. 103, 109-10 (1990) (allowing states to penalize persons possessing and viewing child pornography); *New York v. Ferber*, 458 U.S. 747, 756 (1982) (providing that child pornography is not entitled to First Amendment protection so long as the prohibited conduct is adequately defined by state law).

¹⁴ *See Ferber*, 458 U.S. at 761 (holding that the state has an interest in prohibiting images that are the product of child sexual abuse, regardless of their content).

¹⁵ *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (distinguishing real child pornography from virtual child pornography and explaining why prohibitions on the latter presents a First Amendment problem).

¹⁶ *See* Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439 (1997) (describing techniques utilized to create virtual child pornography). Advancements in technology, specifically through the use of computers, allow for individuals to create visual images that do not consist of images of minors. *Id.*

¹⁷ *Id.* at 440-41.

¹⁸ *Id.* at 440 n.5. *See* Jeff Prosis, *Morphing: Magic on Your PC*, PC MAG., June 14, 1994, at 325 (explaining morphing technology).

of child pornography that appears genuine.¹⁹ In fact, this technology allows an individual to create a computer-generated child from adult pornography images.²⁰ The image of a Playboy centerfold can be scanned into a computer at very little expense and then altered through the use of morphing technology to create a visual depiction that appears to be of a nude child.²¹

Virtual child pornography falls outside the parameters of existing child pornography law because it functions through the use of artistic and computer skills to create animated depictions *resembling* real children.²² The law with respect to child pornography has undergone many changes to meet the continuing challenges of child pornography itself.²³ In reviewing real child pornography laws, the Supreme Court has clearly stated that real child pornography does not warrant First Amendment protection.²⁴ The Court recently had the opportunity to address the constitutionality of prohibitions on virtual child pornography and, despite its declaration that such prohibitions violate the First Amendment, the legislature continues to enact proscriptions against virtual child pornography.²⁵

A. *The Supreme Court*

From the early 1970s the Supreme Court has struggled with

¹⁹ Burke, *supra* note 16, at 472 n.8.

²⁰ *Id.* at 440.

²¹ *Id.*

²² See *New York v. Ferber*, 458 U.S. 747, 765 (1982) (stating that materials or depictions of sexual conduct “which do not involve live performance or photographic or other visual reproduction of live performances,” retain First Amendment protection); *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1092-93 (9th Cir. 1999) (explaining that virtually-created child pornography cannot be suppressed simply because it involves “foul figments of creative technology” that do not involve actual children).

²³ See *supra* Part I.B (discussing early legislation and amendments to deal with the widespread problem of child pornography).

²⁴ See *supra* Part I.A (detailing the Supreme Court’s holdings when analyzing real child pornography laws).

²⁵ S. 151, 108th Cong. (1st Sess. 2003); H.R. 1161, 108th Cong. (2003); H.R. 4623, 107th Cong. (2d Sess. 2002).

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defining permissible limitations on pornography.²⁶ In *Miller v. California*, the Supreme Court provided examples of visual images that states may incorporate into statutes when defining obscenity.²⁷ For example, a state could regulate “patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated, or patently offensive representations or descriptions of masturbation, excretory functions, or lewd exhibition of genitals.”²⁸

Almost ten years later, in *New York v. Ferber*, the Supreme Court expanded the scope of the states’ freedom to suppress material portraying sexual acts or lewd displays of genitalia of children.²⁹ The *Ferber* Court ultimately held that the First Amendment does not extend protection to persons who sell,

²⁶ See, e.g., *Osborne v. Ohio*, 495 U.S.103 (1990); *Ferber*, 458 U.S. 747; *Miller v. California*, 413 U.S. 15 (1973).

²⁷ 413 U.S. 15, 25-26 (1973). The defendant in *Miller* conducted a mass mailing campaign to advertise the sale of illustrated books categorized as “adult material.” *Id.* at 16. His conviction was specifically based on his conduct in causing five unsolicited advertising brochures to be sent through the mail addressed to a restaurant in Newport Beach, California. *Id.* The envelope was opened by the manager of the restaurant and his mother who did not request the brochures and who subsequently complained to the police. *Id.* Defendant was convicted by a jury for violating California Penal Code section 311.2(a) by knowingly distributing obscene matter. *Id.* The Supreme Court held that obscene materials may properly be regulated by the state. *Id.* The Court defined obscenity as works which “taken as a whole, appeal to the prurient interest in sex,” which “portray, in a patently offensive way, sexual conduct specifically defined by the applicable state law” and which “taken as a whole, do not have serious literary, artistic, political or scientific value.” *Id.* at 24.

²⁸ *Id.* at 25.

²⁹ 458 U.S. 747 (1982). *Ferber* involved a Bookstore proprietor convicted under a New York statute prohibiting individuals from “knowingly promoting a sexual performance by a child under the age of 16 by distributing material which depicted such a performance.” *Id.* He appealed his conviction and the Appellate Division affirmed. *Id.* On appeal to the New York Court of Appeals, his conviction was reversed based on a finding that the New York statute under which *Ferber* was convicted was both underinclusive and overbroad and, as a result, violated the First Amendment. 52 N.Y.2d 674 (Ct. App. 1981). The Supreme Court granted certiorari and reversed, holding that child pornography is not protected by the First Amendment and that the New York statute was neither overbroad nor underinclusive. *Ferber*, 458 U.S. at 747.

advertise or otherwise disseminate child pornography.³⁰ The *Ferber* Court rejected the First Amendment challenge, holding that “[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*.”³¹ In the first sentence of the *Ferber* decision, the Court observed that “[i]n recent years, the exploitive use of children in the production of pornography has become a serious national problem.”³² The Court, in so expressing its concern over the children harmed in the production of child pornography, indicated that regulation of child pornography warranted different treatment than regulation of adult pornography.³³ A noteworthy result of *Ferber* was the Court’s holding that all child pornography that depicted actual children may be prohibited, regardless of whether it was “obscene.”³⁴

Subsequently, in *Osborne v. Ohio*, the Court addressed the issue of whether an individual may possess child pornography privately in his home.³⁵ The Court applied the standards from

³⁰ *Ferber*, 458 U.S. at 762.

³¹ *Id.* at 759.

³² *Id.* at 749. *See also* S. REP. 95-438, at 43 (1977). Legislative findings in 1977 revealed that, “because of the vast potential profits involved, it would appear that [the child pornography] enterprise is growing at a rapid rate.” *Id.*

One researcher . . . has documented the existence of over 260 different magazines which depict children engaging in sexually explicit conduct. Such magazines depict children, some as young as three to five years of age, in couplings with their peers of the same or opposite sex, or with adult men and women. The activities featured range from lewd poses to intercourse, fellatio, cunnilingus, masturbation, rape, incest and sado-masochism. Such magazines . . . are only one of the forms of child pornography that are currently available in the United States. Other forms include ten to twelve minute films known as ‘loops,’ still photographs, slides, playing cards and video cassettes.

Id.

³³ *See Ferber*, 458 U.S. at 756.

³⁴ *Id.* at 764-65. *See supra* note 29 (discussing the facts and holding of the *Ferber* opinion).

³⁵ 495 U.S. 103 (1990). In *Osborne*, Ohio police found photographs in Osborne’s home, each of which depicted a nude male adolescent posed in a sexually explicit position. *Id.* Osborne was convicted of violating a state statute

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Ferber, reasoning that the First Amendment similarly does not extend protection to the private possession of child pornography.³⁶ According to the *Osborne* Court, the state could prohibit the possession and viewing of these materials because doing so would further the state's compelling interest in "protecting the physical and psychological well-being of minors and in destroying the market for the exploitative use of children."³⁷

Ashcroft v. Free Speech Coalition,³⁸ decided nearly three decades after the Supreme Court first addressed obscenity in *Miller*, provided the Court with its first opportunity to address legislation prohibiting virtual child pornography.³⁹ The Free Speech Coalition and others originally challenged the CPPA of 1996 in the United States District Court for the Northern District of

prohibiting a person from possessing or viewing any material or performance showing a minor (who was not his child or ward) in a state of nudity, unless the material was presented for a bona fide purpose by or to a person having a proper interest in such materials, or the possessor knew that the minor's parents or guardian has consented in writing to the photographing or use of the minor. *Id.* *Osborne* contended that the First Amendment prohibited the States from proscribing the private possession of child pornography. *Id.*

³⁶ *Id.* at 139.

³⁷ *Id.* at 103.

³⁸ 535 U.S. 234 (2002). In this case, the Supreme Court struck down the portions of the Child Pornography Prevention Act of 1996 (CPPA) which expanded the federal prohibition on child pornography to images that did not depict real children. *Id.* A trade association of businesses involved in the production and distribution of "adult-oriented materials," and others, brought a pre-enforcement challenge, seeking declaratory and injunctive relief from these "virtual" child pornography provisions of the Act, stating that the provisions chilled protected speech. *Id.* The District Court for the Northern District of California disagreed and granted the government's motion for summary judgment. *Id.* The Ninth Circuit reversed and the Supreme Court granted certiorari. *Id.* The Supreme Court, in an opinion by Justice Kennedy, held that speech prohibited by the CPPA's ban on virtual child pornography is distinguishable from child pornography, which may be banned without regard to whether it depicts works of value. *Id.* It also held that the ban on virtual child pornography in the CPPA abridges the freedom to engage in a substantial amount of lawful speech, and thus is overbroad and unconstitutional under the First Amendment. *Id.*

³⁹ *Id.*

California, asserting that certain provisions of the statute were overbroad and vague, “chilling them from producing works protected by the First Amendment.”⁴⁰ The District Court disagreed, granting summary judgment to the Government.⁴¹ The Court applied a strict scrutiny standard and held the CPPA did not burden any more speech than necessary to further “important and compelling government interests” advanced by the legislation.⁴² The Court of Appeals for the Ninth Circuit reversed in *Free Speech Coalition v. Reno*,⁴³ agreeing with respondents that the CPPA was overbroad because it banned material that was neither obscene under *Miller v. California*, nor produced by the exploitation of real children as in *New York v. Ferber*.⁴⁴

According to the Ninth Circuit, the CPPA was unconstitutional on its face.⁴⁵ On the other hand, four other Circuit Courts of Appeals sustained the CPPA.⁴⁶ These courts, while agreeing that

⁴⁰ *Id.* at 243. Plaintiffs in this action consisted of The Free Speech Coalition, a trade association that defends First Amendment rights against censorship, the publisher of a book “dedicated to the education and expression of the ideals and philosophy associated with nudism,” and individual artists whose work include nude and erotic photographs and paintings. *Id.* at 234. Plaintiffs filed a pre-enforcement challenge to the constitutionality of certain provisions of the CPPA, alleging that they are vague, overbroad, and constitute impermissible content-specific regulations and prior restraints on free speech. *Id.*

⁴¹ *Id.*

⁴² *Free Speech Coalition v. Reno*, 1997 WL 487758 at *4 (N.D. Cal. 1997) (noting that among the government’s stated interests is the protection of children from sexual exploitation). The District Court further stated that any ambiguity in determining whether an individual depicted in an image “appears to be a minor” could be “resolved by examining whether the work was marketed and advertised as child pornography.” *Id.* According to a strict scrutiny analysis, a challenged Act must be narrowly tailored to further compelling governmental interests. *United States v. Fox*, 248 F.3d 394, 400 (5th Cir. 2001).

