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Constitutional Law—First Amendment and Freedom of Speech—"It's OK—She's a Pixel, Not a Pixie": The First Amendment Protects Virtual Child Pornography. Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

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CONSTITUTIONAL LAW—FIRST AMENDMENT AND FREEDOM OF SPEECH—"IT'S OK—SHE'S A PIXEL, NOT A PIXIE": THE FIRST AMENDMENT PROTECTS VIRTUAL CHILD PORNOGRAPHY. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

I. INTRODUCTION

Graphic depictions of sexual behavior, often known interchangeably as pornography or obscenity,[1] have troubled Anglo-American society for several centuries.[2] Seeking modes of protecting those perceived as vulnerable to the supposedly nefarious effects of such depictions, society has increasingly turned to the judiciary and the legislature to define and limit the possession, creation, and distribution of such images.[3] Over the past twenty or so years, chief amongst the societal concerns over graphic sexual depictions has been child pornography, which, whether legally obscene or not, poses a genuine threat to the welfare of its child victims.[4] Recent technological advances in the creation and manipulation of digital images have spurred concern in some quarters over what observers commonly call "virtual child porn": images that do not depict real children, but, through the use of youthful-looking actors or computer technology, seem to portray children in graphic sexual situations.[5] The United States Congress, compelled by concern over such images, enacted the Child Pornography Protection Act of 1996 (CPPA),[6] prohibiting images that appeared to portray real children in sexually explicit situations or conveyed the impression that real children participated in the production of the images.[7] The Supreme Court, however, recently determined the CPPA to be overbroad because it banned images

1. GORDON HAWKINS & FRANKLIN E. ZIMRING, PORNOGRAPHY IN A FREE SOCIETY 22–23 (1988) (citing UNITED STATES COMMISSION ON OBSCENITY AND PORNOGRAPHY, REPORT 3 n.4 (1970)). A brief note on these terms is in order. While many casual observers use the terms "pornography" and "obscenity" interchangeably, more precise examination of the topic demands a distinction. The Meese Commission (named for then-United States Attorney General Edwin Meese) report on the topic best explains this distinction: while obscenity "refer[s] to material that has been or would likely be found to be obscene in the context of a judicial proceeding employing applicable legal and constitutional standards," pornography is "undoubtedly pejorative" and without sufficient legal meaning to merit extensive use in the commission report. *Id.* at 23–24 (quoting U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY FINAL REPORT 227–28, 230 (1986)).

2. *See infra* Part III.

3. *See infra* Part III.

4. *See infra* notes 214–27 and accompanying text.

5. *See infra* notes 18–21 and accompanying text.

6. 18 U.S.C. § 2256 (2000).

7. *Id.*

that were neither legally obscene nor child pornography in which real children faced sexual abuse.[8]

This note explores the *Ashcroft v. Free Speech Coalition* decision, finding the case's significance in reasserting the Court's stance that the government may not prohibit materials unless the materials are either obscene or constitute actual child pornography in which children suffer harmful sexual abuse, thereby protecting legitimate expression from heavy-handed censors.[9] In reaching that significance, the note first examines the history of attempts to curb obscenity through legal channels, moving from early English obscenity cases to twentieth-century American judicial attempts to define obscenity, and finally discussing prohibitions on child pornography that create an exception to the law of obscenity.[10] From this historical legal background, the note moves into an examination of the Supreme Court's analysis of the CPPA.[11] This examination of the Court's reasoning provides the basis for a discussion of the *Ashcroft* Court's reaffirmation of earlier principles on obscenity and a brief excursion into the sorts of censorial abuses that the Supreme Court sought to prevent with its *Ashcroft* holding.[12] In conclusion, the note suggests that proponents of measures like the CPPA will likely pass new legislation that will attempt to effect the same restrictions by means of different wording.[13]

II. FACTS

Following the Supreme Court's decision in *New York v. Ferber*[14] that sexually explicit materials involving the abuse of children did not merit First Amendment protection,[15] Congress passed anti-child pornography legislation that sought to protect children from sexual exploitation in such pornographic materials.[16] The laws that followed *Ferber* explicitly required that child pornography involve "minor[s] engage[d] in[] any sexually explicit

8. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 239–40, 258 (2002). Justice Kennedy announced the majority opinion, in which Justices Stevens, Souter, Ginsburg, and Breyer joined. *Id.* at 238. Justice Thomas concurred in the judgment of the Court. *Id.* Justice O'Connor concurred in part and dissented in part, with Chief Justice Rehnquist and Justice Scalia concurring in Part II of her dissenting opinion. *Id.* Chief Justice Rehnquist authored a dissenting opinion in which Justice Scalia concurred except for one paragraph. *Id.*

9. *See infra* Part V.

10. *See infra* Part III.

11. *See infra* Part IV.

12. *See infra* Part V.

13. *See infra* Part V.

14. 458 U.S. 747 (1982).

15. *Id.* at 764–65

16. *See* Brief for Respondents at 1–4, Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (No. 00-795).

conduct for the purpose of producing any visual depiction of such conduct."[17] In the mid-1990s, new technology[18] disturbed the United States Congress into expanding the definition of child pornography punishable by federal statute.[19] The product of this new concern, the CPPA,[20] "expanded the law to combat the use of computer technology to produce pornography containing images that look like children."[21] As the United States Court of Appeals for the Ninth Circuit remarked, "[t]he regulation direction shifted from defining child pornography in terms of the harm inflicted upon real children to a determination that child pornography was evil in and of itself, whether it involved real children or not."[22]

Specifically, the CPPA extended "the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using any real children."[23] The CPPA prohibited "possessing or distributing [such] images, which may be created by using adults who look like minors or by using computer imaging."[24] The difference between the CPPA and the child pornography statutes that preceded it is that the CPPA "shifted the paradigm from the illegality of child pornography that involved the use of real children in its creation to forbid a 'visual depiction' that 'is, or appears to be, of a minor engaging in sexually explicit conduct.'"[25]

The Act faced challenges on many different fronts.[26] One such challenge was a pre-enforcement challenge filed in the United States District Court for the Northern District of California by a group consisting of several different parties who challenged the constitutionality of some of the CPPA's provisions.[27] The Free Speech Coalition ("Free Speech") requested

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17. 18 U.S.C. § 2251(a) (2000).

18. 18 U.S.C. § 2251 (Congressional Findings (5)). Congress found that "new photographic and computer imagining [sic] technologies make it possible to produce . . . visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct." *Id.*

19. *See* Brief for Respondents at 4–5, *Ashcroft* (No. 00-795).

20. 18 U.S.C. § 2256 (2000).

21. Free Speech Coalition v. Reno, 198 F.3d 1083, 1089 (9th Cir. 1999).

22. *Id.*

23. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 239 (2002).

24. *Id.*

25. *Reno*, 198 F.3d at 1089 (quoting 18 U.S.C.A. § 2256(8)(B) (West Supp. 1999)).

26. *See, e.g.*, United States v. Mento, 231 F.3d 912, 922–23 (4th Cir. 2000) (holding that the CPPA was not void for vagueness and gave adequate notice of the material it prohibited), *vacated by* 535 U.S. 1014 (2002); United States v. Hilton, 167 F.3d 61, 76–77 (1st Cir. 1999) (holding that the CPPA was not unconstitutionally vague because its language gave adequate notice as to what the law prohibited).

27. Free Speech Coalition v. Reno, No. C 97-0281 SC, 1997 U.S. Dist. LEXIS 12212, at 1–2 (N.D. Cal. Aug. 12, 1997), *aff'd in part, rev'd in part*, 198 F.3d 1083 (9th Cir. 1999),

declaratory and injunctive relief to prevent enforcement of certain provisions of the CPPA.[28] Both Free Speech and the government moved for summary judgment in the district court.[29] The court granted the government's motion and denied Free Speech's motion, finding that the CPPA provision was not unconstitutionally vague because the statute gave sufficient guidance to reasonably intelligent people as to what the law prohibited and did not impose a prior restraint on speech.[30]

Following the district court's grant of summary judgment, Free Speech appealed to the United States Court of Appeals for the Ninth Circuit, arguing that the district court erred in "its determination that the legislation [was] content neutral" and that the CPPA was "not unconstitutionally vague."[31] Free Speech argued that the CPPA was unconstitutionally vague because the act failed to define "appears to be" and "conveys the impression" so that people of ordinary intelligence could determine what the law prohibited.[32]

The Ninth Circuit reversed the lower court decision,[33] finding that the CPPA was not content neutral because its provisions demanded a "blanket suppression of an entire type of speech," making the Act one "founded upon content-based classification of speech."[34] Congress's intent in passing the Act to combat the secondary effects[35] of speech that appeared to depict children engaging in sexual activity did not sufficiently justify the CPPA's restrictions "because to hold otherwise enables the criminalization of foul figments of creative technology that do not involve any human victim in their creation or in their presentation."[36] Therefore, the Ninth Circuit held

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overruled in part, Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002). The group consisted of the following: The Free Speech Coalition, a trade association of companies that produce and distribute graphic materials; Bold Type, Inc., the publisher of a book "dedicated to the education and expression of the ideals and philosophy associated with nudism;" Jim Gingerich, a New York painter whose works include large nude portraits; and Ron Raffaelli, a professional photographer of nude and erotic scenes. *Reno*, 198 F.3d at 1086 (internal citations omitted).

28. *Reno*, 198 F.3d at 1086.

29. *Id.*

30. *Free Speech Coalition*, 1997 U.S. Dist. LEXIS 12212, at **21, 23.

31. *Reno*, 198 F.3d at 1086–87.

32. *Id.* at 1087.

33. *Id.* at 1097.

34. *Id.* at 1090–91. The court further found that the CPPA was "not a time, place, or manner regulation." *Id.* at 1091.

35. *Id.* Secondary effects of child pornography include the "exploitation and degradation of children." *Id.* at 1090. More specifically, the Ninth Circuit discussed the "victimization of children that may arise from pedophiles' sexual responses to pornography apparently depicting children engaging in explicit sexual activity." *Id.* at 1093.