⁴³ 198 F.3d 1083 (1999).

⁴⁴ *Id.* at 1092-97.

⁴⁵ *Id.* at 1096. “On its face, the CPPA prohibits material that has been accorded First Amendment protection. That is, non-obscene sexual expression that does not involve actual children is protected expression under the First Amendment.” *Id.*

⁴⁶ *See United States v. Fox*, 248 F.3d 394 (5th Cir. 2001); *United States v.*

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the CPPA was a “content-based regulation,” found the Act survived strict scrutiny because it was narrowly tailored to meet the government’s compelling interest in protecting children from child pornography offenders and was not unconstitutionally overbroad or vague.⁴⁷ In *Ashcroft v. Free Speech Coalition*, the Supreme Court granted certiorari and ultimately agreed with the Ninth Circuit that the CPPA was overbroad and thus violated the First Amendment.⁴⁸

B. Early Legislation and Amendments

While the Supreme Court has struggled with addressing which prohibitions on child pornography the First Amendment allows, the legislature has sought to deal with the widespread problem of

Mento, 231 F.3d 912 (4th Cir. 2000); *United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999); *United States v. Hilton* 167 F.3d 61 (1st Cir. 1999), *cert. denied*, 528 U.S. 844 (1999). The Ninth circuit cited to the First Circuit’s decision in *United States v. Hilton*, 167 F.3d 61, 68-69 (1st Cir. 1999), *cert. denied*, 528 U.S. 844 (1999), for a proposition upon which it based its holding:

[T]he First Circuit found that the Act at issue was content-based because it expressly aims to curb a particular category of expression, child pornography, by singling out the type of expression based on its content and then banning it. The *Hilton* court’s determination that blanket suppression of an entire type of speech is a content-discriminating act is a legal conclusion with which we agree. The child pornography law is at its essence founded upon content-based classification of speech.

Free Speech Coalition, 198 F.3d at 1090-91.

⁴⁷ See *Fox*, 248 F.3d at 406. The Court stated that, “[n]otwithstanding the general rule that ‘[c]ontent-based regulations are presumptively invalid’ because of the intolerable ‘risk of suppressing protected expression,’ the Supreme Court has made clear that in regulating child pornography, Congress is entitled to ‘greater leeway.’” *Id.* at 400 (citing *New York v. Ferber*).

⁴⁸ See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256 (2002) (holding “[t]he provision abridges the freedom to engage in a substantial amount of lawful speech. For this reason, it is overbroad and unconstitutional”). The Court stated that, “[e]ven if a film contains no sexually explicit scenes involving minors, it could be treated as child pornography if the title and trailers convey the impression that the scenes would be found in the movie. The determination turns on how the speech is presented, not on what is depicted.” *Id.* at 257.

child pornography itself.⁴⁹ “Child pornography is a social concern that has evaded repeated attempts to stamp it out.”⁵⁰ Congress and state legislatures have vehemently attempted to enact laws that would provide support for the prosecution of individuals “involved in the creation, distribution, and possession of sexually explicit materials made by or through the exploitation of children.”⁵¹

In 1977, the Protection of Children Against Sexual Exploitation Act (1977 Act) was enacted as the first federal law to specifically prohibit the sexual exploitation of children.⁵² The law made it illegal to use a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.⁵³ The creation of the 1977 Act was propelled by

⁴⁹ See *supra* Part I.A (discussing the Supreme Court’s analysis of various pornography laws).

⁵⁰ Free Speech Coalition v. Reno, 198 F.3d 1083, 1087 (1999).

⁵¹ *Id.* at 1087. Numerous states have enacted criminal statutes prohibiting the production, promotion, sale, exhibition, or distribution of photographs of children engaged in sexual activity. See generally ALA. CODE § 13A-12-197 (1996); ALASKA STAT. § 11.41.455, § 11.61.125 (Michie 1995); ARK. CODE ANN. § 5-27-304 (Michie 1995); CAL. PENAL CODE § 311.3, § 311.11 (West 1996); CONN. GEN. STAT. § 53a-193 (1994); DEL. CODE ANN. tit. 11, § 1111 (1995); GA. CODE ANN. § 16-12-100 (1996); 720 ILL. COMP. STAT. 5/11-20.1 (West 1996); IND. CODE § 35-42-4-4 (1996); MD. CODE ANN. § 419A (1996); MASS. ANN. LAWS ch. 272, § 29A (Law. Co-op. 1996); MISS. CODE ANN. § 97-5-33 (1996); MO. REV. STAT. § 573.010 (1995); MONT. CODE ANN. § 45-5-625 (1995); NEB. REV. STAT. § 28-1463.03 (1996); NEV. REV. STAT. § 2A:30B-3 (1995); N.Y. PENAL LAW § 263.05 (McKinney 1996); OHIO REV. CODE ANN. § 2907.322 (Anderson 1996); OR. REV. STAT. § 163.684 (1995); 18 PA. CONS. STAT. § 6312 (1996); S.C. CODE ANN. § 16-15-335 (Law. Co-op. 1995); S.D. CODIFIED LAWS ANN. § 22-22-23.1 (Michie 1996); TENN. CODE ANN. § 39-17-902 (1996); TEX. PENAL CODE ANN. § 43.26 (West 1996); UTAH CODE ANN. § 76-5a-1 (Vernon 1996); VA. CODE ANN. § 18.2-374.1 (Michie 1996); WASH. REV. CODE ANN. § 9.68A.070 (West 1995); WIS. STAT. § 948.12 (1994).

⁵² Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1997) (codified as amended at 18 U.S.C. §§ 2251-2253 (2003)).

⁵³ 18 U.S.C. § 2251. The Act provides, in pertinent part, that:

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of

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congressional findings that child pornography had become a highly organized multi-million dollar industry in which many children were exploited through the production of pornography.⁵⁴ The legislation was flawed, however, in that federal law enforcement officials were unable to make practical use of it in prosecuting offenders.⁵⁵

The Attorney General's Commission on Pornography found that producers of virtual child pornography primarily employed models that looked like minors.⁵⁶ Producers of pornography, in order to cater to the child pornography market, often used very "young-looking performers" and models to give viewers the impression that they were actually looking at minors.⁵⁷ As a result, distributors and producers were able to avoid prosecution simply

producing any visual or print medium depicting such conduct, shall be punished as provided under subsection (c), if such person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed, or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed. (b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct shall be punished as provided under subsection (c) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed. (c) Any person who violates this section shall be fined not more than \$10,000, or imprisoned not more than 10 years, or both, but, if such person has a prior conviction under this section, such person shall be fined not more than \$15,000, or imprisoned not less than two years nor more than 15 years, or both.

Id.

⁵⁴ See *New York v. Ferber*, 458 U.S. 747, 749 n.1 (1982).

⁵⁵ See U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY: FINAL REPORT 596-98 (1986) [hereinafter COMMISSION REPORT] (detailing findings that child pornography has been used "to lure children to engage in sexual activity").

⁵⁶ *Id.* at 618.

⁵⁷ *Id.*

by claiming ignorance or deception by the performers regarding their true age.⁵⁸ This made it impossible, except in the most obvious cases, to be certain whether the performers really were under the age of eighteen, resulting in the hindrance of prosecutions of child pornography offenders.⁵⁹ Consequently, the law has been amended several times since it was first enacted.⁶⁰

As a result of the deficiencies of the 1977 Act and the *Ferber* ruling, Congress enacted the Child Protection Act of 1984 (1984 Act),⁶¹ which incorporated a key phrase from *Ferber*, stating with respect to the limits on the classification of child pornography, the “nature of the harm to be combated requires that the state offense be limited to works that visually depict sexual conduct.”⁶² The statute, as amended, prohibits knowingly mailing or receiving in the mail any visual depiction of a minor engaged in sexually

⁵⁸ *American Library Ass’n v. Reno*, 33 F.3d 78, 89 (D.C. Cir. 1994) (citing to COMMISSION REPORT finding that ambiguity regarding a performer’s true age “provided an excuse to those in the distribution chain, who could profess ignorance that they were actually dealing in sexual materials involving children”).

⁵⁹ *Id.* at 89.

⁶⁰ *See* *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1087 (1999) (discussing deficiencies in the Protection of Children Against Sexual Exploitation Act). Only one person was convicted under the Act’s prohibition against producing pornography. *Id.* at 1087. In addition, the Protection of Children Against Sexual Exploitation Act made it a crime for a person to engage in the distribution for sale of any obscene materials depicting minors engaging in sexually explicit conduct. Pub. L. No. 95-225, § 2(a), 92 Stat. 7, 8 (1978). The Act defined “minor” as any person under the age of sixteen. *Id.* After the Supreme Court’s decision in *Ferber*, an individual could be proscribed from producing or distributing pornographic materials regardless of whether they were obscene or of value. *New York v. Ferber*, 458 U.S. 747, 753-80 (1982). Thus, the legislature sought to expand the law’s prohibitions by passing the Child Protection Act of 1984, which prohibited the distribution of material depicting sexual activities by children regardless of whether the visual depiction was “obscene.” *See* Maria Markova, Comment, *Ashcroft v. Free Speech Coalition: The Constitutionality of Congressional Efforts to Ban Computer-Generated Pornography*, 24 WHITTIER L. REV. 985 (2003); *See also* 18 U.S.C. § 2251 (2003).

⁶¹ Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (1984).

⁶² *Ferber*, 458 U.S. at 764.

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explicit conduct.⁶³

Unlike the 1977 Act, the 1984 Act did not require that the trafficking, receipt, and mailing of child pornography be for the purposes of sale or distribution for sale.⁶⁴ By eliminating the requirement that the production or distribution of child pornography be for the purpose of sale, the 1984 Act recognized that a great deal of trafficking in child pornography was not-for-profit.⁶⁵ Further, the 1984 Act did not require that material be considered obscene under the *Miller* obscenity standard before an individual could be criminally prosecuted for producing, disseminating or receiving such material.⁶⁶ The 1984 Act increased

⁶³ 18 U.S.C. § 2252 (2003). The amended statute provides, in pertinent part, that an individual is subject to punishment if he or she:

- (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 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.