36. *Id.* (citing Jacobson v. United States, 503 U.S. 540, 548–49 (1992)).

that the CPPA established a content-specific ban on speech without a state interest sufficient to meet constitutional standards.[37]

The Ninth Circuit also found the two phrases in question—"appears to be a minor" and "conveys the impression"—void as unconstitutionally vague because the phrases were highly subjective, provided no explicit definition of the phrases' meaning, and provided no means to instruct an ordinarily intelligent person as to what conduct the statute prohibited.[38] The phrases were also constitutionally overbroad because they prohibited activities that the Constitution protected as well as activities that government may legitimately prohibit.[39] Following the Ninth Circuit's reversal of the district court's decision, the Government moved the court for a rehearing and rehearing en banc, but the court denied the petitions.[40] Following the denial of a rehearing, the Government petitioned for certiorari, which the Supreme Court granted.[41] Thus, the battle over virtual child pornography reached the Supreme Court, which would decide the status of the CPPA in *Ashcroft v. Free Speech Coalition*.[42]

III. BACKGROUND

While graphic depictions of sexuality—both written and visual—apparently have a long history,[43] such depictions did not become widely available in England and its colonies until the early eighteenth century.[44] The English elite had previously enjoyed erotic poetry and other bawdy literature, but sexual writing did not cause concern because the few people who could read were considered to be somewhat above any corrupting influence.[45] The rise of literacy in England[46] and the resulting proliferation of

37. *Reno*, 198 F.3d at 1090–91, 1095.

38. *Id.* at 1095.

39. *Id.* at 1096.

40. Free Speech Coalition v. Reno, 220 F.3d 1113, 1114 (9th Cir. 2000).

41. Holder v. Free Speech Coalition, 531 U.S. 1124 (2001).

42. 535 U.S. 234 (2002).

43. *See* FREDERICK S. LANE III, OBSCENE PROFITS: THE ENTREPRENEURS OF PORNOGRAPHY IN THE CYBER AGE 1 (2000). For example, the Venus of Willendorf, a small limestone figurine found in the Danube River's mud in 1908 and carbon dated at over 20,000 years old, is "clearly designed to highlight and accentuate female sexual characteristics." *Id.*

44. LAWRENCE STONE, THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500–1800, at 537 (1977). Stone notes that "it was only in the eighteenth century that there first developed the large-scale production of home-made English pornography, both in literature and in pictures." *Id.*

45. *See* GEOFFREY ROBERTSON, OBSCENITY: AN ACCOUNT OF CENSORSHIP LAWS AND THEIR ENFORCEMENT IN ENGLAND AND WALES 16 (1979).

46. J. PAUL HUNTER, BEFORE NOVELS: THE CULTURAL CONTEXTS OF EIGHTEENTH-CENTURY ENGLISH FICTION 66 (1990). Hunter notes that some evidence suggests that the literacy rate amongst males increased as much as threefold between 1600 and 1800. *Id.*

printed publications,[47] however, led to a desire on the part of some officials to regulate the books people read and the pictures people viewed, a censorial enthusiasm that spread to the American colonies and their successor states as well.[48] After briefly tracing the development of English attempts to regulate obscenity and pornography, this section examines the importation and implementation of English standards to the United States and the subsequent constitutionalization of the obscenity issue in the mid-twentieth century through which the United States Supreme Court defined what sorts of sexual expression receive protection from state regulation.

A. The English Courts and Obscenity, 1650–1868

Early English law spent very little energy attempting to regulate the content of literature and other forms of expression for obscenity.[49] The rise of a broader reading public and the more frequent presentation of frank sexual matter on page and stage, however, gave voice to cries for restrictions on content in the name of public morality.[50] With the 1641 abolition of the infamous Star Chamber[51] and the loss of the ecclesiastic courts' power over the laity,[52] the only English courts with the authority to enforce such regulations were the common-law courts, which in the mid-seventeenth century entered more forcefully into regulating publications.[53]

47. *See* CATHERINE GALLAGHER, NOBODY'S STORY: THE VANISHING ACTS OF WOMEN WRITERS IN THE MARKETPLACE 1670–1820, at 8–9 (1994) (discussing the transition from the patronage system of authorship—wealthy patrons financing writers' endeavors—to a system based more upon widespread sale of texts to consumers).

48. *See infra* notes 104–36 and accompanying text.

49. *See* P.R. MACMILLAN, CENSORSHIP AND PUBLIC MORALITY 1–2 (1983) (pointing out that most early English attempts at censorship focused on heresy and sedition against the crown).

50. *See* FREDERICK F. SCHAUER, THE LAW OF OBSCENITY 2, 4–5 (1976).

51. BLACK'S LAW DICTIONARY 1414 (7th ed. 1999). The Star Chamber, abolished because of abuses of its power, was a court that exercised broad civil and criminal jurisdiction over defendants who enjoyed no right to a jury. *Id.*

52. *See* CHRISTOPHER HILL, SOME INTELLECTUAL CONSEQUENCES OF THE ENGLISH REVOLUTION 56–57 (1980). The Church of England never regained all its power after the restoration of the English monarchy in 1660. *Id.* Lacking the power to enforce its verdicts, the Church faced derision from its subjects and lost authority and power to the common law courts and Parliament. *Id.*

53. MACMILLAN, *supra* note 49, at 1–2.

1. *Attempts at the Regulation of Obscenity in the Restoration and Early Eighteenth-Century Periods*

The development of early English attempts to regulate obscenity traces through three cases:[54] *The King v. Sedley*,[55] *The Queen v. Read*,[56] and *The King v. Curl*.[57] These cases find their importance in the new assertion that the English courts had the power to fill the role of moral censor and to proscribe works for sexual content alone.[58] The views of the courts shift somewhat over this early period; this subsection will trace those views as they emerge in these three cases.

a. *Sedley*: The first English obscenity case

The first instance of English courts asserting the authority to regulate public morals is the case of poet Charles Sedley.[59] Sedley's poetry did not earn him the ire of the courts; rather, a drunken revel at a London tavern ending in a shocking display of public nudity earned him the attention of the authorities.[60] Emboldened by drink, Sedley and his fellows climbed to the balcony of the Cock Tavern, bared their buttocks, and defecated in the street.[61] Further emboldened by this brazen display, Sedley stripped and made indecorous comments to the gathered crowd, inciting a near riot in

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54. For an argument that the eighteenth century took obscenity somewhat lightly and that these three cases represent prosecutions based more on politics than pornography, see Richard R. Reynolds, *Our Misplaced Reliance on Early Obscenity Cases*, A.B.A. J., FEB. 1975, at 200, 222. Reynolds claims that the refusal to censor the popular *Fanny Hill*, which he finds to be "[t]he chief offender" amongst the period's pornographic literature, indicates that eighteenth-century officials were not terribly keen on censoring such materials on their face value as obscenity. *Id.* Reynolds's argument loses some force when considered in light of such developments as the formation of societies for the censorship of immorality during the period. *See* SCHAUER, *supra* note 50, at 4–5.

55. 82 Eng. Rep. 1036 (K.B. 1663). This case is also reported at 83 Eng. Rep. 1146 (K.B. 1663).

56. 88 Eng. Rep. 953 (K.B. 1708). This case is also reported (at a different level of specificity) by a different reporter at 92 Eng. Rep. 777 (K.B. 1708).

57. 93 Eng. Rep. 849 (K.B. 1727).

58. *See* SCHAUER, *supra* note 50, at 4.

59. *Sedley*, 82 Eng. Rep. at 1036–37. Sedley, a court poet during the reign of King Charles II, was "a violent and dissolute man, given to indecent public pranks from the consequences of which only his good friend the king could save him." *See* SEVENTEENTH-CENTURY PROSE AND POETRY 1035 (Alexander M. Witherspoon & Frank J. Warnke eds., 2d ed. 1982).

60. ROBERTSON, *supra* note 45, at 21. For Sedley and some of his contemporaries, public exhibitionism was apparently a normal part of a fun night on the town. Roger Thompson reports that several other poets of the era also enjoyed the occasional nude public frolic. *See* ROGER THOMPSON, UNFIT FOR MODEST EARS 187 (1979).

61. ROBERTSON, *supra* note 45, at 21.

which some of Sedley's angry listeners rampaged through the streets and broke windows.[62]

The Court of the King's Bench tried Sedley, but Sedley demanded to have the ecclesiastic courts hear his case.[63] The court rejected Sedley's demands, announcing that inherent in the court's authority was the power to regulate the morality of the king's subjects, regardless of whether there was any precedent or even a specific law against the behavior in question.[64] The court levied a heavy fine against Sedley for his offense.[65] While *Sedley* deals with an overt act of disagreeable public behavior, "its significance lies in the fact that this was the first time that offensiveness to decency, apart from religious or political heresy, was an element of an offense against the state."[66]

b. *Read*: An attempt to use *Sedley* as precedent

The Queen v. Read[67] is the first case in which a person stood trial in England accused of obscene libel for the act of publishing sexually explicit material.[68] The government indicted James Read for committing obscene libel[69] by publishing *The Fifteen Plagues of a Maidenhead*,[70] a rather indelicate tract suggesting that chastity was little more than one of the nastier results of malnutrition.[71] Obscene libel, charged for the first time in this case, would become the procedural cornerstone of English obscenity law for quite a long time.[72]

Interestingly, given obscene libel's future as the basis for English obscenity law, the Queen's Bench Court dismissed Read's indictment, drawing a distinction between a "crime that shakes religion," such "as profaneness on the stage, &c. [that] is indictable," and "writing an obscene book, as that intitled [sic], 'The Fifteen Plagues of a Maidenhead,'" which "is not indictable, but punishable only in the Spiritual Court."[73] Justice Powell spe-

62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. SCHAUER, *supra* note 50, at 4.
67. 88 Eng. Rep. 953 (K.B. 1708). This case is also reported at 92 Eng. Rep. 777 (K.B. 1708).
68. *See* MACMILLAN, *supra* note 49, at 2.
69. Obscene libel, not to be confused with written defamation, is the "common-law crime of publishing, with the intent to corrupt, material . . . that tends to deprave or corrupt those whose minds are open to immoral influences." BLACK'S LAW DICTIONARY 927 (7th ed. 1999). The offense particularly concerned "sexual words or pictures." *Id.*
70. *Read*, 92 Eng. Rep. at 777.
71. ROBERTSON, *supra* note 45, at 21–22.
72. SCHAUER, *supra* note 50, at 5.
73. The Queen v. Read, 88 Eng. Rep. 953, 953 (K.B. 1708).

cifically rejected the government's contention that the crime of libel could include the publication of racy literature:

> This is for printing bawdy stuff, but reflects on no person, and a libel must be against some particular person or persons, or against the Government. It is stuff not fit to be mentioned [publicly]; if there should be no remedy in the Spiritual Court, it does not follow there must be a remedy here. There is no law to punish it, I wish there were, but we cannot make law; it indeed tends to the corruption of good manners, but that is not sufficient for us to punish.[74]

Powell refused to extend *Sedley* as a precedent, noting that Sedley's explicit acts of obscenity (particularly eliminating upon onlookers) and provocation of a crowd provided that court with something more than mere nudity upon a balcony.[75] Therefore, at least for the time following the court's decision in *Read*, the English courts refused to extend the crime of obscenity to published materials.[76]

c. *Curl*: *Sedley* used as precedent in the first successful prosecution for obscene libel

In *The King v. Curl*,[77] Edmund Curll,[78] a rather notorious early eighteenth-century bookseller,[79] faced an indictment for publishing *Venus in the Cloister, or The Nun in Her Smock*, a book consisting mostly of lewd material.[80] The government originally indicted Curll in 1725, but the court divided sharply over the issue of whether publishing bawdy material was a crime.[81] Sir John Fortescue opined that Curll's was "a great offence," but stated that he knew of no law offering punishment for such an offense.[82] For Fortescue, the *Read* decision created sound precedent that publishing racy

74. *Read*, 92 Eng. Rep. at 777.

75. *Id.*

76. *See* SCHAUER, *supra* note 50, at 5.

77. 93 Eng. Rep. 849 (K.B. 1727).

78. Though the court referred to the defendant as "Edmond Curl," the modern practice is to refer to him as "Edmund Curll." *See, e.g.*, MAYNARD MACK, ALEXANDER POPE: A LIFE 296 (1985).

79. ALEXANDER POPE, *Epistle to Dr. Arbuthnot*, *in* POETRY AND PROSE OF ALEXANDER POPE 200 n.53 (Aubrey Williams ed., Houghton Miffin 1969) (1735). Curll, according to Williams, was "an industrious but shameless and unscrupulous bookseller and publisher; he specialized in disreputable literature of all kinds, and frequently gave unauthorized publication to personal and private papers and correspondence." *Id.* Curll pirated some of Pope's work, leading to a bitter feud between the two men that culminated in Pope's extended, vicious mock-epic lampoon of Curll in Book II of *The Dunciad*. *Id.* at 323–25, lines 31–120.

80. *Curl*, 93 Eng. Rep. at 849.

81. *See* Reynolds, *supra* note 54, at 221.

82. *Curl*, 93 Eng. Rep. at 850.

material, without some breach of the peace or act of force (as with Charles Sedley), did not rise to the level of a crime against the crown.[83] Similarly, Judge Probyn had doubts about the case, and the court ordered further argument for a later date.[84]

Curll might have escaped punishment had he been a more cautious man, but he managed instead to irritate King George II, who already disliked Fortescue.[85] George II removed Fortescue from the bench, replacing him with Francis Page, infamous as a "hanging judge."[86] Page's arrival on the court precipitated a change in the court's attitude toward Curll's case, and the court unanimously convicted Curll of the offense.[87] The court reasoned that Curll had committed "a temporal offence,"[88] which fell under the court's jurisdiction as the guardian of English morality.[89] In so holding, the court rejected the *Read* court's reasoning that *Sedley* turned largely upon the use of force, instead interpreting the case to stand in large part as an example of the court's role as protector of public morality.[90] The court further stated that "if *Read's case* was to be adjudged [by this court], they should rule it otherwise."[91] Curll received as punishment a stint in the pillory, a punishment lauded by the reporter of the decision as "well deserved."[92] Curll thus became the first person in England convicted for publishing erotic material, and the judges created a new law of obscenity.[93]

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83. *See id.* at 851. Fortescue also served as the reporter for one printing of the *Read* decision. The Queen v. Read, 92 Eng. Rep. 777, 777 (K.B. 1708). In that report of the case, Fortescue attached a note informing readers of his involvement in the *Curl* decision: "the Court gave judgment against the Defendant, but contrary to my opinion; and I quoted this case [*Read*]." *Id.*

84. *Curl*, 93 Eng. Rep. at 851.

85. Reynolds, *supra* note 54, at 221.

86. *Id.*

87. *Curl*, 93 Eng. Rep. at 851.

88. The phrase "temporal offense," distinguished from spiritual or ecclesiastical offenses, means something like the modern use of the word "secular." *See, e.g.*, AUGUSTINE, *Law and Self-Defense*, *in* POLITICAL WRITINGS 213, 215–16 (Michael W. Tkacz & Douglas Kries trans., Ernest L. Fortin & Douglas Kries eds., 1994) (temporal law is "the law that restrains peoples in this life" and "can nevertheless justly be changed in the course of time") (no date of original publication); MARTIN LUTHER, *An Appeal to the Ruling Class of German Nationality as to the Amelioration of the State of Christendom*, *in* MARTIN LUTHER: SELECTIONS FROM HIS WRITINGS 403, 473 (John Dillenberger ed., 1962) (1520) (comparing temporal law to spiritual law).

89. *Curl*, 93 Eng. Rep. at 851.

90. *Id.*

91. *Id.*

92. *Id.*

93. ROBERTSON, *supra* note 45, at 23.

2. *The Victorian Period: Legislative and Judicial Regulation of Obscenity*

Though the *Curl* judges established the new crime of obscene libel, history shows few prosecutions under the law in the years immediately following the decision.[94] The availability of obscene libel, it seems, did little to stem the rising tide of production and consumption of erotically charged materials; indeed, the proscription of graphic materials seems to have gained momentum more through societal pressures than judicial fiat.[95] As political power fell into the hands of the rising middle class, a war of sorts began against impropriety.[96] Anti-vice societies arose and took it upon themselves to suppress, amongst other immoral activities, sexually explicit materials.[97] Attempts to regulate sexually explicit materials during the period center upon legislation, but the most important development in obscenity law derives from the case of *The Queen v. Hicklin*,[98] in which the court offered the first judicial attempt at defining obscenity.[99] This subsection briefly discusses Victorian legislation against obscenity and culminates with an examination of *Hicklin*'s definition of obscenity.

a. Scattered early attempts at legislation against obscenity

Though the common law offense of obscene libel provided the Society for the Suppression of Vice ("Society") an avenue to pursue some of their unsavory foes, the Society possessed too much zeal to be content with having only a common-law weapon.[100] In 1824 the Society's efforts helped to produce the Vagrancy Act, a law that provided imprisonment for publication, public display, or public sale of any indecent picture.[101] Fearing an influx of obscene continental materials,[102] Parliament enacted a statute that prohibited the importation of obscene materials, a law apparently brought into existence as a reaction against racy French postcards that had flooded

94. *Id.* at 23–24. The most notable use of obscene libel came in 1763, when political troublemaker John Wilkes published a bawdy parody of Alexander Pope's poetry entitled *Essay on Woman* and faced prosecution for his offense. *Id.*

95. *Id.* at 26.

96. MACMILLAN, *supra* note 49, at 4.

97. *See id.* In the period between 1802 and 1857, the Society for the Suppression of Vice instituted 159 prosecutions for obscene libel, only five of which failed to secure a conviction. ROBERTSON, *supra* note 45, at 26.

98. 3 L.R.-Q.B. 360 (Q.B. 1868).

99. *Id.*

100. *See* ROBERTSON, *supra* note 45, at 27–28.

101. *Id.*

102. *Id.*

England at the time.[103] These enactments, however, were insignificant compared to what soon followed.

b. The Obscene Publications Act (Lord Campbell's Act)—1857

Though hundreds of peddlers of obscenity suffered prosecutions throughout the nineteenth century at the behest of the Society,[104] its efforts did little to stop the production or consumption of pornography.[105] The cause of suppressing erotic materials found a new ally in Lord Campbell, who was Lord Chief Justice, in 1857.[106] The Obscene Publications Act, usually known as Lord Campbell's Act,[107] was a civil act concerned with providing a means of destroying obscene literature. Magistrates could issue search warrants empowering the police to search premises suspected of housing obscene material, which, if found, the magistrates could order destroyed.[108] In practice the procedure worked somewhat like the following: a magistrate, shown a suspicious book, issued a search warrant; the prosecutor, authorized by warrant, raided the suspect premises and seized any books that raised further suspicion; the prosecutor then delivered the seized books to the magistrate, who ordered them destroyed if his examination of the contents found the materials to be sufficiently obscene.[109] As the magistrate who issued the search warrant tended to be the same magistrate who decided to destroy obscene materials, a search warrant usually resulted in the destruction of the materials the prosecutor seized.[110]

The support of the Society aside, strong opposition arose in Parliament to the Act, and a fairly sharp debate took place.[111] Concerning itself with providing a procedure for finding and destroying obscene materials, the bill neglected to provide a definition of obscenity, and the omission troubled many members of Parliament.[112] The opposition seized upon three issues to express its displeasure with the proposed act: (1) the possible use of the Act to proscribe literary works; (2) the possible interference on the part of those empowered by the Act to harass legitimate works; and (3) the absence of any definition of obscenity.[113] Lords Lyndhurst and Brougham stated their

103. *Id.*; SCHAUER, *supra* note 50, at 7.
104. *See supra* note 97.
105. ROBERTSON, *supra* note 45, at 28. As an example of the Society's lack of success, twenty bookshops specializing in erotic materials operated on Holywell Street in 1857. *Id.*
106. *See* MACMILLAN, *supra* note 49, at 5.
107. *Id.*
108. SCHAUER, *supra* note 50, at 6–7.
109. ROBERTSON, *supra* note 45, at 28.
110. *Id.*
111. MACMILLAN, *supra* note 49, at 5.
112. *Id.*
113. *Id.*

belief in the adequacy of the existing laws against obscenity, fearing that the broader powers of the new law might have a deleterious effect on the production and enjoyment of classic texts like Ovid.[114] Members of Parliament feared that the government was trying to police morality and that the law was pointless because people who sought the materials would get them despite the government's efforts.[115]