Id.

⁶⁴ *Id.*

⁶⁵ See *United States v. Andersson*, 803 F.2d 903, 905-06 (7th Cir. 1986) (finding that Congress intended to extend coverage of the Act to those individuals who distributed prohibited materials without commercial motive).

⁶⁶ *Miller v. California*, 413 U.S. 15 (1973). *Miller* defined obscenity not protected by the First Amendment as:

- (a) whether the ‘average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest [in sex]; (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.

Id. See also Pub. L. No. 98-292, 98 Stat. (1984).

the maximum fines for violation tenfold and stated that child pornography consisted of visual depictions of children under the age of eighteen whereas the previous legislation protected children under the age of sixteen.⁶⁷

Federal prosecutions “increased dramatically” as a result of the amended law,⁶⁸ but the House Judiciary Committee concluded that the seriousness of child pornography further called for a need to ban advertisements related to the sexual exploitation of children as well as a need for greater enforcement of laws that “prohibit the transportation of minors for purposes of sexual exploitation.”⁶⁹ As a result, in 1986, Congress amended the law once more, enacting the Child Sexual Abuse and Pornography Act of 1986, which banned the production and use of advertisements for child pornography.⁷⁰

Congress passed the Child Protection and Obscenity Enforcement Act of 1988 (the 1988 Act) in its continued efforts to stop child pornography.⁷¹ The law banned the use of computers to transport, distribute or receive child pornography.⁷² Congress passed the law in response to evidence that computer networks played a substantial role in the exchange of child pornography.⁷³

⁶⁷ Pub. L. No. 98-292, 98 Stat. (1984). *See also* Janelle E. Pretzer, *United States v. United States District Court (Kantor): Protecting Children from Sexual Exploitation or Protecting the Pornography Producer?*, 20 PAC. L.J. 1343, 1356-57 (1989) (“Raising the age requirement from sixteen to eighteen makes it easier to prosecute the many cases in which fourteen or fifteen-year-olds have been sexually exploited, but proof of their age was not available.”).

⁶⁸ Annemarie J. Mazzone, *United States v. Knox: Protecting Children from Sexual Exploitation through the Federal Child Pornography Laws*, 5 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 167, 186 (1994) (explaining that the 1984 revisions allowed federal officials to proceed against noncommercial producers and distributors).

⁶⁹ *Id.* at 186-87.

⁷⁰ Pub. L. No. 99-628, § 2, 100 Stat. 3510 (codified as amended at 18 U.S.C. § 2251 (1986)).

⁷¹ Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended at 18 U.S.C. §§ 2251A-2252 (1998)).

⁷² *Id.*

⁷³ *See generally*, *Computer Pornography and Child Exploitation Act: Hearings on S. 1305 Before the Subcomm. on Juvenile Justice of the Senate*

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“The main innovation of the 1988 Act was its recordkeeping requirement,” used to facilitate the enforcement of criminal child pornography laws.⁷⁴ Congress’ goal was to compel producers of sexually explicit images to educate themselves and others about the ages of the subjects of visual depictions.⁷⁵ In furtherance of this goal, the 1988 Act required “all persons producing material containing visual depictions made after February 6, 1978, showing actual explicit sexual activity to determine the true age of the performers, to maintain records containing this information, and to affix to each copy of the material a statement about where these records could be found.”⁷⁶ The records could not be used in criminal prosecutions.⁷⁷ Failure to comply with these recordkeeping requirements, however, gave rise to a rebuttable presumption that the performers were under the age of eighteen.⁷⁸

After the Supreme Court’s decision in *Osborne*,⁷⁹ holding that

Comm. on the Judiciary, 99th Cong. (1985); *Child Protection and Obscenity Enforcement Act and Pornography Victims Protection Act of 1987: Hearings on S. 704 and S. 2033 Before the Senate Committee on the Judiciary*, 100th Cong. (1988).

⁷⁴ *American Library Ass’n v. Barr*, 956 F.2d 1178, 1182 (1992). Associations representing producers and distributors of books, magazines and films brought action to challenge the constitutionality of the recordkeeping provision of the Child Protection and Obscenity Act of 1988. *Id.* The Court of Appeals held that claims attacking recordkeeping provisions were mooted by enactment of new legislation eliminating the recordkeeping provisions of the Act. *Id.*

⁷⁵ *Id.*

⁷⁶ 18 U.S.C. § 2257 (1988).

⁷⁷ *Id.*

⁷⁸ *See id.* Portions of these recordkeeping provisions were later held unconstitutional because they burdened “too heavily” the right to produce material protected by the First Amendment and because they were not “narrowly tailored” to ban only child pornography. *See American Library Ass’n v. Thornburgh*, 713 F. Supp. 469 (D.C. Cir. 1989). The 1990 amendment incorporated recordkeeping requirements but “significantly altered” the “scope and burden” of the section’s original recordkeeping requirements. *American Library Ass’n v. Reno*, 33 F.3d 78 (D.C. Cir. 1994).

⁷⁹ 495 U.S. 103 (1990). *See supra* notes 35-37 and accompanying text (discussing the *Osborne* decision and its impact on the state of the law respecting pornography).

the First Amendment does not protect child pornography, Congress enacted the Child Protection Restoration and Penalties Enhancement Act of 1990 (the 1990 Amendment).⁸⁰ The 1990 Amendment went further than the 1988 Act and banned the mere knowing possession of child pornography.⁸¹ This version of the federal child pornography law prohibited an individual from knowingly receiving or possessing three or more books or films that have been mailed between states and which contain visual depictions of a child under the age of eighteen engaging in sexually explicit conduct.⁸² In 1994, the 1977 federal law was again amended to prohibit the production or importation of sexually explicit depictions of minors.⁸³ The amended law also provided for mandatory restitution for victims of child pornography.⁸⁴

C. *The Child Pornography Prevention Act of 1996*

Notwithstanding its history of amendments and alterations, child pornography law had yet to face its greatest challenge—the enactment of prohibitions on the creation and possession of virtual child pornography.⁸⁵ Before the CPPA was enacted in 1996,

⁸⁰ Pub. L. No. 101-647, § 301, 104 Stat. 4789 (codified as amended at 18 U.S.C. § 2252(a)(4) (1990)).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ 18 U.S.C. § 2259 (2003). Individuals harmed as a result of the commission of child pornography were entitled to the “full amount of the victim’s losses” including any costs incurred by the victim for: (a) medical services relating to physical, psychiatric, or psychological care; (b) physical or occupational therapy or rehabilitation; (c) necessary transportation; temporary housing; and child care expenses; (d) lost income; (e) attorney’s fees, as well as other costs incurred; and (f) any other losses suffered by the victim as a proximate result of the offense. *Id.*

⁸⁵ *See Free Speech Coalition v. Reno*, 198 F.3d 1083, 1089 (9th Cir. 1999) (noting that, until the Child Pornography Prevention Act of 1996, Congress had yet to define the problem of child pornography in terms of animated visual depictions of children). “The actual participation and abuse of children in the production or dissemination of pornography involving minors was the *sine qua*

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Congress' focus on eliminating the problem of child pornography was limited exclusively to prohibiting the possession or dissemination of pornography involving *real* minors.⁸⁶ The development of computer-related technology, however, led Congress to expand child pornography laws to address visual depictions that *appear to be* of real children.⁸⁷

The CPPA expanded the scope of existing federal law to include "virtual child pornography," defined as:

[A]ny visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where (a) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (b) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct; (c) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or (d) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.⁸⁸

Because the CPPA included language banning images that "appear to be of a minor engaging in sexually explicit conduct,"⁸⁹ the new definition of child pornography included all apparent child pornography, regardless of whether any real children were involved in its creation.⁹⁰

The Government, arguing that the CPPA's ban on virtual child pornography was constitutional, asserted that its inclusion of an

non of the regulating scheme." *Id.* at 1087.

⁸⁶ *See id.*

⁸⁷ *See id.* (discussing the development of the new law to prevent the use of technology for "evil" purposes).

⁸⁸ 18 U.S.C. § 2256(8)(B) (1996).

⁸⁹ 18 U.S.C. §§ 2252, 2256 (1996).

⁹⁰ *Id.*

affirmative defense ensured the Act could stand up to a First Amendment challenge.⁹¹ The affirmative defense allowed a defendant to avoid conviction for nonpossession offenses by showing that the materials were “produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children.”⁹² The *Ashcroft* Court did not officially rule on the affirmative defense in the Act, but did point out that the affirmative defense in the Act was incomplete as well as insufficient.⁹³ The Court reasoned, therefore, that the affirmative defense could not save the statute from a First Amendment challenge.⁹⁴ The provision was incomplete because, while it allowed a defendant charged with *possession* to defend on the ground that the film depicts only adult actors, it did not allow a defendant charged with *distribution* of a proscribed work to raise the same affirmative defense.⁹⁵ Furthermore, the Court found the affirmative defense was insufficient because it did not protect individuals who produced speech solely through the use of technology and did not use images of adult actors who appeared to be minors.⁹⁶ Consequently, a defendant remained open to prosecution even where he could demonstrate that no children were harmed in the production of the pornographic images.⁹⁷

⁹¹ *Ashcroft v. Free Speech Coalition*, 535 U.S. at 237 (stating that the Government’s reliance on the CPPA’s affirmative defense is misplaced). The Court allows for the possibility that an affirmative defense might in some circumstances save a statute from a First Amendment challenge. *Id.* at 256. Here, the Court stated that the defense is insufficient as it does not apply to possession or to images created by computer images. *Id.* As a result, a large amount of speech unrelated to the Government’s interest in prosecuting offenders who use images of real children is left unprotected. *Id.* 18 U.S.C. § 2252A(c) (1996).

⁹² 18 U.S.C. § 2252A(c).

⁹³ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 237 (2002).

⁹⁴ *Id.*

⁹⁵ *Id.* at 255-56.

⁹⁶ *Id.*

⁹⁷ *Id.* The affirmative defense supplies the defendant with an opportunity to prove that his speech is lawful only where he can establish that the actors used in the production of the work were adults. *Id.* The Court also noted that the CPPA’s affirmative defense was lacking because proving that speech is lawful is

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II. TURNING THE FIRST AMENDMENT “UPSIDE DOWN”: *ASHCROFT V. FREE SPEECH COALITION*

When faced with the question whether virtual child pornography as defined in the CPPA falls outside the protection of the First Amendment, the Supreme Court in *Ashcroft v. Free Speech Coalition* answered with a resounding “No.”⁹⁸ According to the Court, the CPPA is overbroad because it abridges an individual’s freedom to engage in a substantial amount of lawful speech and thus violates the First Amendment of the Constitution.⁹⁹ “The statute proscribes the visual depiction of an idea—that of minors engaging in sexual activity—that is a fact of modern society and has been a theme in art and literature throughout the ages.”¹⁰⁰ Thus, the statute prohibits speech despite its serious literary, political or scientific value.¹⁰¹

a heavy burden and an innocent possessor would most likely have difficulty proving the age of the actors. *Id.* Further, even if the defendant himself possessed the work, the producer himself may not have “preserved the records necessary to meet the burden of proof.” *Id.* at 256. *See infra* Part IV (asserting that the affirmative defense in the PROTECT Act similarly creates an unreasonable burden on the defendant).

⁹⁸ *Ashcroft*, 535 U.S. at 234-58. The Free Speech Coalition, a trade association of businesses involved in the production and distribution of “adult oriented materials,” and other parties, sought declaratory and injunctive relief by a pre-enforcement challenge to certain provisions of the CPPA before the United States District Court for the Northern District of California. *Id.* at 234. The Government moved for summary judgment, which the court granted. Plaintiffs appealed to the Court of Appeals for the Ninth Circuit in *Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999), which reversed the lower court decision. *Id.* The Supreme Court granted certiorari. *Id.* Justice Kennedy delivered the opinion of the Court. *Id.*

⁹⁹ *Id.* at 256-58. The First Amendment does not protect all categories of speech. *Id.* at 245-46. Defamation, incitement, obscenity, and pornography produced with real children may be prohibited without violating the First Amendment. *Id.* As the *Ashcroft* Court stated, though, none of these categories includes the speech prohibited by the CPPA. *Id.* at 246.

¹⁰⁰ *Id.* at 246.

¹⁰¹ *Id.* The Court notes the literary merit of the themes of teenage sexual activity and the sexual abuse of children. *Id.* at 248. The Court points to the works of William Shakespeare as well as to modern Academy Award-nominated

The Government argued that the possibility of producing images through the use of computer imaging makes it very difficult to prosecute those who produce pornography using real children because experts may have difficulty determining whether the pictures were made by using real children or computer imaging.¹⁰² The necessary solution, the Government continued, is to prohibit both kinds of images.¹⁰³ The Government asserted a compelling interest in ensuring that criminal prohibitions against child pornography “remain enforceable and effective.”¹⁰⁴ The Court interpreted the Government to be arguing that “protected speech may be banned as a means to ban unprotected speech.”¹⁰⁵ The Court refused to follow this reasoning to uphold the CPPA’s constitutionality because this analysis, said Justice Kennedy, “turns the First Amendment upside down.”¹⁰⁶ In fact, First Amendment jurisprudence requires the opposite.¹⁰⁷ It is preferable to permit

films like *Traffic* and *American Beauty*, both of which depict underage characters engaging in sexual relations. *Id.* at 247-48 A single graphic depiction within such works of sexual activity that “appears to” involve a minor would subject the possessor to harsh punishment “without inquiry into the work’s redeeming value”. *Id.* at 248. The Court stated that:

Our society, like other cultures, has empathy and enduring fascination with the lives and destinies of the young. Art and literature express the vital interest we all have in the formative years we ourselves once knew, when wounds can be so grievous, disappointment so profound, and mistaken choices so tragic, but when moral acts and self-fulfillment are still in reach. Whether or not the films we mention violate the CPPA, they explore themes within the wide sweep of the statute’s prohibitions.

Id.

¹⁰² *Id.* at 254-55.

¹⁰³ *Id.*

¹⁰⁴ See H.R. REP. NO. 107-526, at 2 (2002) (citing legislative findings for the proposed Child Obscenity and Pornography Prevention Act of 2002).

¹⁰⁵ *Ashcroft*, 535 U.S. at 255.

¹⁰⁶ *Id.* “The Government may not suppress lawful speech as a means to suppress unlawful speech.” *Id.* The Court’s analysis rests on the presumption that virtual child pornography in which no children are directly involved, is speech entitled to First Amendment protection. *Id.*

¹⁰⁷ *Id.*

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some unprotected speech to go unpunished than to suppress speech that should be protected.¹⁰⁸ This principle, known as the overbreadth doctrine, prohibits statutory prohibitions of speech where “a substantial amount of protected speech is prohibited or chilled in the process.”¹⁰⁹

Moreover, the *Ashcroft* Court rejected the Government’s contention that speech prohibited by the CPPA is “virtually indistinguishable from material that may be banned under *Ferber*” and therefore virtual child pornography should similarly be proscribed under the First Amendment.¹¹⁰ The *Ferber* Court supported its decision to ban child pornography using real children based on its finding that the acts were “intrinsically related” to the sexual abuse of children.¹¹¹ The *Ashcroft* Court’s ruling was consistent with the holding in *Ferber* in that virtual child pornography, unlike the real child pornography banned in *Ferber*, is not “intrinsically related” to the sexual abuse of children.¹¹² The Court concluded that speech prohibited by the ban on virtual child pornography in the CPPA is distinguishable from speech

¹⁰⁸ See *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (discussing application of the overbreadth doctrine). *Broadrick* involved a class action brought by certain Oklahoma state employees seeking a declaration that a state statute regulating political activity by state employees was invalid since it was impermissibly vague. *Id.* The Court held that the statute was not substantially overbroad and thus was not unconstitutional on its face. *Id.* at 618.

¹⁰⁹ See Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970) (explaining the overbreadth doctrine). For example, overbreadth attacks have been sustained where the Court believed that rights of associations were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (citations omitted).

¹¹⁰ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). See *supra* Part I.A (discussing the Supreme Court’s decision in *New York v. Ferber*).

¹¹¹ *New York v. Ferber*, 458 U.S. 747, 759 (1982). First, child pornography creates a permanent record of a child’s abuse. Second, since traffic in child pornography is an economic motive for its production, “the State had an interest in closing the distribution network.” *Id.*

¹¹² *Id.* The *Ferber* decision, while holding that child pornography is not protected by the First Amendment, based its decision on the harm suffered by children during the production of child pornography, rather than on the idea that such depictions communicate. See *Ferber*, 458 U.S. at 758.

prohibited by the ban on child pornography under *Ferber* because the CPPA prohibits speech “that records no crime and creates no victims by its production.”¹¹³ Virtual child pornography is not “intrinsically related” to the sexual abuse of children, according to the Supreme Court, since any causal link between virtual images and harm to real children is “contingent and indirect.”¹¹⁴

The *Ferber* Court not only distinguished between real and virtual child pornography, it relied on this distinction to support its holding.¹¹⁵ “*Ferber* did not hold that child pornography is by definition without value. The Court recognized that some works in this category might have significant value,¹¹⁶ but relied on virtual images—the very images prohibited by the CPPA—as an alternative and permissible means of expression.”¹¹⁷ Because the *Ferber* Court relied on the distinction between real and virtual child pornography to support its holding, the *Ashcroft* Court reasoned that the holding could not be used to support the CPPA, “a statute that eliminates this distinction.”¹¹⁸

III. TAILORING VIRTUAL CHILD PORNOGRAPHY LAWS TO MEET

¹¹³ *Ashcroft*, 535 U.S. at 236.

¹¹⁴ *Id.* “The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.” *Id.* The Court disagreed with the government’s argument that virtual child pornography would result in harm to real children in the form of sexual abuse. *Id.* This argument is based on the premise that virtual child pornography “whets the appetites of pedophiles and encourages them to engage in illicit conduct.” *Id.* at 253. The Court responded that it could not ban virtual child pornography offenses merely because virtual child pornography may have a tendency to encourage real child pornography offenses because this comes close to banning thought rather than action. *Id.* See *infra* Part V (discussing realistic solutions to the problems associated with the advent and existence of virtual child pornography).

¹¹⁵ *Ferber*, 458 U.S. at 765. The Court stated that the “[d]istribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances by children retain First Amendment protection.” *Id.* at 764-65.

¹¹⁶ *Id.* at 761.

¹¹⁷ *Id.* at 763.

¹¹⁸ *Ashcroft*, 535 U.S. at 251.

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CONSTITUTIONAL STANDARDS

According to the Government, the existence of computer-generated child pornography has already affected its ability to prosecute child pornography offenders.¹¹⁹ In 1992, federal prosecutors brought suit against 104 child pornography offenders.¹²⁰ Of these prosecutions, 85 defendants pled guilty and 9 cases resulted in a guilty verdict.¹²¹ In contrast, data from 1999 shows that of 510 prosecutions, 360 defendants pled guilty and 18 cases resulted in a guilty verdict.¹²² These statistics show a drop in the number of guilty pleas as well as a decrease in the number of successful prosecutions.¹²³

Congressional findings reveal that the vast majority of child pornography prosecutions today involve images contained on the defendant's computer hard drive, computer disk or related media.¹²⁴ Congress found that child pornography offenses were pursued in only the most "clear-cut" cases in which there was substantial evidence to support the defendant's guilt.¹²⁵ To be sure,

¹¹⁹ See H.R. REP. NO. 107-526, at 2 (2002) (citing legislative findings of the adverse impact of the Court's holding in *Ashcroft* on the ability to prosecute offenders used in support of the Child Obscenity and Pornography Prevention Act of 2002).

¹²⁰ U.S. DEP'T OF JUSTICE, REVIEW OF CHILD PORNOGRAPHY AND OBSCENITY CRIMES, REPORT NO. I-2001-07 (Jul. 2001), available at <http://www.usdoj.gov> [hereinafter DEP'T OF JUSTICE REPORT].

¹²¹ *Id.* Nine of these cases were dismissed. *Id.*

¹²² *Id.* Thirty of these cases were dismissed. *Id.*

¹²³ See *id.*

¹²⁴ H.R. 4623, at § 2 (2002).