Lord Campbell defended his act against its detractors, telling the House that he did not intend the new law to apply to works of art or literature; rather, its purpose was to prevent the spread of such materials that served only to corrupt youth and general decency.[116] Further, Campbell contended, the law would prohibit only work created with the intention of corrupting.[117] Lord Lyndhurst, one of the Act's opponents, reminded Campbell "that an act of Parliament does not mean what its sponsors intend it to mean, but what later generations of judges want it to mean," but Campbell and his followers did not heed the warning.[118] The Act passed, and the fallacy of Campbell's defense was exposed as the application of the law showed that intent, whether to corrupt or just to be erotic, bore little or no consideration in cases involving the Obscene Publication Act.[119] As Lyndhurst warned, judges would soon decide what constituted obscenity under the law.

c. *Hicklin*: The first judicial definition of obscenity

In *The Queen v. Hicklin*,[120] the Queen's Bench fulfilled the warning to Campbell that future judges would define obscenity independently of parliamentary intent.[121] Henry Scott, a metal broker in the town of Wolverhampton, was a member of The Protestant Electoral Union, a group that sought "to protest against those teachings and practices which are un-English, immoral, and blasphemous, to maintain the Protestantism of the Bible and the liberty of England," and to support members of Parliament who would "expose and defeat the deep-laid machinations of the Jesuits, and resist grants of money for Romish purposes."[122] Exposing Catholic machinations included—for Scott at least—purchasing and distributing at cost copies of a pamphlet entitled "The Confessional Unmasked; shewing the depravity of the Romish priesthood, the iniquity of the Confessional,

114. ROBERTSON, *supra* note 45, at 29.
115. *See id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. MACMILLAN, *supra* note 49, at 5.
120. 3 L.R.-Q.B. 360 (1868).
121. *See supra* text accompanying notes 116–19.
122. *Hicklin*, 3 L.R.-Q.B. at 362 (internal citations omitted).

and the questions put to females in confession" to anyone who desired to have a copy.[123] The Queen's Bench Court, in its recitation of the case's facts, found about half of the pamphlet to be "obscene in fact as relating to impure and filthy acts, words, and ideas."[124]

Under the authority of Lord Campbell's Act, Wolverhampton magistrates issued a warrant, and police officers seized 252 copies of the pamphlet.[125] The magistrates ordered the pamphlets destroyed, but Scott appealed to the Wolverhampton Quarter Sessions, where the recorder, Benjamin Hicklin, found that the sale and distribution of the pamphlets was not a misdemeanor and quashed the order for the destruction of the pamphlets.[126] Hicklin reasoned that although the pamphlets were indeed obscene in part, Scott's intention in distributing them was not to do harm.[127]

The Court of the Queen's Bench reviewed Hicklin's decision, discussing intent and motive at some length before arriving at the decision that a work's intent is of no concern if the work is obscene.[128] Therefore, because Hicklin had already deemed Scott's anti-Catholic pamphlets obscene, the pamphlet was punishable, and the magistrates' decision to order the destruction of such obscenity was lawful; the Queen's Bench Court thus reversed the recorder's decision.[129]

The case's most important component, however, came in dicta. Lord Chief Justice Cockburn, after disposing of the case, proceeded to give a definition of obscenity: "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[130] Additionally, the work need not be obscene taken as a whole; a passage found obscene sufficed for declaring the book obscene.[131] Cockburn's test, then, based its definition of obscenity on the effect of the work upon individuals particularly susceptible to corruption, disregarding the work's effect, or lack thereof, on the public at large.[132]

123. *Id.* Scott distributed between two and three thousand copies of the pamphlet for one shilling each. *Id.*

124. *Id.* at 363.

125. *See id.* at 362.

126. *Id.* at 360, 362–63; *see also* SCHAUER, *supra* note 50, at 7.

127. *Hicklin*, 3 L.R.-Q.B. at 364.

128. *See id.* at 363–69.

129. *Id.* at 370, 373.

130. *Id.* at 368, 371.

131. *Id.*

132. *See* SCHAUER, *supra* note 50, at 7–8.

B. Obscenity in the American Courts: The Constitutionalization of Obscenity Law

The history of American regulation of obscenity tended, from the founding to the middle of the twentieth century, to follow English precedent.[133] Some states actively enforced the common-law crime of obscene libel;[134] some states passed statutes prohibiting obscene materials;[135] and the federal government banned the mailing of obscene materials.[136] Conspicuously absent from the regulation of obscenity in the United States was a definition of obscenity, and lacking a definition rooted in American law or based upon the Constitution, many courts simply adopted the *Hicklin* test.[137] Judge Learned Hand, in applying the *Hicklin* definition in *United States v. Kennerley*,[138] criticized the test as unduly harsh, noting that "however consonant [*Hicklin*] may be with mid-Victorian morals, [it] does not seem to me to answer to the understanding and morality of the present time."[139]

After this long period of unsure standards for obscenity, by the 1950s, courts did not apply obscenity law uniformly, and books held obscene in one part of the United States might not be held obscene elsewhere.[140] Accordingly, "the definition of obscenity was long ripe for adjudication by the United States Supreme Court."[141] In addition to formulating a uniform definition of obscenity, the Supreme Court also faced the issue of obscenity against the background of the First Amendment's protection of speech and

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133. DANIEL S. MORETTI, OBSCENITY AND PORNOGRAPHY: THE LAW UNDER THE FIRST AMENDMENT 1 (1984).

134. *See, e.g.*, Commonwealth v. Sharpless, 2 Serg. & Rawle 91, 100 (Pa. 1815) (holding that obscene libel was a crime at common law and was thus a crime in Pennsylvania).

135. *See* SCHAUER, *supra* note 50, at 8–11 (discussing early state laws banning obscenity).

136. Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use, ch. 258, 17 Stat. 598 (1873) (current version at 18 U.S.C. § 1461 (2000)).

137. *See, e.g.*, United States v. Two Obscene Books, 99 F. Supp. 760, 761–62 (N.D. Cal. 1951), *aff'd sub nom.* Besig v. United States, 208 F.2d 142 (9th Cir. 1953) (applying *Hicklin* definition to hold Henry Miller's *Tropic of Cancer* and *Tropic of Capricorn* obscene); United States v. Bennett, 24 F. Cas. 1093, 1103–04 (C.C.S.D.N.Y. 1879) (No. 14,571) (upholding trial court's use of *Hicklin* standard for jury instructions on the issue of whether passages of materials were obscene).

138. 209 F. 119 (S.D.N.Y. 1913).

139. *Id.* at 120. Judge Hand begrudgingly applied *Hicklin* because the "test has been accepted by the lower federal courts until it would be no longer proper for me to disregard it." *Id.* For a decision in which the court explicitly rejected the *Hicklin* test and formulated a new test, see *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182, 184–85 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934) (holding that James Joyce's *Ulysses* was not obscene because, taken as a whole, the novel was not an " aphrodisiac").

140. MORETTI, *supra* note 133, at 4.

141. *Id.*

press.[142] This subsection traces the development of the United States Supreme Court's constitutionalization of obscenity law, beginning with the Court's first definition of obscenity in *Roth v. United States*,[143] moving to the Court's refining of that definition in a handful of 1960s cases, and finally considering the Court's retrenchment on the definition of obscenity in *Miller v. California*.[144]

1. Roth*: The Supreme Court Decides the Issue of Obscenity Under the First Amendment and Defines Obscenity*

While the issue of obscenity as a protected form of speech under the First Amendment arose during the 1940s and remained current throughout the 1950s,[145] the Supreme Court did not deal with the issue until *Roth v. United States*.[146] In that case, Roth sought certiorari on a conviction in a New York federal court for violating 18 U.S.C. § 1461, the federal obscenity statute that declared obscene material "nonmailable matter."[147] The Court also heard and decided, along with Roth's case, the case of Alberts, whom California had convicted of violating the obscenity provisions of the California Penal Code for selling and composing obscene materials.[148]

a. Obscenity and the First Amendment

The Court considered the same issue for both Roth and Alberts: "whether obscenity is utterance within the area of protected speech and press" under the First Amendment.[149] To answer this question, Justice Brennan, writing for the Court, examined the history of obscenity.[150] The Court noted that, though it had not decided the issue, it had always assumed that the First Amendment did not protect obscenity,[151] an assumption supported by the lack of state protection of obscenity prior to the adoption of the First Amendment.[152] The Court stated that "[i]n light of this history, it is

142. *See* SCHAUER, *supra* note 50, at 29–30.

143. 354 U.S. 476 (1957).

144. 413 U.S. 15 (1973).

145. *See* SCHAUER, *supra* note 50, at 30–33. Schauer notes that the same period saw the prosecutions of many respected literary texts, rather than commercial pornography, as obscenity, perhaps affecting the Supreme Court's decision in *Roth*. *Id.* at 33.

146. 354 U.S. at 476.

147. *Id.* at 479 n.1 (quoting 18 U.S.C. § 1461).

148. *Id.* at 481.

149. *Id.*

150. *Id.* at 479, 482–83.

151. *Id.* at 483.

152. *Roth*, 354 U.S. at 482. The opinion notes that of the fourteen states that had ratified the Constitution by 1792, ten states had guaranties of freedom of expression, and none of those ten states protected obscenity under those guaranties. *See id.*

apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance."[153] While the First Amendment affords its protections to "[a]ll ideas having even the slightest redeeming social importance," the Court rejected obscenity "as utterly without redeeming social importance," holding that obscenity does not fall under the aegis of constitutionally protected speech or press.[154]

b. The *Roth* definition of obscenity

After deciding that the First Amendment does not protect obscenity, the Court defined obscenity. The Court began its analysis of the definitional issue by explicitly rejecting the *Hicklin* definition of obscenity: "The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press."[155] Obscene material, in the Court's definition, "is material which deals with sex in a manner appealing to prurient interest"[156] or "material having a tendency to excite lustful thoughts."[157] The Court emphasized that this definition did not apply to a work simply because sex is a theme or object of representation in the work.[158]

Having thus defined obscenity, the *Roth* court provided a test for determining whether materials fall under that definition. First, a court must consider "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[159] The second part of the *Roth* test inquires whether material alleged to be obscene is "utterly without redeeming social importance."[160] Therefore, under the *Roth* test, a work that appeals to the prurient interest might not be obscene if a court could determine that the work has some small measure of redeeming social importance.[161]

2. *Later Modifications of the* Roth *Test*

While *Roth* answered some questions regarding obscenity—namely whether the First Amendment protects obscenity and whether the *Hicklin*