¹²⁵ Pub. L. 108-21, Title V, § 501, Apr. 30, 2003, 117 Stat. 676. Evidence submitted to the Congress, including evidence from the National Center for Missing and Exploited Children, demonstrates that "technology already exists to disguise depictions of real children to make them unidentifiable and to make depictions of real children appear computer generated." *Id.* The technology will soon exist, if it does not already, to make depictions of virtual children look real. Congress found that: "The vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disks, and/or related media," *id.*; "technological advances since *Ferber* have led many criminal defendants to suggest that the images of child pornography they

the primary reasons reported by prosecutors for deciding not to prosecute a case involving child pornography included weak evidence (22.9 percent), lack of evidence (11.7 percent) and lack of evidence that a federal crime has been committed (11.5 percent).¹²⁶

Data provided by law enforcement agents shows that when a child pornographer is arrested, he usually has in his possession a collection of child pornography either in hard copies or loaded on computer disks.¹²⁷ Problems prosecuting offenders often arise due to the difficulty or impossibility of identifying the children who participated in the production of the pornography where technology has been used to alter images.¹²⁸ Further, computer technology may make it impossible to identify whether an image

possess are not those of real children, insisting that the government prove beyond a reasonable doubt that the images are not computer-generated," *id.*; "[s]uch challenges will likely increase after the Ashcroft v. Free Speech Coalition decision," *id.*; "[c]hild pornography circulating on the Internet has, by definition, been digitally uploaded or scanned into computers and has been transferred over the Internet, often in different file formats, from trafficker to trafficker," *id.*; "[a]n image seized from a collector of child pornography is rarely a first-generation product, and the retransmission of images can alter the image so as to make it difficult for even an expert conclusively to opine that a particular image depicts a real child. If the original image has been scanned from a paper version into a digital format, this task can be even harder since proper forensic delineation may depend on the quality of the image scanned and the tools used to scan it," *id.*; "[t]he impact on the government's ability to prosecute child pornography offenders is already evident. The Ninth Circuit has seen a significant adverse effect on prosecutions since the 1999 Ninth Circuit Court of Appeals decision in Free Speech Coalition." *Id.*

¹²⁶ DEP'T OF JUSTICE REPORT, *supra* note 120.

¹²⁷ See *Child Pornography Prevention Act of 1995: Hearings on S.1237 Before the Senate Comm. on the Judiciary*, 104th Cong. 21 (1996).

¹²⁸ See Lydia W. Lee, *Child Pornography Prevention Act of 1996: Confronting the Challenges of Virtual Reality*, 8 S. CAL. INTERDISC. L.J. 639, 676 (1999) (pointing out that enforcement of existing child pornography laws would be "nearly impossible" if virtual child pornography is left outside the scope of criminal liability because the average viewer would be unable to distinguish between real and virtual child pornography). The average viewer includes the child-victim, perpetrator, police, prosecutor, judge, and jury. *Id.*

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of a real child was used in the creation of child pornography.¹²⁹

Developments in computer technology that make virtual and real child pornography virtually indistinguishable have led to the creation of a good faith or reasonable doubt defense in the enforcement of child pornography laws.¹³⁰ As a result, criminal defendants who might easily have been prosecuted in the past evade conviction by creating a reasonable doubt as to their guilt where they claim that their conduct merely involved virtual child pornography and not a real child.¹³¹ For example, in *United States v. Kimbrough*, the defense introduced expert witness testimony that computers could be used to generate pictures of children that were undetectably identical to actual child pornography.¹³² This ability could have created a reasonable doubt in the jury's mind about whether the pictures in the defendant's possession were real.¹³³

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² 69 F.3d 723 (5th Cir. 1995). Kimbrough was convicted of two counts of receipt of child pornography and two counts of possession of child pornography. *Id.* at 735. His conviction was reversed in part and remanded for the trial court to vacate Kimbrough's conviction and to resentence him within the trial court's discretion. *Id.* at 730. The court required that a jury find beyond a reasonable doubt that Kimbrough knew the images in his possession involved real children. *Id.* at 733. Kimbrough was ultimately convicted. *Id.* at 737. See John P. Feldmeier, *Close Enough for Government Work: An Examination of Congressional Efforts to Reduce the Government's Burden of Proof in Child Pornography Cases*, 30 N. KY. L. REV. 205, 220 (2003) (arguing that the "virtual child" defense has not been a successful one for defendants, contrary to the government's assertions).

¹³³ *Id.* See *United States v. Sims*, 220 F. Supp. 2d 1222 (D.N.M. 2002) (after the decision in *Ashcroft v. Free Speech Coalition*, court entertained motion to reconsider previously denied motion for judgment of acquittal; judgment of acquittal was granted with respect to one set of images in which the government had no evidence other than the images themselves); *United States v. Bunnell*, 2002 WL 927765 (D. Me. 2002) (after the *Ashcroft* case was decided, defendant's motion to withdraw his guilty plea granted); *United States v. Reilly*, 2002 WL 31307170 (S.D.N.Y. 2002) (after *Ashcroft*, defendant's motion to withdraw guilty plea granted. The court held that the government must prove beyond a reasonable doubt that *the defendant knew* that the images depicted real children).

Congressional findings suggest that prosecutors, having difficulty prosecuting offenders, are bringing cases against individuals only where they can specifically identify the child depicted or where the image originated.¹³⁴ The Government utilized these findings as support for proposed legislation, the Child Obscenity and Pornography Prevention Acts of 2002 and 2003,¹³⁵ as well as for the newly enacted the PROTECT Act.¹³⁶

The COPPA of 2002 of 2003¹³⁷ were the subject of criticism

¹³⁴ See H.R. REP. No. 107-526, at 2 (2002). The National Center for Missing and Exploited Children testified at Congressional hearings that prosecutors around the country have expressed concern about whether previously indicted cases will continue to be viable. *Id.* They also expressed concern about whether potentially meritorious prosecutions will decline as a result of the Supreme Court's affirmation of the Ninth Circuit's decision in *Free Speech Coalition*. See *id.* Other Congressional findings include the following:

(1) Obscenity and child pornography are not entitled to protection under the First Amendment and thus may be prohibited; (2) The Government has a compelling state interest in protecting children and those who sexually exploit them, including both child molesters and child pornographers; (3) The Government has a compelling interest in ensuring that the criminal prohibitions against child pornography remain enforceable and effective; (4) In 1982, when the Supreme Court decided *Ferber*, the technology did not exist to (a) create depictions of virtual children that are indistinguishable from depictions of real children, (b) create depictions of virtual children using compositions of real children to create an unidentifiable child, or (c) disguise pictures of real children being abused by making the image look computer generated.

Id.

¹³⁵ H.R. 4623, 107th Cong. (2d Sess. 2002); H.R. 1161, 108th Cong. (2003). The proposed bills stated that child pornography exists by means of:

[a]ny visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where: Such visual depiction is a computer image or computer-generated image that is, *or is indistinguishable from*, that of a minor engaging in sexually explicit conduct.

H.R. REP. No. 107-526, at 2.

¹³⁶ See S.151, 108th Cong. (1st Sess. 2003).

¹³⁷ The COPPA of 2002 was passed by the House of Representatives by a 413-8 vote. See David L. Hudson, *A First Amendment Focus: Reflecting on the*

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because, like the CPPA, they criminalized virtual child pornography offenses.¹³⁸ Neither proposed Act was enacted into

Virtual Child Porn Decision, J. MARSHALL L. REV. 211, 217 (2002). Subsequently, the President called upon the Senate to pass the legislation. See Joseph J. Beard, *Virtual Kiddie Porn: A Real Crime? An Analysis of the PROTECT Act*, 21 ENT. & SPORTS LAW 3 (analyzing the PROTECT Act, Congress' latest legislative response to the problem of child pornography). However, differences between the COPPA of 2002 and the Senate version of this bill passed in November of 2003 could not be reconciled before the conclusion of the 107th Congress and the COPPA was never enacted into law. *Id.* Undeterred by the failure of the 2002 Act, the House passed the COPPA of 2003 on March 27, 2003. H.R. 1161, 108th Cong. (2003). Testimony in support of the bill states that the COPPA of 2003 is "closely modeled" on the COPPA of 2002. *The Child Abduction Prevention Act and the Child Obscenity and Pornography Prevention Act of 2003: Hearing on H.R. 1104 and H.R. 1161 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 108th Cong. (2003) (statement of Daniel P. Collins, Associate Deputy Attorney General), available at <http://www.house.gov/judiciary/collins031103.htm>. As such, the Act retained its proscription against virtual child pornography in its continued effort to protect the interests of child pornography victims. See H.R. 1161, 108th Cong. (2003). The COPPA of 2003 contains a revised version of § 2256(8)(B) of the CPPA. *Id.* The House replaced the "appears to be" language with the words "is, or is indistinguishable from." *Id.* Second, the COPPA of 2003 removes § 2256(8)(D) of the CPPA, the subparagraph which contained the term "conveys the impression." *Id.* By striking this provision, Congress removes the prohibition on material that "is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." See *id.* Instead, the proposed Act provided that producers and distributors may not knowingly suggest that material portrays a minor engaging in sexually explicit material. *Id.* In effect, this incorporates a mens rea requirement into the statute in an attempt to remedy the *Ashcroft* Court's concern regarding the overbreadth of this section of the CPPA. See *id.* In addition, the COPPA of 2003 included an affirmative defense which modifies the affirmative defense in the CPPA. *Id.* Under the affirmative defense provision, a defendant would be absolved of liability if he could show that the image for which he was arrested did not implicate a real child. *Id.* They could do this by establishing that either an adult or computer-generated image was used in the production of the alleged child pornography. *Id.*

¹³⁸ See Sara C. Marcy, *Banning Virtual Child Pornography: Is There Any Way Around Ashcroft v. Free Speech Coalition?*, 81 N. CAR. L. REV. 2136 (2003) (citing criticisms of the COPPA of 2002 and 2003).

law; However, Congress ultimately incorporated provisions from the COPPA of 2002 and 2003 into the PROTECT Act.¹³⁹ As such, the controversy surrounding virtual child pornography continues with respect to the current law.¹⁴⁰

According to its supporters, the PROTECT Act addresses the difficulty prosecutors have had in the wake of the *Ashcroft* decision by attempting to “[s]trengthen the laws against child pornography in ways that can survive constitutional review.”¹⁴¹ The PROTECT Act seeks to address the *Ashcroft* Court’s concerns about the unconstitutionality of the CPPA.¹⁴² The PROTECT Act, like the COPPA, amends the CPPA in an attempt to meet the standards of the First Amendment.¹⁴³

Specifically, the law amends section 2256(8)(B) of the CPPA,¹⁴⁴ replacing the constitutionally deficient “appears to be” language with the words “indistinguishable from.”¹⁴⁵ Specifically, the Act bans “Obscene Child Pornography,” defined as “a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting” that depicts an actual minor or image that “appears to be of a minor” engaging in “graphic” sexual activity and “lacks serious literary, artistic, political, or scientific value.”¹⁴⁶ This

¹³⁹ Doug Isenberg, *The Wrong Answer to Child Porn on the Net*, CNET News.com, May 15, 2003, available at http://news.com.com/2010-1071_3-1001105.html (stating that the Act “has received widespread publicity for its coordination of nationwide efforts to locate missing children and their abductors, an effort that has gained momentum thanks in part to the work of Ed Smart, father of formerly missing Salt Lake City teenager Elizabeth Smart”).

¹⁴⁰ Marcy, *supra* note 138, at 2153.

¹⁴¹ DEP’T OF JUSTICE, FACT SHEET: PROTECT ACT, available at http://www.usdoj.gov/opa/pr/2003/April/03_ag_266.htm.

¹⁴² *See id.*

¹⁴³ *See* Marcy, *supra* note 138, at 2152 (discussing provisions of the PROTECT Act in light of the Supreme Court’s concerns in *Ashcroft*).

¹⁴⁴ 18 U.S.C. § 2256 (West 2000).

¹⁴⁵ Pub. L 108-21, April 30, 2003, 117 Stat 650; 18 U.S.C. 2256(8). The PROTECT Act expands the definition of “child pornography” to include a digital images, computer images or computer-generated images that are indistinguishable from minors engaging in sexually explicit conduct. *Id.* Indistinguishable is defined as “virtually indistinguishable.” *Id.*

¹⁴⁶ 18 U.S.C. § 1466A(a)(2)-(b)(2). The Act defines “graphic” images as

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definition necessarily includes images which are not created with the use of real children.¹⁴⁷

In addition, the PROTECT Act, like the COPPA, incorporates a knowledge requirement.¹⁴⁸ Thus, a person is in violation of the Act if he or she *knowingly*

[R]eproduces any child pornography for distribution through the mails, or in interstate or foreign commerce by any means, including computer or advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains (i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or (ii) a visual depiction of an actual minor engaging in sexually explicit conduct.¹⁴⁹

Significantly, the PROTECT Act, like the COPPA, places the burden of proof on the defendant to prove that the images did not depict real children, rather than requiring prosecutors to prove that the images were made from images of real children.¹⁵⁰ In

those that are or appear to be of a minor “engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex.” *Id.*

¹⁴⁷ See *id.*

¹⁴⁸ § 504(a), 117 Stat. at 680-81; Marcy, *supra* note 138, at 2153.

¹⁴⁹ § 504(a), 117 Stat. at 680-81.

¹⁵⁰ *Id.* A defendant might meet the affirmative defense by establishing the identity or existence of the actors used to create the pornography. See *Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary House of Representatives on H.R. 1104 and H.R. 1161*, Mar. 11, 2003, available at http://commdocs.house.gov/committees/judiciary/hju85642.000/hju85642_of.htm (citing Honorable Robert C. Scott’s position with respect to the affirmative defense in the COPPA of 2003 that the “Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not lawful”). The Honorable Robert Scott points out that:

Where the defendant is not the producer of the work, he may have no

promulgating this affirmative defense, Congress contends that the Supreme Court in *Ashcroft* left open the possibility that, had the existing affirmative defense been more complete, the 1996 statute might have survived a constitutional challenge, even if it was overbroad.¹⁵¹ The affirmative defense allows a defendant to show that “the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct and each such person was an adult at the time the material was produced,” or that “the alleged child pornography was not produced using any actual minor or minors.”¹⁵²

IV. FACING THE FIRST AMENDMENT: WHY LAWS PROSCRIBING VIRTUAL CHILD PORNOGRAPHY ARE CONSTITUTIONALLY SUSPECT

The prohibitions on virtual child pornography contained in the

way of establishing the identity or even the existence of the actors, and if the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor.

Id. Under the PROTECT Act, it is an affirmative defense that:

The alleged child pornography was produced using an actual person or persons engaged in sexually explicit conduct; and each person was an adult at the time the material was produced; or the alleged child pornography was not produced using any actual minor or minors.

18 U.S.C. § 2252A(c)(2) (2002).

¹⁵¹ See *id.*; see also Jason Baruch, Case Comment, *Constitutional Law: Permitting Virtual Child Pornography—A First Amendment Requirement, Bad Policy, or Both?*, 55 FLA. L. REV. 1073 (2003). Baruch explains that:

Even if the Government were to prosecute parties uttering protected speech, courts generally do, on a “case-by-case analysis,” correct the misapplication of an overbroad statute. A fortiori, the CPPA provides defendants with an affirmative defense that facilitates such correction.

Id. at 1087.

¹⁵² 18 U.S.C. § 2252A(c)(1)(A), (B); 18 U.S.C. § 2252A(c)(2). See also John P. Feldmeier, *Close Enough for Government Work: An Examination of Congressional Efforts to Reduce the Government’s Burden of Proof in Child Pornography Cases*, 30 N. KY. L. REV. 205 (2003). The PROTECT Act also incorporates the COPPA of 2003’s requirement that the defendant give notice to the prosecution that it will raise the affirmative defense so as to prevent “unfair surprise” at trial. See 18 U.S.C. § 2252A.

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PROTECT Act are constitutionally deficient and should be struck down under the First Amendment.¹⁵³ Actual child pornography is, without question, not constitutionally protected speech.¹⁵⁴ On the other hand, sexually explicit material that does not involve actual children does not fall within the definition of “child pornography.”¹⁵⁵ The *Ashcroft* Court struck down the CPPA on the fact that it was overbroad because it criminalized speech that was not obscene and did not involve real children.¹⁵⁶ The PROTECT Act suffers from the same fatal flaw as the CPPA: The bill is similarly overbroad in that it bans innocent speech and works of literary, artistic or political merit in an effort to proscribe virtual child pornography.¹⁵⁷

To be sure, while the Act amends the CPPA, replacing the constitutionally-deficient “appears to be” language, the language inserted in its place is similarly inconsistent with the First Amendment.¹⁵⁸ The PROTECT Act makes illegal the possession or distribution of computer images or computer-generated images that are, or are *indistinguishable from*, that of a minor engaging in sexually explicit conduct.¹⁵⁹ The words “indistinguishable from” create the same problem from a constitutional standpoint as the words “appears to be” because they prohibit what the Supreme Court held could not be prohibited—the creation of virtual images that do not implicate or harm children.¹⁶⁰

As a result of the overbreadth of the statutory language, artists and filmmakers would remain vulnerable to prosecution where they create artistic works without the use of actual children.¹⁶¹ The Court in *Ashcroft* unambiguously held that a defendant could not

¹⁵³ Pub. L. No. 108-21.

¹⁵⁴ *New York v. Ferber*, 458 U.S. 747, 758 (1982).

¹⁵⁵ *See id.*

¹⁵⁶ *See supra* Part I (discussing the *Ashcroft* Court’s holding that pornography which does not involve real children could not be proscribed by the CPPA).

¹⁵⁷ *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 246 (2002).

¹⁵⁸ 18 U.S.C. § 2252(A); Feldmeier, *supra* note 152, at 218.

¹⁵⁹ 18 U.S.C. § 2256(8)(B) (1996).

¹⁶⁰ *See Ashcroft*, 535 U.S. at 246.

¹⁶¹ *Id.* at 246-47.

be convicted for creating images that do not involve real children.¹⁶² The virtual child pornography provisions of the PROTECT Act will fail on the same ground as the CPPA failed in *Ashcroft*—the Act punishes a defendant where no real children are implicated or harmed.¹⁶³

In support of legislation banning virtual child pornography, Congress seems to assert that the *Ashcroft* Court did not consider the harm that would occur to real children when technology makes it impossible to distinguish real children from virtual children.¹⁶⁴ An examination of the *Ashcroft* opinion, however, reveals that the Court did consider this issue and found that the argument nevertheless did not provide support for the prohibition against virtual child pornography.¹⁶⁵ In response to the Government's assertion that virtual images promote trafficking in works produced through the exploitation of real children, the Court stated that "[t]he hypothesis is somewhat implausible. If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice."¹⁶⁶

Furthermore, it is unlikely the affirmative defense included in the PROTECT Act will save the PROTECT Act from a constitutional challenge because it imposes too heavy a burden on defendants.¹⁶⁷ The government's arguments in support of the

¹⁶² See *id.* The Court in *Ashcroft* stated, "the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not 'intrinsically related' to the sexual abuse of children" *Id.*

¹⁶³ See *supra* note 9 and accompanying text (discussing the unconstitutional provision of the COPPA which proscribed virtual child pornography).

¹⁶⁴ See H.R. REP. No. 107-526, at 7-13 (2002) (asserting the need for legislation proscribing virtual child pornography). "Child pornography—virtual or otherwise—is detrimental to the nation's most precious and vulnerable asset—our children. Regardless of the method of its production, child pornography is used to promote and incite deviant and dangerous behavior in our society." *Id.* at 12.

¹⁶⁵ *Ashcroft*, 535 U.S. at 253.

¹⁶⁶ *Id.* at 254.

¹⁶⁷ Feldmeier, *supra* note 152, at 223.

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affirmative defense assert that requiring the state to identify whether an image is graphic or a real photograph places an unrealistic burden on prosecutors.¹⁶⁸ But if this argument stands, and if requiring the government to identify the children in alleged pornographic materials is an impossible burden to meet, the logical conclusion is that requiring a defendant to establish the identity of the children in such images is similarly unreasonable.¹⁶⁹ The Court in *Ashcroft*, while leaving the door open to the possibility that an affirmative defense could save the CPPA, was very clear that the evidentiary burden at hand was not a “trivial” one.¹⁷⁰ According to the Court, “if the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor.”¹⁷¹ The Court further stated that

[t]he Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker

¹⁶⁸ See *id.* at 242. Even some supporters of the COPPA of 2003 concede that Prosecutors’ hands are not entirely tied by the *Ashcroft* decision. According to Associate Deputy General Daniel Collins:

Prosecutors have several potential avenues for proving that a child depicted in an image is real. First, prosecutors might know the identity of a particular child depicted in an image from another child sex abuse situation. Second, prosecutors might be able to establish that a given image predates the technology at issue. Third, prosecutors might be able to present expert testimony that a given image likely depicts a real child.

The Child Abduction Prevention Act and the Child Obscenity and Pornography Prevention Act of 2003: Hearing on H.R. 1104 and H.R. 1161 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary, 108th Cong. (2003) (statement of Daniel P. Collins, Associate Deputy Attorney General), available at <http://www.house.gov/judiciary/collins031103.htm>.

¹⁶⁹ See Feldmeier, *supra* note 152, at 225. “If the government, with its seemingly infinite resources, is purportedly having trouble proving that a depiction is that of a real minor, then how can criminal defendants, many of whom are indigent, be expected to do so?” *Id.*

¹⁷⁰ *Ashcroft*, 535 U.S. at 255.