153. *Id.* at 483.
154. *Id.* at 485.
155. *Id.* at 489.
156. *Id.* at 487.
157. *Id.* at 487 n.20.
158. *Roth*, 354 U.S. at 487.
159. *Id.* at 489.
160. *Id.* at 484.
161. *Id.*

test satisfied the Constitution—the decision left open some questions regarding the definition of obscenity.[162] In the early and mid-1960s, the Court modified the *Roth* test several times; the most important of these modifications came in *Manual Enterprises v. Day*,[163] *Jacobellis v. Ohio*,[164] and *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*.[165]

a. *Manual Enterprises v. Day*: Obscene material must be patently offensive, and protected material need not have redeeming value

Manual Enterprises represents the Court's first important adjustment of the *Roth* definition.[166] In *Manual Enterprises*, the Postmaster General found magazines distributed by Manual Enterprises that featured pictures of naked male models to be obscene; thus, the Postmaster General prohibited the company from mailing its magazines.[167] The United States Court of Appeals for the District of Columbia Circuit upheld a district court decision that the materials were obscene.[168] The Supreme Court granted certiorari to determine the status of the publications.[169]

The Supreme Court reversed the lower court decision.[170] Justice Harlan announced the divided Court's decision,[171] issuing an opinion stating that the prurient interest component of the *Roth* test was insufficient alone to determine obscenity; thus Harlan appended to the test a requirement that the work be patently offensive as well.[172] Harlan also noted that while the magazines in question possessed no scientific or artistic merit, they were not obscene, thus limiting the *Roth* test's redeeming value component.[173] Therefore, Harlan's opinion in *Manual Enterprises* limits both components of the *Roth* test, edging the Court toward an obscenity definition that encompassed "hard-core" pornography only.[174]

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162. *See* MORETTI, *supra* note 133, at 11.
163. 370 U.S. 478 (1962).
164. 378 U.S. 184 (1964).
165. 383 U.S. 413 (1966) (plurality opinion).
166. MORETTI, *supra* note 133, at 13.
167. *Manual Enters.*, 370 U.S. at 479–80.
168. Manual Enters. v. Day, 289 F.2d 455, 456 (D.C. Cir. 1961), *rev'd*, 370 U.S. 478 (1962).
169. *Manual Enters.*, 370 U.S. at 479–80.
170. *Id.* at 495.
171. *Id.* at 479. Justice Stewart joined in Justice Harlan's opinion. *Id.*
172. *Id.* at 486.
173. *Id.* at 481–82.
174. MORETTI, *supra* note 133, at 15.

b. *Jacobellis*: Community standards are national standards

Just as *Roth* did not finally answer the problem of establishing a definition of obscenity, *Manual Enterprises* failed to provide any lasting solution to the problem, particularly the terms "patently offensive" and "prurient interest" lacked clear definition.[175] Further, the socially redeeming value component still presented some difficulty to courts considering the obscenity question.[176]

In this climate, the Court decided *Jacobellis v. Ohio*,[177] a case in which the Court again restricted the scope of the government's authority to proscribe obscenity.[178] An Ohio state court convicted Jacobellis, a theatre manager, for the exhibition of obscene films.[179] The Supreme Court took the appeal to decide whether the film Jacobellis showed was indeed obscene.[180] Justice Brennan, writing an opinion in which Justice Goldberg joined, announced the judgment of the Court that the movie was not obscene, reversing the Ohio Supreme Court.[181] Brennan's opinion stated that the government may prohibit obscenity because obscene materials are utterly without redeeming social value, noting that the mere portrayal of sex in artistic and scientific endeavors was not cause for proscribing those materials.[182] The correct test also did not attempt to weigh the prurient interest against a work's redeeming social value, "for a work cannot be proscribed unless it is 'utterly' without social importance."[183] The Court in *Jacobellis* also adopted the patent-offensiveness test announced by Justice Harlan in *Manual Enterprises*.[184]

Perhaps the most important restatement of a *Roth* principle in *Jacobellis*, though, lies in Justice Brennan's further definition of the community whose standards should adhere under *Roth*'s "contemporary community standards" component.[185] In the period between the *Roth* and *Jacobellis* decisions, some commentators had suggested that the contemporary community standards test implied that the applicable standards for determining

175. *Id.*
176. *See id.*
177. 378 U.S. 184 (1964).
178. *See* SCHAUER, *supra* note 50, at 42.
179. *Jacobellis*, 378 U.S. at 185–86. Jacobellis's conviction was affirmed by an intermediate Ohio appellate court. Ohio v. Jacobellis, 175 N.E.2d 123, 126 (Ohio Ct. App. 1961). The Supreme Court of Ohio subsequently affirmed the Ohio Court of Appeals decision. Ohio v. Jacobellis, 179 N.E.2d 777, 781 (Ohio 1962).
180. *Jacobellis*, 378 U.S. at 186–87.
181. *Id.* at 185, 187.
182. *Id.* at 191.
183. *Id.*
184. *Id.* at 191–92.
185. *Id.* at 193.

the constitutional issue of obscenity in each case were the standards of the particular community from which the case arose.[186] Brennan rejected this explanation of the standard, stating that a local definition of community standards defied implementation.[187] Brennan based the rejection of local standards, as determining in the consideration of obscenity, on the principle that the "Court has explicitly refused to tolerate a result whereby 'the constitutional limits of free expression in the Nation would vary with state lines.'"[188] Therefore, the standards that courts should use to determine obscenity were national, rather than local.[189]

c. *Memoirs*: A restatement of *Roth* with a three-element test

In *Memoirs v. Massachusetts*,[190] the Supreme Court again faced the issue of what constitutes obscenity. This time John Cleland's *Memoirs of a Woman of Pleasure* (also known as *Fanny Hill*)[191] was the target of government regulation; a Massachusetts court had declared the book obscene in an *in rem* proceeding[192] brought against the book itself.[193] The Supreme Court reversed the judgment that the book was obscene.[194]

The Court used *Memoirs* as an opportunity to provide a definitive restatement of the *Roth* test and its subsequent modifications. Justice Brennan, in an opinion in which Chief Justice Warren and Justice Fortas joined,[195] restated the *Roth* test:

> Under [the *Roth*] definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[196]

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186. *Jacobellis*, 378 U.S. at 192.

187. *Id.* at 193.

188. *Id.* at 194–95 (quoting Pennekamp v. Florida, 328 U.S. 331, 335 (1946)).

189. *Id.* at 195.

190. 383 U.S. 413 (1966) (plurality opinion).

191. For a brief treatment of the history and importance of this seminal work of English pornography, along with an account of John Cleland's life, see PETER SABOR, *Introduction* to JOHN CLELAND, MEMOIRS OF A WOMAN OF PLEASURE vii–xxvi (Peter Sabor ed., Oxford University Press 1999) (1748–1749).

192. Attorney General v. A Book Named "John Cleland's Memoirs of a Woman of Pleasure," 206 N.E.2d 403, 404 (Mass. 1965).

193. *Memoirs*, 383 U.S. at 415.

194. *Id.* at 417.

195. *Id.* at 414.

196. *Id.* at 418.

Each component of the test receives its own consideration; weighing the factors against one another is improper.[197] This restatement of the *Roth* test further established the trend toward a definition of obscenity encompassing only "hard-core" materials that had been growing since the Court decided *Roth*.[198]

3. Miller*: The Court Reconsiders and Reshapes the* Roth *Test*

The very limited scope for government regulation in the wake of *Memoirs* led to very few successful prosecutions for obscenity offenses, and the period was one of minimal regulation of sexually explicit materials.[199] The substantive law regarding obscenity did not change again until 1973, when the Supreme Court decided *Miller v. California*.[200] Miller mass-mailed unsolicited advertising brochures that were sexually explicit to consumers, and a California court convicted him of violating California's obscenity law.[201] The Supreme Court, in vacating and remanding Miller's conviction, reaffirmed the *Roth* standard for obscenity, but reconstituted the test into a three-part consideration, the elements of which are considered in the following subsections.[202]

a. Contemporary standards and the prurient interest

The first element of the Court's three-part test in *Miller* is a restatement of the *Roth* test for obscenity: "whether 'the average person, applying contemporary community standards,' would find that the work, taken as a whole, appeals to the prurient interest."[203] This element reasserts the notion that the standards employed in making an obscenity determination are not to be the national standards set out in *Jacobellis*; rather, the operative standards are to be local standards in the community in which the court making the determination sits.[204]

b. Patent offensiveness

The second element of the *Miller* test is "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined

197. *Id.* at 419–20.
198. SCHAUER, *supra* note 50, at 43.
199. *See id.* at 43–44.
200. 413 U.S. 15 (1973).
201. *Id.* at 16.
202. *See id.* at 24.
203. *Id.* (quoting Roth v. United States, 354 U.S. 476, 489 (1957)).
204. *Id.* at 30–32.

by the applicable state law."[205] This element retains the patent offensiveness standard that the Court had added to *Roth* in the *Manual Enterprises* and *Jacobellis* decisions, but the element also added "a due process standard" requiring that statutes prohibiting obscenity specifically state the sorts of depictions that the law covered.[206] The need for careful limitation of state regulatory powers over any type of expression resulted in the Court confining "the permissible scope of such regulation to works which depict or describe sexual conduct."[207] The Court further defined constitutionally allowed regulation as being directed toward "'hard core' sexual conduct specifically defined by the regulating state law, as written or construed."[208]

c. Serious literary, artistic, political, or scientific value

The third *Miller* element is "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[209] This element represents the most significant departure from the earlier Court interpretations of *Roth*: the Court specifically rejected the constitutional standard, announced in *Memoirs v. Massachusetts*, that a work be utterly without redeeming social value for regulation to be permissible.[210] Therefore, the Court's new test offered a standard under which "[a]t a minimum, prurient, patently offensive depiction or description of sexual conduct must have . . . value" in some important sphere of endeavor.[211] As an example of a text that might appeal to the prurient interest and be patently offensive but not qualify as obscenity under the test, the Court offered medical textbooks that contain graphic photographs or other illustrations and textual descriptions of human anatomy, noting that the scientific value of these texts prevents their prohibition.[212] Unlike the previous test announced in *Memoirs*, *Miller* requires a work to have some value in some field of study or endeavor.[213]

C. *Ferber* and *Osborne*: The Child Pornography Problem Under *Miller*

While the *Miller* decision provided a test for obscenity that still stands nearly thirty years later, the question of child pornography under the *Miller* test remained unanswered in the decade following the Supreme Court's

205. *Id.* at 24.
206. SCHAUER, *supra* note 50, at 46–47.
207. *Miller*, 413 U.S. at 23–24.
208. *Id.* at 27.
209. *Id.* at 24.
210. *Id.* at 24–25 (quoting A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413, 419 (1966)).
211. *Id.* at 26.
212. *Id.*
213. *Miller*, 413 U.S. at 26.

redefinition of obscenity.[214] By the mid-1970s, child pornography had grown into a large industry, producing by one count some 260 different magazines depicting children engaged in sexually explicit conduct.[215] In response to the rising flow of child pornography, the federal government and several state governments enacted statutes against child pornography, many of which did not require that the material in question be obscene under the *Miller* standard.[216]

In light of the Supreme Court's rulings that material necessarily must be obscene before government regulation is constitutional, these statutes posed a problem under the First Amendment.[217] This section details the Court's decisions in *New York v. Ferber*[218] and *Osborne v. Ohio*,[219] the cases creating an exception to the rule that material must be obscene if the government is to regulate it and granting the states the power to prohibit the production, distribution, and possession of child pornography.

1. Ferber: *Child Pornography's Intrinsic Relation to the Sexual Abuse of Children*

Paul Ferber, owner of a Manhattan bookstore specializing in erotic materials, sold two films featuring child pornography to an undercover police officer.[220] Ferber's sale of the films brought prosecution for violating New York's child pornography statute, which prohibited the knowing promotion by distribution of materials depicting sexual performances by children under the age of sixteen, regardless of whether the material was obscene.[221] A trial court convicted Ferber, and the Appellate Division of the New York Supreme Court affirmed the conviction without opinion.[222] The New York Court of Appeals, however, reversed the conviction, reasoning that the New York statute violated the First Amendment by prohibiting materials that were not necessarily obscene.[223] New York sought review from the United States Supreme Court, and the Court granted certiorari to determine whether the First Amendment allowed a state to prohibit child pornography regardless of whether the prohibited material was obscene.[224]

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214. *See* MORETTI, *supra* note 133, at 53.
215. *Id.*
216. *Id.*
217. *See id.*
218. 458 U.S. 747 (1982).
219. 495 U.S. 103 (1990).
220. *Ferber*, 458 U.S. at 751–52.
221. *Id.* at 750–51.
222. People v. Ferber, 424 N.Y.S.2d 967 (N.Y. App. Div. 1980).
223. People v. Ferber, 422 N.E.2d 523, 526 (N.Y. 1981).
224. *Ferber*, 458 U.S. at 753.

The Supreme Court held that where material depicts child sexual abuse, states have an interest in prohibiting child pornography regardless of the material's content.[225] The Court noted, in response to Ferber's argument that *Miller*'s obscenity test provided enough regulatory power for the state to stop child sexual abuse, that "a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography."[226] The *Ferber* Court further stated that states may prohibit the distribution of child pornography because of the intrinsic relationship between the distribution of such materials and the sexual abuse of children; circulation of such materials would cause further harm to the child by creating a permanent record of the abuse, and controlling the production of pornography entails closing the market for such materials.[227] Based on this rationale of protecting children from sexual abuse at the hands of child pornographers, the Court thus allowed states to take far more aggressive steps against the distribution of child pornography than those measures previously allowed against purveyors of other graphic materials.

2. Osborne*: States May Prohibit Possession of Child Pornography*

The Supreme Court extended its *Ferber* holding in *Osborne* to allow states to prohibit the possession of child pornography.[228] The Court based its extension of *Ferber* on a concern for the state's interest in protecting child pornography's victims, an interest that justifies attempts to stop child pornography at every point in its distribution chain.[229] Along with this concern for the children who are victims of such pornography, the Court reiterated the *Ferber* concern for stopping the harm caused by the free circulation of the record of a child's abuse.[230] Additionally, the Court noted that pedophiles might use child pornography to seduce new victims giving states another reason to ban possession of such materials.[231]

The varied history of obscenity law leads, then, to the constitutional standards that now control government attempts at regulating sexually explicit materials. Under *Miller*, sexually explicit materials receive protection from the First Amendment so long as they are not obscene under the test announced in that case.[232] *Ferber* (along with *Osborne*) creates an exception

225. *Id.* at 761 n.12.
226. *Id.* at 761.
227. *Id.* at 759.
228. Osborne v. Ohio, 495 U.S. 103, 111 (1990).
229. *Id.* at 110.
230. *Id.* at 111.
231. *Id.*
232. *See supra* Part III.B.3.

to the *Miller* test, removing materials displaying the sexual abuse of children from the First Amendment's protection.[233] Against this scheme of First Amendment protection, the Supreme Court decided *Ashcroft*.

IV. REASONING

In *Ashcroft v. Free Speech Coalition*,[234] the United States Supreme Court held overbroad provisions of the CPPA[235] that prohibited graphic images appearing to be of children or conveying the impression that they depicted children because the law banned speech protected by the First Amendment.[236] After a brief discussion of the types of images banned under the CPPA and Congress's reasons for banning those images,[237] the majority opinion of the Court proceeded to examine the two provisions of the CPPA in question and declare them overbroad.[238]

Justice Thomas concurred in the majority's judgment, adding that the government's argument that purveyors of actual child pornography might argue that their images are computer-generated is too speculative at this point to justify the CPPA's broad restrictions on such images.[239] Justice O'Connor concurred in the majority's opinion as to its judgment that a prohibition on "youthful-adult pornography" and material conveying the impression that actual children appear in the images infringed upon protected speech, but she dissented from the majority's decision that the CPPA's ban of virtual child pornography was overbroad.[240] Chief Justice Rehnquist, in a dissent joined by Justice Scalia,[241] argued that the CPPA's legitimate sweep was substantial enough to offset any negative effects of broad readings of the Act's reach and potential effects on First Amendment rights.[242]

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233. *See supra* Part III.C.

234. 535 U.S. 234 (2002).

235. 18 U.S.C. § 2256(8)(B), (D) (2000).

236. *Ashcroft*, 535 U.S. at 258.

237. *Id.* at 241–42.

238. *Id.* at 243–58. Justice Kennedy announced the judgment of the Court affirming the Ninth Circuit's judgment. *Id.* at 258.

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

240. *Id.* at 263 (O'Connor, J., concurring and dissenting). Chief Justice Rehnquist and Justice Scalia joined Justice O'Connor's dissent only. *Id.* at 260 (O'Connor, J., concurring and dissenting).

241. *Id.* at 267 (Rehnquist, C.J., dissenting). Justice Scalia joined the Chief Justice's dissent except for one paragraph discussing the CPPA's legislative record. *Id.* at 270–71 n.2 (Rehnquist, C.J., dissenting).

242. *Ashcroft*, 535 U.S. at 273 (Rehnquist, C.J., dissenting).

A. The Majority Opinion

1. *The "Appears To Depict" Provision*

The Court began its analysis of the CPPA by examining the Act's language, particularly the sections of the Act under challenge before the Court.[243] The Court noted that, before the CPPA's enactment in 1996, "Congress defined child pornography as . . . images made using actual minors," a prohibition retained under the CPPA.[244] The CPPA added "three other prohibited categories of speech, of which the first, § 2256(8)(B), and the third, § 2256(8)(D), are at issue in this case."[245]

In considering 18 U.S.C. § 2256(8)(B), the Court first examined the statute under the *Miller* test for obscenity.[246] The Court found that the CPPA extended "to images that appear to depict a minor engaging in sexually explicit activity without regard to the *Miller* requirements."[247] Under the CPPA's statutory language, prohibited materials did not have to appeal to the prurient interest, and the statute proscribed any depiction of graphic sexual activities, regardless of their presentation.[248] As a result of that language, the Act's proscription extended to "a picture in a psychology manual" and to movies "depicting the horrors of sexual abuse."[249] Moreover, the Act did not require materials to be patently offensive and failed to take into account that not every explicit depiction of underage sexual activity contravenes community standards.[250]

Delving further into the CPPA's prohibition of non-obscene materials, the Court considered the literary, artistic, political, and scientific value that prohibited works might have.[251] The language of the Act worked to proscribe "the visual depiction of an idea—that of teenagers engaging in sexual activity—that is a fact of modern society and has been a theme in art and

243. *Id.* at 241.

244. *Id.* (citing 18 U.S.C. §§ 2252, 2256(8)(A)).

245. *Id.* The third category, contained in 18 U.S.C. § 2256(8)(C) (2000), "prohibit[ed] a more common and lower tech means of creating virtual images, known as computer morphing." *Ashcroft*, 535 U.S. at 242. Morphing allows pornographers to "alter innocent pictures of real children so that the children appear to be engaged in sexual activity." *Id.* The Court did not consider the validity of this section because the Free Speech Coalition and its fellow litigants did not challenge it, but the Court noted in dicta that such images "implicate the interests of real children," bringing them closer to the images the Court allowed states to prohibit in *Ferber*. *Id.*

246. *Ashcroft*, 535 U.S. at 246.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at 246–47

literature throughout the ages."[252] The CPPA banned depictions of sexual activity involving persons that appear under eighteen years of age, an age higher than the legal age for marriage and for consenting to sexual relations in many states.[253] Further, many literary and other artistic endeavors address themes covered by the sweep of the CPPA's prohibitions, including any of numerous adaptations of William Shakespeare's *Romeo and Juliet* and such Academy Award-winning films as *Traffic* and *American Beauty*.[254] The CPPA banned any such work that contained even "a single graphic depiction of sexual activity within the statutory definition," subjecting the possessor of the work to incarceration and fines without inquiring into the work's redeeming value.[255] The CPPA's prohibition of a work because of the presence of one scene or part violates the First Amendment principle that a work's artistic merit does not depend upon the presence of one explicit scene or segment.[256] For a work to be obscene under the *Miller* test, its "redeeming value [must] be judged by considering the work as a whole."[257] Because the CPPA prohibited works without considering their value as a whole and also made no link between its prohibitions and community standards, "the CPPA cannot be read to prohibit obscenity" as allowed under *Miller*.[258]

In seeking to address the failure of the CPPA to sustain scrutiny under the *Miller* standards for obscenity, the government argued to the Supreme Court that the CPPA banned material "virtually indistinguishable from child pornography, which may be banned without regard to whether it depicts works of value" under *Ferber*.[259] The Court rejected this contention, however, explaining that the decisions in *Ferber*, which allowed states to prohibit the distribution and sale of child pornography, and *Osborne*, which allowed states to prohibit the possession of child pornography, premised approval of such prohibitions on three distinct considerations, the second and third of which deal with the need to stop the market demand for child pornography.[260] First, the government has a legitimate interest in protecting children from the sexual abuse inherent to the production of child pornography, regardless of the work's merit.[261] Second, child pornography creates "a