¹⁷¹ *Id.* at 255-56.

must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense.¹⁷²

This burden shifting creates constitutional due process concerns.¹⁷³ Due process requires that the prosecution prove each and every element of the offense beyond a reasonable doubt.¹⁷⁴ Shifting the burden to the defendant to show that images that are indistinguishable from or appear to be actual minors do not involve real children creates a constitutionally impermissible presumption that the defendant was in possession of real child pornography images in the first place.¹⁷⁵ The affirmative defense would allow a defendant to rebut this presumption.¹⁷⁶ It is the presumption itself, however, that is problematic from a constitutional standpoint because it “relieves the government of its burden of proof on an essential element of the case”—namely that the images themselves depict real child pornography.¹⁷⁷

If the PROTECT Act comes before the Supreme Court on a constitutional challenge, the Court, following the *Ashcroft* holding, will likely conclude that the amended Act is similarly flawed with respect to the affirmative defense.¹⁷⁸ Congress’ attempt to remedy the affirmative defense by stipulating that it applies to possession as well as to production and distribution of child pornography fails to protect individuals who create images in which no children were harmed.¹⁷⁹

V. WHERE CONGRESS GETS IT RIGHT: VIABLE SOLUTIONS TO THE PROBLEM OF VIRTUAL CHILD PORNOGRAPHY

Child pornography “abuses, degrades and exploits the weakest

¹⁷² *Id.* at 255.

¹⁷³ Feldmeier, *supra* note 152, at 224.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *See* Marcy, *supra* note 138, at 2146.

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and most vulnerable members of our society.”¹⁸⁰ The harms associated with the creation and distribution of child pornography are tremendous, both in nature and in scope.¹⁸¹ The children used to create child pornography suffer direct emotional and psychological problems.¹⁸² Furthermore, child pornography creates a record that could potentially exist forever, thereby deepening the harm associated with the crime.¹⁸³ Moreover, sexual abusers may use already-created visual depictions to ensure that their victims will remain quiet about the exploitation.¹⁸⁴ Offenders further perpetuate the cycle of child pornography by luring other children into modeling for them by using the images of other children to work a “peer pressure” approach on their prospective victims.¹⁸⁵

In enacting the CPPA of 1996, Congress recognized that pedophiles and sexual abusers use child pornography as a way “to stimulate and whet their own sexual appetites.”¹⁸⁶ Thus, the significance of the effort to ban child pornography is heightened

¹⁸⁰ S. REP. NO. 104-358, at 12 (1996).

¹⁸¹ See *id.* (discussing the role of child pornography in the cycle of child abuse and exploitation); Sarah Sternberg, *The Child Pornography Prevention Act of 1996 and the First Amendment: Virtual Antithesis*, 69 FORDHAM L. REV. 2783, 2785 (2001) (noting that the “harms associated with child pornography are as varied as they are egregious”).

¹⁸² See Sternberg, *supra* note 181, at 2785.

¹⁸³ See *New York v. Ferber*, 458 U.S. 747, 759 n.10 (1982). Because child pornography creates an enduring record, it poses “an even greater threat to the child victim.” *Id.* “A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.” *Id.* In addition, “[t]he victim’s knowledge of publication of the visual material increases the emotional and psychic harm suffered by the child.” *Id.*

¹⁸⁴ Sternberg, *supra* note 181, at 2786.

¹⁸⁵ *Id.* The “peer pressure” consists of seven stages: (1) showing child pornography to a child for “educational purposes”; (2) attempting to persuade the child that sexual activity is permitted and even pleasurable; (3) convincing the child that because his peers engage in sexual activity, such activity is acceptable; (4) desensitizing the child and lowering the child’s inhibitions; (5) engaging the child in sexual activity; (6) photographing such sexual activity; and (7) using the resulting child pornography to “attract and seduce yet more child victims.” *Id.*

¹⁸⁶ S. REP. NO. 104-358, at 13 (1996).

due to the stimulating effect such materials have on those who view it.¹⁸⁷ Criminal investigations have shown that almost all pedophiles collect child pornography, which may escalate their addiction and desensitize them to its deviant nature.¹⁸⁸

According to the National Center for Missing and Exploited Children, child pornography prosecutions have increased an average of 10 percent per year every year since 1995.¹⁸⁹ The government's concern that the legality of virtual child pornography will stifle prosecutors in their effort to prosecute offenders of real child pornography laws is not without merit.¹⁹⁰ First, there is Congress' finding that, after the Ninth Circuit decision in *Free Speech Coalition*, prosecutions are increasingly being brought only in the most clear-cut cases.¹⁹¹ The Ninth Circuit's decision also resulted in the release from prison of a man who pled guilty to possessing 2,600 images of child pornography.¹⁹² He was freed after a judge ruled that the state's law was unconstitutional because it failed to distinguish between real and virtual pornography.¹⁹³

As the history of efforts to ban real child pornography

¹⁸⁷ *See id.*

¹⁸⁸ Sternberg, *supra* note 181, at 2786.

¹⁸⁹ THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, available at <http://www.missingkids.com> (2004).

¹⁹⁰ *See* H.R. REP. No. 107-526, at 7 (2002).

¹⁹¹ *Id.*

¹⁹² *See* *People v. Alexander*, 791 N.E.2d 506 (S.Ct. Ill. 2003). Kenneth Alexander was charged under Illinois state law with 45 counts of child pornography. *Id.* He successfully challenged the law, whose definition of child pornography included virtual images, arguing that it was overbroad and thus violated the First Amendment. *Id.* at 511-12. *See also* Jan LaRue, *Supreme Court Rules First Amendment Protects "Virtual" Child Porn*, (Aug. 23, 2002), available at <http://www.cwfa.org/articledisplay.asp?id=2044&department=CWA&categoryid=pornography>. Kenneth Alexander was awaiting sentencing and faced up to 15 years in prison because police found close to 2,600 images of children engaging in lewd behavior with other children, adults and animals in his computer at his residence. *Id.* His attorney, Donald Morrison of Waukegan, however, challenged the state law to which Alexander pled guilty to on March 28, citing the U.S. Supreme Court ruling in *Ashcroft v. Free Speech Coalition*. *Id.*

¹⁹³ *Id.*

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demonstrates, prohibitions on virtual child pornography will require continued amendments to bring the laws in harmony with the First Amendment.¹⁹⁴ Unfortunately, resources and time spent by the government on passing constitutionally-suspect legislation diverts resources that can otherwise produce visible results in the fight against child pornography. Legislative attempts at proscribing virtual child pornography, instead of combating child pornography, will harm efforts to prosecute individuals who exploit real children by directing federal resources towards the constitutionally difficult task of prosecuting individuals who create or possess computer generated images.¹⁹⁵ Rather than attempting to ban virtual child pornography, the government should strengthen other areas that would allow for more effective prosecution of offenders.

First, federal funds should be allocated to programs such as the FBI Innocent Images Initiative, which identifies and investigates

¹⁹⁴ See *supra* Part I.B (detailing changes in the law respecting pornography). The history of efforts to ban real child pornography is exhibited in the numerous amendments to the Protection of Children Against Sexual Exploitation Act of 1977. Pub. L. No. 95-225, 92 Stat. 7 (1978).

¹⁹⁵ A dialogue with ACLU member Nadine Strossen about the COPPA of 2002 illustrates this dilemma:

QUESTION: Earlier this year, the United States Supreme Court struck down the Child Pornography Prevention Act, which regulated so-called virtual child pornography, as fatally overboard. Congress responded by immediately going back to the drawing board to craft a supposedly more precise version of the CPPA called the Child Obscenity and Pornography Prevention Act of 2002. Is Congress wasting its time here, and, by extension, wasting taxpayers' dollars, in attempting to regulate fake child pornography?

RESPONSE: I admit I don't know what the provisions of this new law are. If they are still dealing with what Justice Kennedy's opinion correctly analogized to a thought crime, then we're exactly in that area that I just talked about where protection is absolute. I would defend somebody's right to look at any image that does not involve the use of an actual child no matter how realistic it is. If that's what the new law is criminalizing, I think the Supreme Court's rationale is going to extend to that legislation.

Robert D. Richards & Clay Calvert, *Nadine Strossen and Freedom of Expression: A Dialogue with the ACLU's Top Card-Carrying Member*, 13 GEO. MAS. UNIV. CIV. RTS. L. J., 185, 222-23 (2003).

individuals who use the Internet to exploit children.¹⁹⁶ The Initiative reports that, throughout the FBI, there was a 1,280% increase in the number of child pornography cases opened between fiscal years 1996 and 2001.¹⁹⁷ The organization anticipates that the number of cases opened and the amount of resources utilized to address the crime problem will continue to rise during the next several years.¹⁹⁸ Recently, in March of 2002, the Initiative undertook "Operation Candyman," in which it invested a great deal of time and energy to investigate an "Electronic Group" ("Egroup"), a "community" of people communicating via the Internet.¹⁹⁹ An undercover agent uncovered three Yahoo! Egroups involved in posting, exchanging and transmitting child pornography.²⁰⁰ One website depicted the Egroup as a group "for people who love kids."²⁰¹ Subpoenas were issued on Internet providers for the addresses of individuals who frequented these sites.²⁰² Information on approximately 1,400 subjects was provided, and at least eighty individuals have been charged.²⁰³

¹⁹⁶ FBI INNOCENT IMAGES INITIATIVE, *available at* <http://www.fbi.gov/hq/cid/cac/innocent.htm> (last visited Oct. 22, 2003). The Innocent Images initiative is composed of 23 task forces in 56 FBI field offices around the country, their purpose is to "investigate and eradicate online sexual exploitation of children and the production and distribution of child pornography." *Id. available at* <http://www.fbi.gov/pressrel/pressrel102/cm031802.htm>.

¹⁹⁷ FBI INNOCENT IMAGES INITIATIVE *available at* <http://www.fbi.gov/pressrel/pressrel102/cm031802.htm> (last visited Oct. 22, 2003). The number of child pornography cases opened increased from 113 in 1996 to 1,159 in 2001. *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* As of March 18, 2002, over 266 searches had been conducted. Twenty seven people had been arrested and admitted to the prior molestation of over 36 children. FEDERAL BUREAU OF INVESTIGATION PRESS RELEASE, *available at* <http://www.fbi.gov/pressrel/pressrel/candyman/candymanhome.htm>.

²⁰¹ The group also stated, "You can post any type of messages you like too or any type of pics and vids you like too. P.S. IF WE ALL WORK TOGETHER WE WILL HAVE THE BEST GROUP ON THE NET." *Id.*

²⁰² *Id.*

²⁰³ *Id.*

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Moreover, the Justice Department should increase funding for the Internet Crimes Against Children Task Forces, a department that assists state and local authorities in combating child sexual exploitation.²⁰⁴ Since 1998, the Task Forces have helped train more than 1,500 prosecutors and 1,900 investigators, and have provided direct investigative assistance in more than 3,000 cases involving individuals who allegedly use the Internet to perpetuate child pornography crimes.²⁰⁵ President George W. Bush has already pledged to increase efforts to expand the investigation and “vigorous prosecution of child exploitation on the Internet.”²⁰⁶ The executive branch seeks to increase funding in furtherance of such efforts.²⁰⁷ Congress should support such efforts, both financially and vocally, in order to strengthen efforts to prosecute child pornography offenders.

In addition, as designated in the Child Pornography Prevention Act of 2002, resources should be allocated to: (1) create an FBI database of images already known to be of real children, thereby facilitating the prosecution of others found to have those images; (2) encourage greater voluntary reporting of suspected child pornography found by Internet companies; and (3) strengthen enhanced penalties for repeat offenders.²⁰⁸

The creation of an FBI database would answer Congress’ concerns with respect to the increased difficulties faced by the government in prosecuting child pornography offenders.²⁰⁹ Evidence submitted to Congress, including testimony from the National Center for Missing and Exploited Children, demonstrates that technology already exists to disguise depictions of real children to make them unidentifiable and to make depictions of

²⁰⁴ THE WHITE HOUSE, *Increasing Online Safety for America’s Children*, Press Release (Oct. 23, 2002), available at <http://www.whitehouse.gov/news/releases/2002/10/20021023.html>.

²⁰⁵ *See id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *See* H.R. REP. NO. 107-526 (2002). In addition to banning virtual child pornography, the COPPA of 2003 would also provide for an FBI database and encourage greater voluntary reporting by Internet companies. *Id.*

²⁰⁹ *Id.* at 7-13.

real children appear computer-generated.²¹⁰ The inability of prosecutors to identify the children who participate in the production of pornography allows criminal defendants who would have been easily prosecuted in the past to go free based on their claims that no real children were used in the production of the pornography.²¹¹

The COPPA of 2002 included a provision for the creation of a database where images known to be of real children would be compiled.²¹² Such a database would ease prosecutions of child pornography offenders by refuting the “reasonable doubt” argument, i.e. that the images they possessed, distributed or created did not utilize real children.²¹³ Images found in the possession of offenders could be matched up with those in the database to determine if any of the children’s photos match those of the “virtual” children.²¹⁴ Efforts to create such a database are being hindered. Consequently, in a futile effort to ban virtual child pornography, Congress has impeded a portion of the Act that is likely to be of great practical use in prosecuting offenders. Rather than continuing to incorporate viable solutions within otherwise constitutionally faulty legislation, Congress should pass separate legislation that creates an FBI database and includes provisions designed to encourage greater reporting of suspected child pornography.

Congress has also begun to address concerns about the lack of reporting of child pornography offenses.²¹⁵ Part of the problem is the fact that children who are sexually victimized—in part due to intimidation by the individuals who exploit them—are not likely to report the exploitation.²¹⁶ The CPPA of 1996 required

²¹⁰ *See id.*

²¹¹ *See supra* Part II (discussing the *Ashcroft* decision as well as the government’s concerns that the decision will make it difficult, if not impossible, to prosecute child pornography offenders in the wake of virtual child pornography technology).

²¹² *See* H.R. 4623, 107th Cong. (2d Sess. 2002).

²¹³ *See id.*

²¹⁴ *See id.*

²¹⁵ *See* H.R. REP. NO. 107-526 (2002).

²¹⁶ *See* THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN,

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communications providers to report to the National Center for Missing and Exploited Children (NCMEC) knowledge of facts or circumstances of potential sexual exploitation crimes against children.²¹⁷ A provider of electronic communication services could be fined for knowingly and willfully failing to make a report.²¹⁸ The NCMEC was to forward the reports to law enforcement agencies designated by the Attorney General.²¹⁹

Congress stated in its legislative findings that the COPPA of 2002 strengthens this reporting system by adding the new offenses under sections 1466A and 1466B—the sections of the Act proscribing virtual child pornography.²²⁰ Since the Act never went into effect, though, neither did the purported “stronger reporting system.” A more effective avenue to strengthen the reporting system in the 1996 Act would be to work closely with the NCMEC to encourage greater voluntary reporting of child pornography offenses by informing electronic communication service providers of their legal duty to report such offenses.²²¹ To ensure and maximize the effectiveness and impact of such legislation, this legal duty should be addressed in a bill separate from any

available at <http://www.missingkids.com>. “A major step to eliminating child pornography is to make people knowledgeable of both federal and state laws regarding the definitions and criminal implications of child pornography. In doing so, the general public can become more responsive to the issue and report violations to the appropriate officials.” *Id.*

²¹⁷ H.R. REP. 107-526. The 1996 Act incorporated this as a legal duty. 18 U.S.C. § 2251 (1996).

²¹⁸ 18 U.S.C. § 2251.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ 42 U.S.C. § 13032(b) (2003); 18 U.S.C. § 2702(b)(6) (2003). Pursuant to the Protection of Children from Sexual Predators Act of 1998, anyone engaged in providing an electronic communication service or a remote computing service to the public must report “knowledge of facts or circumstances” from which a violation of child pornography laws is apparent to the National Center for Missing and Exploited Children (NCMEC) and the FBI or U.S. Customs Service. 18 U.S.C. § 2702(b)(6). Such a report must be made “as soon as reasonably possible” after obtaining knowledge and should include “whatever information . . . that led it to conclude that a violation of federal child pornography statutes” had occurred. 42 U.S.C. § 13032(b).

legislation that seeks to criminalize virtual child pornography offenses. Therefore, if a bill prohibiting virtual child pornography is defeated as unconstitutional or held up in a battle over its constitutionality, legislation will still exist to criminalize the failure of electronic communication service providers to report child pornography offenses.

A possible method for progress in this area would be to make service providers aware of the ease by which they may report offenses to the NCMEC's CyberTipline, launched on March 9, 1998.²²² The tip line serves as a national online clearinghouse for investigative leads and tips regarding child sexual exploitation.²²³ The NCMEC has received and processed over 120,000 leads through the Cyber Tipline, at least half of which were reports of child pornography, resulting in hundreds of arrests and successful prosecutions.²²⁴ In light of the Cyber Tipline's success, Congress should attempt to direct resources to assisting the NCMEC. Furthermore, in light of the limited federal resources available to investigate child pornography, Congress should expand the scope of investigators to include state and local law enforcement, provided that a proper system is implemented to facilitate the exchange of information between law enforcement on both state and federal levels.²²⁵

²²² THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, *Cyber Tipline Information and Success Stories*, at <http://www.missingkids.com/missingkids/> (2004).

²²³ *Id.* The NCMEC's CyberTipline is linked via server to the FBI, Customs Service and Postal Inspection Service. *Id.* Leads are received and reviewed by NCMEC's analysts, who visit the reported sites, examine and evaluate the content, use search tools to try to identify perpetrators, and provide all lead information to the appropriate law enforcement agency and investigator. *Id.* Both the FBI and Customs Service have assigned agents who work directly out of the NCMEC, and review reports. *Id.*

²²⁴ CYBER TIPLINE, *Campaign Overview*, at http://www.cybertipline.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1230.

²²⁵ See COMBATING CHILD PORNOGRAPHY: UNITED STATES GENERAL ACCOUNTING OFFICE, Report to the Ranking Minority Member, Committee on Government Reform, House of Representatives, (Nov. 2002), available at <http://www.gao.gov/new.items/d03272.pdf> (providing information on coordination of federal efforts to combat child pornography).

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Finally, the government should take steps to inform both parents and children about child pornography so that both are encouraged to report offenses more extensively.²²⁶ “Computer telecommunications have become one of the most prevalent techniques used by pedophiles to share illegal photographic images of minors and to lure children into illicit sexual relationships.”²²⁷ According to the National Center for Missing and Exploited Children, children who view child pornography begin to view pornographic acts as acceptable and normal.²²⁸ This acceptance may decrease the likelihood that they will report such offenses.²²⁹ If children are made more knowledgeable about what it means to be solicited on the Internet, they will more likely speak up about such incidents.²³⁰ In the same respect, if parents are made more knowledgeable about federal and state laws regarding the definitions and criminal implications of child pornography, they will more likely be responsive to the issue and report such offenses to the appropriate authorities.²³¹

²²⁶ See *infra* note 230 and accompanying text.

²²⁷ FEDERAL BUREAU OF INVESTIGATION, ONLINE CHILD PORNOGRAPHY: INNOCENT IMAGES NATIONAL INITIATIVE, at <http://www.fbi.gov/hq/cid/cac/innocent.htm> (last visited, Oct. 30, 2003).

²²⁸ NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, *Child Pornography Background*, at http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageID=1198 (last visited Oct. 30, 2003).

²²⁹ Statistics have yet to be released to illustrate the decline in the number of successful prosecutions after the CPPA’s ban on virtual child pornography was overturned.

²³⁰ NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, *Campaign Against Child Sexual Exploitation*, at http://www.missingkids.com/missingkids/servlet/CampaignServlet?LanguageCountry=en_US&PageId=1246 (last visited Jan. 9, 2004). One of the campaign’s messages states: “The Sound A Child Makes When Sexually Assaulted is Usually Silence.” The campaign encourages parents to be proactive in detecting and preventing child sexual exploitation and in educating their children about sexual exploitation in order to encourage reporting of such offenses.

²³¹ *Id.*

CONCLUSION

It is too soon to determine the extent virtual child pornography will affect the government's ability to prosecute child pornography offenders. Unfortunately, the scenario envisioned by prosecutors, in which a defendant in possession of child pornography can escape liability by asserting that the government must prove beyond a reasonable doubt that the images they possess, create or distribute are derived from real children, is already a reality.²³² The fact remains, however, that the Supreme Court has stated that child pornography may be proscribed only where a real child is involved and where the welfare of real children is primarily in the balance.²³³ The COPPA of 2002 and 2003 and the ban on virtual child pornography in the PROTECT ACT suffer from a fatal flaw in that their prohibitions on virtual child pornography do not solely implicate real children.²³⁴ As such, Congress faces the tremendous and arguably insurmountable obstacle of tailoring virtual child pornography laws to meet constitutional standards. Particularly in light of the problems in the numerous statutes enacted over the last decade, Congress should focus its resources on alternative viable solutions to the problems created by virtual child pornography in order to strengthen the case against offenders of actual child pornography.

²³² See *supra* Part III (pointing to cases in which prosecutors are having difficulty prosecuting cases where defendants assert that the images they allegedly possessed or distributed did not implicate real children).

²³³ See *supra* Part II (discussing the *Ashcroft v. Free Speech Coalition* decision and its implications with respect to virtual child pornography laws).

²³⁴ See *supra* Part IV (analyzing the constitutionality of these recent legislative attempts).