252. *Ashcroft*, 535 U.S. at 246.
253. *Id.* at 247.
254. *Id.* at 247–48.
255. *Id.* at 248.
256. *Id.* (citing A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413, 419 (1966) (plurality opinion)). For an examination of the *Memoirs* case, see *supra* Part III.B.2.c.
257. *Ashcroft*, 535 U.S. at 248.
258. *Id.* at 249.
259. *Id.*
260. *Id.* at 249–50.
261. *Id.* at 249.

permanent record of a child's abuse," and "the continued circulation itself would harm the child who had participated."[262] Third, the traffic in child pornography provides economic rewards for its production, giving states an interest in stopping the distribution of such materials.[263]

In contrast to situations where *Ferber* permits prohibition of such images without regard to their other merit, the Court held that the CPPA bans speech that does not record the crime of child sexual abuse and does not create victims in its production.[264] Virtual child pornography, the Court reasoned, has no intrinsic relation to the sexual abuse of children, as did the actual child pornography at issue in *Ferber*.[265] Any causal link between virtual child pornography and actual child abuse is "contingent and indirect" and therefore insufficient to support the CPPA's broad provisions.[266]

The government argued that even a weak link between virtual child pornography and any actual harm to children should suffice to support the ban on such materials because, as acknowledged in *Ferber*, child pornography rarely has value as speech.[267] The Court rejected this argument as flawed in two respects. First, the Court stated that *Ferber's* concern over child pornography derived from its production, not the content of the materials.[268] Under *Ferber*, the First Amendment protects speech that is neither obscene nor the product of child sexual abuse.[269] Second, the *Ferber* holding did not include a declaration that "child pornography is by definition without value."[270] The *Ferber* Court actually recognized that some works might indeed have value and offered "virtual images—the very images prohibited by the CPPA—as an alternative and permissible means of expression" for certain modes of expression dealing with the sexuality of youth.[271] Indeed, the Court in *Ferber* "not only referred to the distinction between actual and virtual child pornography, it relied upon it as a reason supporting its holding."[272] The Court thus found that the CPPA obliterated the *Ferber* distinction and criminalized the alternative means held out by that case as an acceptable mode for communicating certain ideas, and, accordingly, the government could find no support for its defense of the Act in that case's reasoning.[273]

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262. *Id.*
263. *Ashcroft*, 535 U.S. at 249–50.
264. *Id.* at 250.
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.* at 250–51.
269. *Ashcroft*, 535 U.S. at 251.
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.*

After the Court found the CPPA to be inconsistent with *Miller* and beyond the reach of *Ferber*, it examined the government's other justifications for the Act.[274] The government argued that the CPPA is necessary because virtual child pornography might prove an aid to pedophiles in seducing young victims.[275] The Court, noting that the government may punish adults who provide unsuitable material to children[276] and also may penalize unlawful solicitation,[277] found that the CPPA prohibited speech in an attempt to protect children from others who might commit crimes.[278] Such a law violates the principle that the government may not prohibit speech acceptable for adults because children may obtain it.[279] While evil may lurk around such materials, that evil derives from the actor's unlawful conduct, conduct that is criminal regardless of its link to the speech at issue.[280] Prohibiting illegal conduct of the sort the government claimed the CPPA targeted does not justify restricting speech that law-abiding adults may obtain and consume.[281]

The government further submitted that virtual child pornography "whets the appetites of pedophiles and encourages them to engage in illegal conduct," providing another justification for prohibiting such materials.[282] The Court again rejected the government's argument, stating that the "mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it."[283] The government can prohibit speech for its advocacy of the use of force or of a violation of the law "only if 'such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'"[284] In defending the CPPA, the government failed to prove any "attempt, incitement, solicitation, or conspiracy" in the works prohibited under the CPPA and made only a weak connection between speech that might encourage certain behaviors and child abuse.[285] For the government to have made its argument on this point successfully, it would have needed to demonstrate a more direct and significant connection between virtual child pornography and child sexual abuse.[286] Failing to do so, the weakly proven tendency of virtual child pornography to whet the appe-

274. *Id.*
275. *Ashcroft*, 535 U.S. at 251.
276. *Id.* at 251–52 (citing Ginsberg v. New York, 390 U.S. 629 (1968)).
277. *Id.* at 252.
278. *Id.*
279. *Id.*
280. *Id.*
281. *Ashcroft*, 535 U.S. at 252–53.
282. *Id.* at 253.
283. *Id.*
284. *Id.* (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam)).
285. *Id.*
286. *Id.*

tite of pedophiles does not justify the CPPA's prohibition on virtual child pornography.[287]

The government also offered the justification that the valid "objective of eliminating the market for pornography produced using real children necessitates a prohibition on virtual images as well," arguing that "virtual images promote the trafficking in works produced through the exploitation of real children."[288] The Court, finding this hypothesis to border on the implausible, rejected it, reasoning that if virtual images were suitable substitutes for illegal child pornography, the market for the illegal images would shrivel because the risk of prosecution for abusing real children would carry little reward if fictional, computerized images provided suitable images for the market.[289]

The government's final argument offered in its attempt to provide justification for the prohibitions of the CPPA on virtual child pornography centered upon the purported difficulty in prosecuting actual child pornography created by virtual child pornography.[290] According to the government, an expert for the prosecution in the trial of a child pornographer might not be able to distinguish between actual and virtual child pornographic images.[291] The only solution, goes the argument, is a prohibition against both actual and virtual child pornography.[292] The Court characterized the argument as being that "protected speech may be banned as a means to ban unprotected speech," an argument that "turns the First Amendment upside down."[293] The resemblance of lawful speech to unlawful speech does not justify banning the former. The overbreadth doctrine keeps the government from banning unprotected speech if the prohibition affects a substantial amount of protected speech.[294]

Further, the Supreme Court characterized the government as requesting a reading of the CPPA as a law that distributed the burden of proof to the defendant to prove that the speech in question is lawful, relying on a statutory affirmative defense that allowed a defendant to escape conviction if he could show that the materials in question involved only adults in their production and that the distribution of the materials did not occur in a manner conveying the impression that the materials depicted real children.[295] The Court rejected the government's position that the affirmative defense should

287. *Ashcroft*, 535 U.S. at 253–54.
288. *Id.* at 254.
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.*
293. *Ashcroft*, 535 U.S. at 255.
294. *Id.*
295. *Id.* (citing 18 U.S.C. § 2252A(c)).

save the CPPA, basing this rejection on the premise that the defense allowed conviction for some persons who could prove that the materials did not exploit children.[296] Further, a defendant could only assert the affirmative defense if prosecuted for distributing the images, meaning that a person would have a defense for distributing a film that another person could face prosecution for possessing.[297] Finally, the defense was not available to defendants charged with producing computer-generated images that harmed no children at all.[298] The affirmative defense, then, left "unprotected a substantial amount of speech not tied to the Government's interest in distinguishing images produced using real children from virtual ones" and did not save the CPPA from a First Amendment challenge.[299]

2. *The "Conveys the Impression" Provision*

The respondents also challenged the language in 18 U.S.C. § 2256(8)(D) of the CPPA banning "depictions of sexually explicit conduct that are '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.'"[300] The Court found this language to require insufficient examination of the content of the image in that the CPPA treated films containing no sexually explicit scenes involving minors as child pornography if the title and trailers simply conveyed the impression that one could find the scenes in the film.[301] Thus, this CPPA provision "turns on how the speech is presented, not on what is depicted."[302] The "conveys the impression" language made the statute so broad that any receivers of such materials could suffer prosecution, even where the receivers shared no responsibility for the marketing, sale, or description of the images.[303] The Court held that the First Amendment requires more precision in such restrictions, and the CPPA, failing to provide such precision, failed as violating the First Amendment and as being substantially overbroad.[304]

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296. *Id.* at 256.
297. *Id.*
298. *Id.*
299. *Ashcroft*, 535 U.S. at 256.
300. *Id.* at 257 (quoting 18 U.S.C. § 2256(8)(D)).
301. *Id.*
302. *Id.*
303. *Id.* at 258. The Court pointed out that the statute proscribed possession of a movie advertised as child pornography at any point in the distribution chain, no matter how distant the advertiser from the possessor, and that the statute also proscribed works that did not feature young actors if the works had packaging simply suggesting the involvement of children. *Id.*
304. *Id.*

B. Justice Thomas's Concurring Opinion

Justice Thomas concurred in the majority's judgment.[305] Finding that the "prosecution rationale" that prosecutors might face difficulty in successfully prosecuting child pornographers who claim that the images for which they are on trial are computer-generated might be valid given some proof of a successful defense on such grounds, Justice Thomas noted that the government provided no such proof.[306] Justice Thomas concluded that the rationale was too speculative at this point to support the CPPA's broad reach and thus concurred in the judgment of the Court.[307]

C. Justice O'Connor's Concurring and Dissenting Opinion

Justice O'Connor concurred in the court's judgment that youthful-adult and virtual child pornography receive First Amendment protection and that the CPPA's restrictions on such images were overbroad.[308] Justice O'Connor concluded that the causal connection between such depictions and actual child abuse was not strong enough to justify a withdrawal of First Amendment protection from such speech.[309] Finally, Justice O'Connor agreed that the "CPPA's ban on material presented in a manner that 'conveys the impression' that it contains pornographic depictions of actual children" violated the First Amendment.[310]

Justice O'Connor dissented, however, from the Court's holding that the CPPA's ban of virtual child pornography was overbroad.[311] Justice O'Connor reasoned that courts could read the CPPA to ban pornographic depictions appearing to be of minors so long as the Act did not apply to youthful-adult pornography,[312] thus reading the act to prohibit only images depicting virtual children who are virtually indistinguishable from actual children to assure a narrowly tailored and definite statute.[313]

D. Chief Justice Rehnquist's Dissenting Opinion

Arguing that the majority treated the *Ashcroft* case differently from most First Amendment cases, Justice Rehnquist, in a dissent joined by Jus-

305. *Ashcroft*, 535 U.S. at 259 (Thomas, J., concurring).
306. *Id.* (Thomas, J., concurring).
307. *Id.* at 260 (Thomas, J., concurring).
308. *Id.* at 261 (O'Connor, J., concurring in part and dissenting in part) (quoting 18 U.S.C. § 2256(8)(D)).
309. *Id.* at 262 (O'Connor, J., concurring in part and dissenting in part).
310. *Id.* (O'Connor, J., concurring in part and dissenting in part).
311. *Ashcroft*, 535 U.S. at 262 (O'Connor, J., concurring in part and dissenting in part).
312. *Id.* at 265 (O'Connor, J., concurring in part and dissenting in part).
313. *Id.* (O'Connor, J., concurring in part and dissenting in part).

tice Scalia, cited the principle that the Court does not normally "strike down a statute on First Amendment grounds 'when a limiting instruction has been or could be placed on the challenged statute.'"[314] The Chief Justice argued that a narrow reading of the statutory text would have the Act reach only images consistent with the national goal of enforcing child pornography laws, a "compelling" goal.[315] This narrow reading, at least as performed by the Chief Justice, interprets the CPPA as prohibiting only "computer-generated images that are virtually indistinguishable from real children engaged in sexually explicit conduct."[316] Such a prohibition, goes the argument, does not offend the First Amendment's protection of free speech.[317]

V. SIGNIFICANCE

The importance of the United States Supreme Court's decision in *Ashcroft v. Free Speech Coalition*[318] striking down the ban on virtual child pornography lies in its affirmation of long-standing principles involving sexually explicit materials, in its easing of a chilling effect on legitimate forms of such expression, and in the possibility of further action by proponents of the CPPA to enact new laws in an effort to again prohibit materials the CPPA once banned. This section addresses each of these issues respectively in an effort to further explain the significance of *Ashcroft*.

A. The Court's Refusal To Redraw the Lines on Protected Speech

Some of the participants in *Ashcroft* and observers who favored striking down the CPPA feared that the Supreme Court might create a new scheme granting the government broader powers to regulate sexually explicit material.[319] Ann Beeson, a staff attorney for the American Civil Liberties Union, said that she and her colleagues "were all worried that the Court would change its mind about *Miller v. California* and *Ferber v. New York*, which are getting to be old precedents."[320] Rather than strike down those precedents or modify the tests for obscenity and child pornography, the Court's decision refused, in Beeson's words, "to redraw its line on obscenity."[321]

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314. *Id.* at 268 (Rehnquist, C.J., dissenting) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).

315. *Id.* at 273 (Rehnquist, C.J., dissenting).

316. *Id.* (Rehnquist, C.J., dissenting).

317. *Ashcroft*, 535 U.S. at 273 (Rehnquist, C.J., dissenting).

318. *Id.* at 234.

319. Tony Mauro, *Court: Congress Went Too Far on Porn*, LEGAL TIMES, Apr. 22, 2002, at 8.

320. *Id.*

321. *Id.*

The Court's refusal to overrule or modify its earlier decisions in this area indicates that the area of obscenity law will continue its most stable period since the Court first ruled on obscenity in a First Amendment context in *Roth v. United States*.[322] In the years that followed *Roth*, the Court's First Amendment decisions varied widely, creating a shifting course of law in which obscenity lacked a clear definition. Since the *Miller* decision in 1973, however, the test for obscenity has remained the same, with the Court's only substantial modification being the allowance for prohibitions against materials that are not obscene but feature the sexual abuse of actual children in *Ferber*. *Ashcroft*, with its solid six justice majority, indicates that the stability of obscenity jurisprudence should continue for the foreseeable future.

B. The Court's Protection of Sexually Explicit Speech

In reasserting its previous decisions on obscenity, the Supreme Court confirmed the constitutional protection of materials that do not fail the *Miller* and *Ferber* tests. A large part of Justice Kennedy's majority opinion focused on the possible chilling effect that enforcement of the CPPA might have had upon legitimate dramatic and film productions.[323] The Court found that the CPPA criminalized productions like *Romeo and Juliet*, *American Beauty*, and *Traffic* that have legitimate artistic value simply because they depict young people engaged in sex acts.[324] At oral argument in *Ashcroft*, justices asked attorneys for the government to address this concern over the CPPA's chilling effect, and Deputy Solicitor General Paul D. Clement[325] argued that movie studios could avoid punishment under the CPPA if they simply excised the sexually explicit conduct the CPPA prohibited in the movies that the studios make.[326]

Despite the government's attempt to portray the CPPA's effect on legitimate artistic pursuits as minimal, the experience of director Adrian Lyne in his production of a film version of Vladimir Nabokov's novel *Lolita* suggests that the CPPA had a more nefarious effect on filmmakers.[327] *Lolita*, a novel dealing with "the affair between a middle-aged sexual pervert and twelve-year-old girl," has long suffered at the hands of would-be censors,[328]

322. 354 U.S. 476 (1957). For a discussion of the Supreme Court's early decisions in this field and the decisions that led to *Miller*, see *supra* Part III.B.

323. *See supra* notes 251–58 and accompanying text.

324. *See supra* notes 251–58 and accompanying text.

325. Transcript of Oral Argument at 1, Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (No. 00-795).

326. *Id.*

327. *See* Charles Taylor, *Nymphet Mania*, SALON, May 29, 1998, *at* http://archive.salon.com/ent/movies/reviews/1998/05/cov_29review.html.

328. Charles Rolo, Lolita, *by Vladimir Nabokov*, ATLANTIC MONTHLY, Sept. 1958, at 78, *available at* http://www.theatlantic.com/unbound/classrev/lolita.htm. Rolo notes that several

and Lyne's attempt to produce a film version of the novel met with a similar fate.[329]

Lyne took great precautions to avoid making child pornography, employing an adult actress to stand in during sex scenes for the child actress playing Lolita.[330] During editing of the film, an attorney assisted Lyne with every scene in an effort to assure that none of the film's scenes crossed the line into child pornography as defined by the law.[331] Despite Lyne's best efforts to avoid child pornography, every major American movie studio rejected the film.[332] The reticence of studios to release the film stemmed from the CPPA.[333] While it appears that prosecutors sought no charges against anyone involved in the production of *Lolita*, the fact remains that the CPPA kept the film from receiving a wide audience in the United States.

While "[t]he suppression of *Lolita* [cannot] be called out-and-out censorship," the history of Lyne's efforts to release his film provide "a good example of how easily and insidiously our government can control what we see without ever openly violating the First Amendment."[334] The Supreme Court's rejection of the CPPA as unconstitutional explicitly recognizes the danger that such a law presents to the work of producing and showing art. Rather than treat potential viewers as "a nation of children incapable of grasping the subtleties of art,"[335] the Supreme Court has refused to allow the government to enact a law that threatens legitimate filmmakers with prosecution should they produce films dealing with teenage sexuality. So long as the filmmaker does not actually sexually abuse a child or create an obscene film, the First Amendment, under the *Ashcroft* decision, will protect his efforts.

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publishers rejected the novel, and the French government banned it. *Id.* Rolo also describes the novel as having "not a single obscene term" and as being a work of "comic genius." *Id.*

329. *See* Alissa Havens, *Child Pornography Without Children: A 1st Amendment Concern*, MEDILL NEWS SERVICE, Aug. 20, 2002, *at* http://www.medill.northwestern.edu/docket/00-0795fx.html.

330. *Id.*

331. *Id.*

332. Taylor, *supra* note 327. The cable network Showtime eventually gave *Lolita* its American release. *Id.*

333. *Id.*; *see also* Stephanie Zacharek, *Child's Play? The Travails of Adrian Lyne's "Lolita,"* BOSTON PHOENIX, June 8, 1998, *at* http://www.weeklywire.com/ww/06-08-98/boston_movies_2.html (blaming the inability of Lyne to find a studio on the "cultural watchdogs" who pushed the CPPA through Congress).

334. Zacharek, *supra* note 333.

335. *Id.*

C. The Possibility for Further Action by Anti-Pornography Crusaders

Ashcroft, though it dealt a damaging blow to anti-child pornography activists, does not seem to have stopped the drive for laws dealing with the sorts of images covered under the CPPA.[336] The *Ashcroft* decision sparked considerable outrage amongst conservative commentators,[337] and it seems quite likely that, depending upon the outcome of congressional elections and other extrinsic events, Congress will pass and the president will sign another bill seeking prohibitions along the lines of those contained in the CPPA. The Child Obscenity and Pornography Prevention Act, a bill passed this summer by the House of Representatives, seeks to respond to the *Ashcroft* decision, but some observers find the bill's provisions to be quite narrow and perhaps without any real force as written.[338]

While the prospects for new legislation targeting virtual child pornography and materials suggesting sexual activity involving children remain somewhat unclear, those who perceive child pornography as a burgeoning problem will persist in their work against such materials.[339] CPPA proponents like Congressman Mark Foley, who commented that "[p]edophiles do not have a First Amendment right to gawk over exploited children, real or virtual,"[340] remain determined in their quest, making it quite possible that *Ashcroft* may be only the first in a series of legal battles over the sort of materials at issue in *Ashcroft*.

Gary D. Marts, Jr.[*]

336. *See* Jason Krause, *Can Anyone Stop Internet Porn?*, 88 A.B.A. J., Sept. 2002, at 56, 60 (discussing the passage in the summer of 2002 of The Child Obscenity and Pornography Prevention Act (COPPA) as a response to *Ashcroft*). The Senate passed a similar bill in February 2003. *Washington in Brief*, WASH. POST, Feb. 25, 2003, at A4. The Senate bill still requires House action. *Id.*

337. *See, e.g.*, Robert H. Bork, *The Sanctity of Smut*, WALL ST. J. ONLINE, Apr. 27, 2002, *at* http://opinionjournal.com/extra/?id=105001991 (claiming the *Ashcroft* decision assists in the destruction of "thought that displays any subtlety, gradation or nuance").

338. Krause, *supra* note 336, at 60.

339. *See* Wendy Kaminer, *Porn Again*, AMERICAN PROSPECT, July 1, 2002, at 9, *available at* http://www.prospect.org/print/V13/12/kaminer-w.html. Kaminer thinks it likely that the new efforts will ultimately succeed. *Id.*

340. *Id.* Kaminer pointed out the non sequitur in Foley's statement: pedophiles, despite their deviousness, cannot exploit a virtual child. *Id.*

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